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")

BRIEF OF AUTHORITIES OF ALLEN-VANGUARD CORPORATION

(Cross-Motion Re: Allen-Vanguard Mini-Trial, returnable February 11, 2014)

February 5, 2014

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TO: **THE SERVICE LIST**

INDEX

Tab 1

Indexed as:

Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc.

Between
Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd., plaintiff (respondent), and
Scott's Food Services Inc. and Scott's Hospitality Inc., defendants (appellants)

[1998] O.J. No. 4368

114 O.A.C. 357

41 B.L.R. (2d) 42

83 A.C.W.S. (3d) 382

Docket No. C28208

Ontario Court of Appeal
Toronto, Ontario

Moldaver, Goudge JJ.A. and Ferrier J. (ad hoc)

Heard: May 4 and 5, 1998.
Judgment: November 2, 1998.

(29 pp.)

Franchises -- Franchise agreement -- Interpretation -- Breach of agreement -- What constitutes -- Transfer of franchises -- Consent of franchisor.

Appeal by Scott's Food Services from a trial judgment allowing Kentucky Fried Chicken's (KFC) action for termination of a licensing agreement. Scott's was the largest KFC franchisee in the world. Scott's Food was owned by Scott's Hospitality. Scott's Hospitality owned a school bus business as well as the KFC franchise. In 1996, as part of a transaction with Laidlaw Inc., the shareholders of Scott's Hospitality transferred its ownership of the franchise to Scott's Restaurants. The Shareholders then owned Scott's Restaurants which owned Scott's Food. Laidlaw purchased the shares of

Scott's Hospitality and acquired the school bus business. The change in ownership of the franchise was made without KFC's consent. In issue was whether the license agreement required Scott's to obtain KFC's consent to the change in ownership of the franchisee failing which KFC could terminate the contract. Also in issue was whether Scott's had failed to meet its obligations to enhance its KFC outlets. The trial judge found that consent to a change in ownership was required and that KFC had the right to terminate the agreement. The trial judge also found that Scott's failed to meet its obligation to enhance which was a material and substantive failure also entitling KFC to terminate the license agreement unless the outlets were enhanced within three months. Scott's appealed.

HELD: Appeal allowed. The contract, being a negotiated commercial document, was interpreted objectively and in accordance with sound commercial principles and good business sense. The contract did not give KFC a right to approve a change in the controlling shareholder of the franchisee, Scott's. Such a right would have meant a significant change in the agreement which had governed the franchise relationship since 1969. Prior to executing the agreement, KFC was told that Scott's would not agree to any restriction on changes of ownership in the franchisee. Furthermore, the standard "deemed transfer" language present in every other KFC franchise agreement, which provided for KFC's right to approve a change in shareholders of the franchisee, was conspicuously absent from the Scott's license agreement. The interpretation suggested by KFC resulted in a commercial absurdity. Scott's had bargaining power at least equal to that of KFC and sufficient power to achieve a contract with no restriction on the transferability of shares. Therefore, the license agreement could not be interpreted to give KFC a right to approve a change in the shareholders of Scott's. Consequently, KFC did not have the right to terminate the franchise. The appeal was also allowed on the enhancement issue. The franchise agreement did not give KFC a substantive right to terminate for failure by Scott's to discharge its enhancement obligations.

Counsel:

Dennis R. O'Connor, Q.C., David Stockwood, Q.C., Nancy J. Spies and Timothy H. Mitchell, for the appellants.
David R. Byers, Katherine L. Kay and Christopher J. Cosgriffe, for the respondent.

The following judgment was delivered by

1 **GOUDGE J.A.**:-- This appeal was heard on May 4 and 5, 1998. This court's reasons for judgment were ready for release on July 9, 1998 when the parties contacted the court to request that this not be done. On the basis of the reasons given by the parties for this request, the court agreed to refrain from releasing its judgment until November 1, 1998 but made clear that the judgment would then be released unless prior to October 31, 1998 both parties notified the court in writing that the matter had been fully and finally settled and that the appellant wished to withdraw the appeal. This has not happened and these reasons are therefore being released.

2 The appellant Scott's Food is the largest Kentucky Fried Chicken ("KFC") franchisee in the world. Its franchise agreement (the "license agreement") with the respondent covers some four hundred outlets, approximately half of all KFC outlets in Canada.

3 Up until 1996, Scott's Food was owned by the appellant Scott's Hospitality whose other major business was a school bus operation. At that point, as part of a transaction with Laidlaw Inc. ("Laidlaw") in which Laidlaw acquired the school bus business, the shareholders of Scott's Hospitality replaced it as the sole shareholder of the franchisee with a new company, Scott's Restaurants. As a result, these shareholders then owned Scott's Restaurants which in turn owned Scott's Food. This change was made without the respondent's consent.

4 There were two main issues at trial. The second, which the parties call the enhancement issue, was whether, apart altogether from the corporate changes entailed by the Laidlaw transaction, Scott's Food had upgraded its outlets as required by its contract. At trial, Steele J. found that it had not. I will come in due course to the limited appeal taken from the judgment below on this issue.

5 The first and indeed the fundamental issue at trial, called the transfer issue, was whether the license agreement required the appellants (to whom I will refer jointly as "Scott's") to obtain the respondent's consent to the change in ownership of the franchisee failing which the respondent could terminate the agreement. Steele J. interpreted the contract as requiring consent, thereby giving the respondent the right to terminate since no consent was obtained. For the reasons that follow, I have come to the opposite conclusion and I would therefore allow the appeal on the transfer issue.

THE TRANSFER ISSUE

The Relevant Facts

6 The license agreement that is the subject of this litigation was signed on June 9, 1989, effective January 1, 1989. The respondent was the franchisor and the appellant Scott's Food the franchisee. The latter was a wholly-owned subsidiary of Scott's Hospitality which was not a party to the agreement.

7 At the time the license agreement was made, Scott's operated about one-half of all the KFC outlets in Canada and more than ten times as many as the next largest franchisee in the country. Unlike most franchisees, Scott's had very significant bargaining power in the negotiations which led up to the agreement.

8 For the purposes of the transfer issue, the critical paragraphs of the license agreement are the following:

> 16. Transfer
>
> 16.1 The grant of the License hereunder is personal to Licensee. The grant of the License hereunder is based upon full disclosure in writing by the Licensee to KFC, and approval by KFC, of all directors and holders of majority control of the voting shares of Licensee and of any corporation or corporations which directly or indirectly (whether by means of any intermediate corporations or otherwise) own or control or have an interest in the shares of the Licensee. Licensee acknowledges that the restrictions provided in this Paragraph 16 are reasonable and necessary to protect the KFC System and the KFC Marks and are for the benefit and protection of all KFC licensees as well as KFC.
>
> 16.2 Licensee agrees that it shall not sell, transfer, assign, encumber, sub-license or otherwise deal with this Agreement or its rights or interest hereunder (herein-

after referred to as "transfer"), without KFC's prior written consent and Licensee's compliance in all respects with the terms and conditions of this Paragraph 16. Any transfer or any attempt to do so, contrary to Paragraph 16 shall be a breach of this Agreement and shall be void but shall give KFC the right of termination as provided in Paragraph 17.2(d).

9 Paragraph 17.2(d) reads as follows:

> 17.2 KFC may, without prejudice to any other rights or remedies contained in this Agreement or at law or in equity, terminate the License upon immediate notice (or in the event advance notice is required by law, upon the giving of such notice) in the event that:
>
> . . .
>
> (d) Licensee makes or permits a transfer contrary to the provision of Paragraph 16;

10 The history of Scott's as a KFC franchisee predates the license agreement by twenty years. It goes back to 1969 when Scott's Hospitality entered into an agreement to become a franchisee operating KFC outlets in Canada. The franchisor then was Col. Sanders Kentucky Fried Chicken Limited ("Colonel Sanders"), the owner of the KFC trademarks in Canada. This agreement was to run until January 1, 1994. It is noteworthy that it contained no clause like the current paragraph 16.1. It did not specify that the rights of Scott's Hospitality were personal to it, nor were there any provisions restricting the transfer of its shares. There was, however, a provision restricting the transfer of the license without the prior written consent of the franchisor.

11 By 1985, the franchisor had developed a standard franchise agreement ("the 1985 Agreement") containing certain restrictions on the transfer of shares in the franchisee which, at that point, were standard in all KFC franchise agreements in Canada except that with Scott's Hospitality.

12 While paragraph 16.1 of the 1985 Agreement reads identically to paragraph 16.1 in the license agreement, paragraph 16.2 of the 1985 Agreement when coupled with paragraph 16.4 contains significant differences. These two paragraphs are reproduced below, highlighting the words that do not appear in the license agreement:

> 16.2 The Franchisee agrees that it shall not sell, transfer, assign, encumber, sub-license or otherwise deal with this Agreement or its rights or interest hereunder (hereinafter referred to as "transfer"), and shall not suffer or permit any deemed sale, transfer or assignment of this Agreement or its rights or interest hereunder (hereinafter referred to as "deemed transfer" and more particularly defined in paragraph 16.4), without KFC's prior written consent and Franchisee's compliance in all respects with the terms and conditions of this Paragraph 16. Any transfer or deemed transfer, or any attempt to do so, contrary to this Paragraph 16 shall be a breach of this Agreement and shall be void but shall give KFC the right of termination as provided in paragraph 17.2(d).
>
> 16.4 For the purposes of this Paragraph 16, a deemed transfer of this Agreement or the rights and interest hereunder shall include:

(a) ...

(b) in the event that Franchisee is a corporation, any change (including but without limitation any issuance, sale, assignment, transfer, redemption or cancellation of, or conversion of any securities into, voting shares of the corporate Franchisee or any other corporation referred to in paragraph 16.1, or any amalgamation, merger or other reorganization of the corporate Franchisee or any such other corporation) in any of the holdings of voting shares referred to in paragraph 16.1; provided that, in the case of any such corporation the voting shares of which are listed and publicly traded on a stock exchange, no such change in any of the holdings of its voting shares shall constitute a deemed transfer unless, in the sole opinion of KFC, direct or indirect control of the corporate Franchisee would thereby be changed.

13 In 1987, Col. Sanders sold its entire interest in the KFC trademarks in Canada to Kentucky Fried Chicken's corporation ("KFC Corp." or "KFC") which held those rights for the rest of the world.

14 Just prior to this sale, by letter agreement dated July 16, 1987, KFC Corp. agreed that when the sale from Col. Sanders was concluded, it would grant Scott's Hospitality a ten-year renewal of the 1969 agreement. This letter agreement suggested no constraint on the transfer of shares of the franchisee.

15 Pursuant to the 1987 letter agreement, negotiations ensued between KFC and Scott's Hospitality. In these negotiations, Scott's Hospitality refused to agree to terms in the language of the 1985 agreement, just as it had previously refused to do with Col. Sanders. The Scott's representative made clear to KFC that Scott's would not agree to any restrictions on changes of ownership in the licensee.

16 The relative bargaining power of Scott's and KFC in these negotiations was the subject of some considerable attention at trial. The chief KFC negotiator testified that Scott's was at least the equal of KFC in bargaining power. The leading expert for KFC testified that it was unusual for a franchisee to be in such a position.

17 Because of these unique circumstances, the trial judge concluded that the evidence of the experts as to the usual practice in the franchising industry must be applied with caution. Ultimately, he found that Scott's had sufficient bargaining power to negotiate a contract in which there would be no restriction on the transferability of shares. The question he had to decide was whether the resulting license agreement contained such a restriction.

18 The first of the two Laidlaw transactions, which triggered the need to answer this question, began in January 1996 with an unsolicited offer from Laidlaw to purchase all of the shares of Scott's Hospitality. Laidlaw's intention was that following a successful takeover, it would sell off Scott's Food and retain the school bus business operated by Scott's Hospitality. Laidlaw's offer contained a condition that it be satisfied that there was no impediment to its disposing of the shares of Scott's Food to a third party without affecting the franchisee's rights under the license agreement. KFC was not prepared to give its consent to this transaction and indeed commenced this litigation in response. As a result, this Laidlaw proposal could not be completed within its time frame and hence it did not proceed.

19 Rather, a second Laidlaw transaction was structured in which Scott's Restaurants was incorporated as a subsidiary of Scott's Hospitality. Scott's Hospitality then transferred its shares in Scott's Food to Scott's Restaurants in exchange for shares of Scott's Restaurants which were dividended out to the shareholders of Scott's Hospitality. The shareholders of Scott's Hospitality thereby became the owners of Scott's Restaurants which, in turn, became the owner of the franchisee, Scott's Food. Laidlaw then purchased the shares of Scott's Hospitality thereby acquiring the school bus business.

20 KFC was kept fully informed of this transaction but continuously opposed it. Indeed, its consent was never expressly sought. The simple question at trial was whether that consent was required.

The Judgment Below

21 The trial judge found that while Scott's Food as franchisee was bound by the license agreement, Scott's Hospitality was not bound by its terms. He concluded that Scott's Food was neither the alter ego nor the agent of Scott's Hospitality. The respondent does not contest this conclusion.

22 He then went on to his core finding on the transfer issue, namely, the construction of paragraph 16.1 of the license agreement. He construed that paragraph to contain a continuing obligation on the part of the franchisee to obtain approval of KFC to any transfer of the shares of either Scott's Food or its controlling shareholder. He put his findings in these terms:

> In my opinion the disclosure and approval of the directors and holders of majority control would be meaningless unless it was a continuing obligation and not merely at the time of execution. Based on good business sense section 16.1 must be construed as being a continuing obligation.
>
> ...
>
> In my opinion there is nothing in section 16 that prohibits or gives the right of approval to KFC of trading of shares of Scott's Food or Hospitality provided that there is no issue of a change of control.
>
> There are no clearly expressed words requiring the approval of KFC to any transfer of the shares of Scott's Food or its controlling shareholders. However section 16.1 referring to the grant being personal and the reference to the directors and holders of majority control of the shares of Scott's Food and the broad reference to any other corporations with control make it clear that any transfer of the controlling shares of Scott's Food or Hospitality are subject thereto. To interpret the section otherwise would defeat the personal aspect and not make good business sense and would be contrary to the generally accepted practice in the franchise industry.

23 He then moved directly and without elaboration to a finding that paragraph 16.2 prohibits a transfer or an attempted transfer of the license agreement without consent and since the first Laidlaw proposal was an attempted transfer and the second was an actual transfer, each breached

paragraph 16.2 and gave KFC the right to terminate the license agreement pursuant to paragraph 17.2(d).

Analysis

24 The question to be determined on the transfer issue is one of contractual interpretation: properly construed, does either paragraph 16.1 or paragraph 16.2 of the license agreement require KFC's consent to either Laidlaw transaction? The trial judge determined that this was not a case of ambiguity and on this basis, he declined to consider evidence of the subjective intentions of the parties which were not communicated to each other. Equally he excluded the various draft documents leading up to the license agreement. He did, however, consider the relationship between the parties and the custom of the industry, including the license agreements between the respondent and other franchisees in Canada, as part of the factual matrix that must be looked at in interpreting the agreement.

25 I agree with this approach. While the task of interpretation must begin with the words of the document and their ordinary meaning, the general context that gave birth to the document or its "factual matrix" will also provide the court with useful assistance. In the famous passage in Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen, [1976] 1 W.L.R. 989 at 995-96 (H.L.) Lord Wilberforce said this:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

26 The scope of the surrounding circumstances to be considered will vary from case to case but generally will encompass those factors which assist the 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." Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888 at 901.

27 Where, as here, the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity[1]. Rather, the document should be construed in accordance with sound commercial principles and good business sense[2]. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other.

28 With these broad principles of interpretation in mind, I turn first to the construction to be given to paragraph 16.1 of the license agreement. Properly construed, does it give KFC the right to approve a change in the controlling shareholder of the franchisee? It is the second Laidlaw transaction that requires this question to be answered. Given that the first Laidlaw transaction was not proceeded with, KFC did not argue at trial or on appeal that it breached paragraph 16.1.

29 It is helpful at this point to set out the provision again:

> 16.1 The grant of the License hereunder is personal to Licensee. The grant of the License hereunder is based upon full disclosure in writing by the Licensee to KFC, and approval by KFC, of all directors and holders of majority control of the voting shares of Licensee and of any corporation or corporations which directly or indirectly (whether by means of any intermediate corporations or otherwise) own or control or have an interest in the shares of the Licensee. Licensee acknowledges that the restrictions provided in this Paragraph 16 are reasonable and necessary to protect the KFC System and the KFC Marks and are for the benefit and protection of all KFC licensees as well as KFC.

30 I have concluded that this clause does not give KFC a right to approve a change in the controlling shareholder of its franchisee Scott's Food. In other words, paragraph 16.1 does not extend to the second Laidlaw transaction. I say this for a number of reasons.

31 First, the license agreement was signed in 1989. The Laidlaw transactions occurred in 1996. The ordinary meaning of the language used in paragraph 16.1 suggests that the franchisor KFC had the right on entering the contract to know and approve the shareholders of the franchisee. There is nothing to suggest a right to approve a change in those shareholders some seven years later.

32 Second, such a right would mean a significant change from the agreement which had governed this franchise relationship since 1969 which clearly contained no such right. Moreover, Scott's had refused to enter into an agreement like the 1985 standard franchise agreement which did provide the franchisor with this right. The trial judge found that prior to executing the license agreement, KFC knew this and had been told that Scott's would not agree to any restriction on changes of ownership in the franchisee.

33 Third, the language of the 1985 standard franchise agreement is revealing. In 1989, when the license agreement was concluded, every other KFC franchise agreement in Canada expressly provided for the franchisor's right to approve a change in the shareholders of the franchisee. This was done not by means of paragraph 16.1 but rather through the "deemed transfer" language of paragraphs 16.2 and 16.4. Paragraph 16.1 in the license agreement ought not to be construed to provide the franchisor with this right where the identical language in the 1985 standard franchise agreement was clearly not intended to have that effect. The corollary to this is that the deemed transfer language which does provide this right to the franchisor in the 1985 standard franchise agreement is conspicuously absent from the license agreement.

34 Fourth, paragraph 16.1 extends the right of approval to the holders of majority control of the franchisee and any corporation which has an interest in the shares of the franchisee. If this language is read to give KFC a right to approve any subsequent change in the majority shareholder of the franchisee, it must also give KFC the right to approve a subsequent change in shareholder control of any corporation which owns any interest in the franchisee, even if it is only a single share. In argument, the respondent conceded that this would be a commercial absurdity. To find, as the trial judge did, that the franchisor's right of approval is limited to a change of control in the franchisee is, in my opinion, to read out of paragraph 16.1 the phrase "have an interest in". By contrast, to extend this right of approval to the majority shareholder and also to shareholders who have an interest in the shares of the franchisee does not create a commercial absurdity if that right applies simply at the point of entering the license agreement.

35 Fifth, paragraph 16.4 provides support for this interpretation. It requires the franchisee to seek KFC's consent to a transfer to a third party of the franchisee's interest under the license agreement. To allow an informed consent, this paragraph expressly obliges the franchisee to give KFC the same information about the shareholders of the third party that paragraph 16.1 provided concerning the franchisee. However, if paragraph 16.1 contained an ongoing right of KFC to be informed of and approve the shareholders of the party holding the franchise, paragraph 16.4 would be superfluous.

36 Finally, and with respect, it is my view that the three reasons offered by the trial judge for the opposite interpretation of paragraph 16.1 do not withstand scrutiny.

37 The first reason given by the trial judge was that the meaning I would accord to paragraph 16.1 would defeat the personal aspect of the license agreement. That paragraph certainly makes clear that the grant of the license is personal to the licensee. However, that licensee is clearly and expressly Scott's Food, not its controlling shareholder. A change in the latter leaves the licensee unchanged. Following the second Laidlaw transaction, the license is still granted personally to Scott's Food.

38 The second reason was that it would not make good business sense to read paragraph 16.1 so that it did not extend to a change in the shareholders of the franchisee. While this might not make good business sense from the perspective of the franchisor, it might well make good business sense for the franchisee. In my view, neither of these is helpful in the required task of contractual interpretation. Rather, in applying objectively the interpretive principle of what accords with sound commercial principles and good business sense, the key fact is that for twenty years, from 1969 to 1989, this franchise relationship operated with apparent viability without the right of approval contended for by the respondent. In light of this history, it cannot be concluded that the meaning I give to paragraph 16.1 would not make good business sense.

39 Finally, it was said that reading paragraph 16.1 as I do would be contrary to the generally accepted practice in the franchise industry. The fallacy in this reasoning is that, as the trial judge recognized, this was a very unusual franchising relationship. This franchisee appeared to have bargaining power at least equal to that of KFC and certainly sufficient power to achieve a contract with no restriction on the transferability of shares. By contrast, the trial judge found the industry standard to be that the franchisor has control over the franchisee. In these circumstances, the generally accepted industry practice is of little use in interpreting this particular license agreement.

40 Hence, I conclude that paragraph 16.1 of the license agreement cannot be construed to give KFC the right to approve a change in the shareholders of Scott's Food. This paragraph, therefore, was not breached when Scott's did not obtain KFC's approval of the second Laidlaw transaction.

41 It is next necessary to consider the proper interpretation to be given to paragraph 16.2 of the license agreement. It is helpful to reproduce this provision a second time:

> 16.2 Licensee agrees that it shall not sell, transfer, assign, encumber, sub-license or otherwise deal with this Agreement or its rights or interest hereunder (hereinafter referred to as "transfer"), without KFC's prior written consent and Licensee's compliance in all respects with the terms and conditions of this Paragraph 16. Any transfer or any attempt to do so, contrary to Paragraph 16 shall be a

> breach of this Agreement and shall be void but shall give KFC the right of termination as provided in Paragraph 17.2(d).

42 The respondent's primary argument was that the second Laidlaw transaction engaged the last sentence of this paragraph. It was said to be a transfer contrary to paragraph 16.1 which, because of paragraph 16.2, triggered the right of termination in paragraph 17.2(d). Given the conclusion I have reached concerning paragraph 16.1, this argument must fail.

43 Apart altogether from paragraph 16.1, however, the respondent also argues that for the purposes of paragraph 16.2, the first Laidlaw transaction was an attempted transfer and the second was an actual transfer and that KFC's prior written consent was therefore required.

44 In my view, this argument also must fail. On the ordinary meaning of the words used in paragraph 16.2, it is the licensee Scott's Food that is constrained from dealing with its interest under the license agreement. Once the alter ego argument is dismissed, this paragraph simply cannot reach Scott's Hospitality, the shareholder of the franchisee. Nor does it reach the shareholders of Scott's Hospitality. Neither an attempted change nor an actual change in the shareholders of the franchisee constitutes the franchisee dealing with its interest under the license agreement.

45 This conclusion is assisted by examining the language of the counterpart paragraph 16.2 in the 1985 standard franchise agreement. The two Laidlaw transactions would be encompassed by that provision only because of the inclusion of the "deemed transfer" concept. As I have said, this concept is conspicuously absent from paragraph 16.2 of this license agreement.

46 The respondent argues that its proposed reading of paragraph 16.2 is consistent with good business sense and industry practice. However, as I have indicated in connection with the argument on paragraph 16.1, in the circumstances of this case, neither of these aids to interpretation requires that paragraph 16.2 be read to give KFC the right to consent to a change in the shareholders of its franchisee.

47 Finally, the respondent relies on GATX v. Hawker-Siddely Canada Inc. (1996), 27 B.L.R. (2d) 251 (Ont. Gen. Div.) to assert a broad meaning for the phrase "or otherwise deal with" as found in paragraph 16.2. That case is different from this one in that, there, the contracting party was clearly dealing indirectly with its interest under the agreement. Here, neither Laidlaw transaction involved the franchisee dealing in any way with its interest under the license agreement.

48 I therefore find that, properly construed, paragraph 16.2 does not give KFC the right to prior written consent to either Laidlaw transaction.

49 Given my conclusions about paragraphs 16.1 and 16.2 of the license agreement, it is unnecessary to deal with the appellant's alternative arguments: that paragraph 16.1 is limited to a change in ultimate control of the franchisee; that KFC could not have reasonably refused its approval of the second Laidlaw transaction; that a breach of paragraph 16.1 entitles KFC to terminate only if it was a fundamental breach of the license agreement; but in any event, for KFC to terminate would be a breach of its good faith duty under the license agreement; and finally, that the appellants are entitled to relief from forfeiture. Nor is it necessary to deal with the respondent's alternative argument that a breach of paragraph 16.1 allows it to terminate through direct resort to paragraph 17.3 of the license agreement.

50 Before leaving the transfer issue, the remaining matter required to be dealt with arises from the finding below that pursuant to paragraph 16.3 of the license agreement, KFC had a right of first refusal in the circumstances of both Laidlaw transactions. That paragraph reads in part as follows:

> 16.3 In the event that Licensee receives a bona fide offer, which licensee is willing to accept, from a third party to purchase or otherwise acquire any of the Licensee's rights and interest in this Agreement, ..., Licensee shall first offer to sell the same to KFC at the same price and on the same terms and conditions as in the third party's offer ... In the event that KFC so accepts such offer to sell, a binding agreement of purchase and sale shall thereby be constituted between Licensee and KFC at the said price and upon the said terms and conditions ... [Emphasis added.]

51 The reasons below reveal no analysis of the language in this paragraph by the trial judge in reaching his conclusion.

52 In my opinion, the ordinary meaning of the words used in the paragraph dictates the opposite conclusion -- that neither Laidlaw transaction triggered a right of first refusal. Neither an offer to purchase the shares of Scott's Hospitality nor an offer to change the controlling shareholder of Scott's Food is an offer which the franchisee receives or one which the franchisee can accept. The licensee cannot receive a takeover bid for the licensee's parent or for the licensee itself.

53 In summary, therefore, the appellant did not breach either paragraph 16.1 or paragraph 16.2 of the license agreement because of the Laidlaw transactions and KFC does not have the right to terminate the license agreement as a result. Nor did either Laidlaw transaction give KFC a right of first refusal.

54 I would accordingly allow the appeal on the transfer issue and set aside the declarations in paras. 1, 2, 3 and 4 of the judgment below. Instead, an order will go dismissing the claims for these declarations. Finally, I would set aside para. 13 of the judgment below and would grant the declaration sought therein.

THE ENHANCEMENT ISSUE

55 The other major issue at trial was whether Scott's Food had failed to meet its obligations to enhance its KFC outlets. These obligations are contained in the license agreement and the addendum to it, the Master Development Agreement, signed at the same time. The trial judge's two principal findings on this issue were that Scott's Food had failed to enhance its outlets as required by paragraph 7.2 of the Master Development Agreement and, secondly, because more than five to ten per cent of the outlets had not been enhanced as required, the failure was material and substantive, thereby entitling KFC to terminate the license agreement pursuant to paragraph 17.2(e) unless Scott's Food corrects the failure within three months. The appellants appeal neither of these findings. Indeed, they raise only two grounds of appeal in connection with the enhancement issue.

56 Firstly, they appeal the declaration that KFC is also entitled to terminate the license agreement pursuant to paragraphs 17.2(e) and 17.3 because Scott's Food's enhancement failures were breaches of paragraphs 3.2, 5 and 6 of the license agreement. While the judgment contains this declaration, the reasons for judgment do not reveal the basis upon which the declaration was made.

57 Second, they appeal the finding that to avoid KFC's right to terminate under paragraph 17.2(e), Scott's Food must, within three months, enhance all of its outlets, not just a sufficient number that the failure becomes less than material and substantive.

58 Turning to the first of these two grounds of appeal, it is helpful to set out paragraphs 17.2(e) and 17.3 of the license agreement:

> 17.2 KFC may, without prejudice to any other rights or remedies contained in this Agreement or at law or in equity, terminate the License upon immediate notice (or in the event advance notice is required by law, upon the giving of such notice) in the event that:
>
> . . .
>
> (e) Licensee fails to satisfy, in a material and substantive manner, the requirements for enhancement and development contained in Articles 3.3, 3.4, 7.2 and 7.3 of the Addendum, provided that notice of any such failure is delivered to Licensee and Licensee shall not have corrected such failure within (3) months from the delivery of such notice.
>
> 17.3 The License will terminate on the termination date specified in any notice by KFC to Licensee (without any further notice of termination unless required by law), provided that (a) the notice is hand delivered or mailed at least thirty (30) days (or such longer period as may be required by law) in advance of the termination date, (b) the notice reasonably identifies one or more breaches or defaults in Licensee's obligations or performance hereunder, (c) the notice specifies the manner in which the breach(es) or default(s) are not fully remedied before, and as of, the termination date.

59 In my view, paragraph 17.2(e) deals explicitly and exhaustively with the enhancement obligations on the franchisee that, if not met, give KFC the right to terminate the license agreement. None of paragraphs 3.2, 5 or 6 of the license agreement is included in that list.

60 Moreover, as indicated by the trial judge, paragraph 17.3 merely sets out the procedure of formal notice. It does not accord to KFC a substantive right to terminate for any failure by Scott's Food to discharge its enhancement obligations. To so interpret paragraph 17.3 would fly in the face of paragraph 17.2 where the parties have carefully selected the enhancement obligations that, if breached, justify termination. Hence I would reverse the declaration that because the franchisee's enhancement failures breached paragraphs 3.2, 5 and 6 of the license agreement, KFC is entitled to terminate pursuant to paragraphs 17.2(e) and 17.3.

61 As to the second ground of appeal on the enhancement issue, paragraph 17.2(e) of the license agreement provides that failure in a material and substantive manner (my emphasis) to meet the franchisee's enhancement obligations as specified therein gives KFC the right to terminate if the failure is not corrected within three months. As I have said, the trial judge found that where more than five to ten per cent of the outlets fall below this required standard, Scott's Food was in substantial breach for the purposes of this paragraph. He went on to say this:

> ... KFC must give three months' notice from the date of this judgment to Scott's to allow it to remedy the default found in this decision on the enhancement issue. In other words, Scott's must be given three months in which to upgrade all of its remaining outlets to certification standards. If it chooses not to do so, it may close those stores under other termination procedures.

62 There is nothing in the actual judgment appealed from that requires the franchisee to enhance or close all of its remaining outlets to avoid termination. Hence, I propose to make no order on this ground of appeal.

63 However, in my opinion, if failure in a material and substantive manner to meet the enhancement requirements occurs when five to ten per cent of the outlets are below standard, correcting that failure means enhancing at least enough outlets so that there is no possibility of this line being crossed. This means that to correct that failure within three months, Scott's Food must ensure that no more than five per cent of its outlets are substandard. I would therefore not think it necessary that to correct the failure, the franchisee must sufficiently upgrade all its remaining outlets. To do so would make the correction incongruent with the failure contrary to what I think is meant by the final phrase of paragraph 17.2(e).

64 The view I have expressed is also consistent with paragraph 6.3 of the Master Development Agreement. It contemplates that the franchisee could operate outlets for a limited period of time even if they had not been enhanced to the required standard. This paragraph is inconsistent with a correction requirement that would compel the franchisee to properly enhance all of its remaining outlets.

65 In summary, I would allow the appeal on the enhancement issue. I would set aside the declaration in para. 9 of the judgment below and order that the claim for this declaration be dismissed.

COSTS

66 The trial judge ordered that there be no costs of the trial on the basis of paragraph 18.3 of the license agreement which required this result unless one party prevailed entirely, something that did not occur at this trial.

67 Before us, neither party sought to disturb this order and I do not do so. Both parties submitted that costs of the appeal should follow the result. I can see no reason why this should not happen.

68 In conclusion, I would allow the appeals with costs on the transfer issue and the enhancement issue in accordance with these reasons. The trial judgment is otherwise undisturbed.

GOUDGE J.A.
MOLDAVER J.A. -- I agree.
FERRIER J. (ad hoc) -- I agree.

cp/d/ln/aaa/DRS/qlgxc

1 City of Toronto v. W.H. Hotel Ltd. (1966), 56 D.L.R. (2d) 539 at 548 (S.C.C.).

2 Scanlon v. Castlepoint Development Corporation et al. (1992), 11 O.R. (3d) 744 at 770 (Ont. C.A.).

Indexed as:

Kentucky Fried Chicken of Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Foods Services Inc.

Between
Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd., plaintiff, and
Scott's Food Services Inc. and Scott's Hospitality Inc., defendants

[1997] O.J. No. 3773

41 O.T.C. 241

74 A.C.W.S. (3d) 45

Court File No. 96-CU-103096

Ontario Court of Justice (General Division)

Steele J.

Heard: February 10-12, 14, 17, 19, 20, 24-28, March 3-7, 10-12, 14, 18-21, 24-27, April 1-4, 21, 22, 24, 25, 28-30, May 1, 5-9, 12, 14, 15 and July 3, 1997.
Judgment: September 19, 1997.

(106 pp.)

[Ed. note: Supplementary reasons for judgment released November 5, 1997. See [1997] O.J. No. 4451.]

Franchises -- Franchise agreement -- Breach of agreement -- What constitutes -- Damages -- Transfer of franchises -- Consent of franchisor -- Company law -- Share transfer -- Transfer -- Effect of.

Action by the plaintiff, Kentucky Fried Chicken, a Division of Pepsi-Cola Canada (KFC), for several declarations and for damages for breach of a licence franchise agreement by the defendants, Scott's Food Services (Scott's), a subsidiary of the defendant, Scott's Hospitality (Hospitality). KFC had a franchise licence agreement with Scott's for 400 stores in Canada. Section 16 of the agreement

provided a personal franchise grant to Scott's which required full disclosure of, and approval by KFC of all directors and holders of majority control of voting shares of Scott's and any corporations that owned, controlled, or had any interest in Scott's shares. It also prohibited Scott's from transferring or otherwise dealing with the agreement without consent, and it dealt with the procedure for third party offers to purchase. In 1995, Laidlaw and Hospitality agreed that Laidlaw would purchase Hospitality's shares. Laidlaw intended to sell Scott's to A&W after the takeover. KFC was advised of the offer and it advised the defendants that the proposed sale violated the agreement's transfer provision. It also raised the issue that the defendants were in breach of remodelling and upgrading obligations. The defendants applied for a declaration regarding the transfer provisions' effect and KFC commenced this action. Laidlaw and the defendants then completed a second transaction whereby Hospitality sold to Laidlaw all of its business, other than the KFC business. KFC objected to this transaction, but it was completed. The two main issues were whether the defendants could transfer shares under the licence agreement, and what remodelling and upgrading of Scott's Food outlets were covered by the licence agreement.

HELD: Action allowed. Certain declarations were granted, while others were dismissed. KFC was entitled to terminate the agreement due to the defendants' breach. Any transfer of controlling shares of Scott's Food or Hospitality was subject to KFC approval. Section 16 applied to both Laidlaw transactions and required KFC approval; thus, both transactions breached the agreement. Also, the defendants substantially breached the agreement's annual remodelling provisions. However, as KFC was entitled to terminate the agreement based on the transfer issue, it was inequitable to order specific performance and have the defendants expend substantial sums of money to remedy the breach. Relief from forfeiture was not granted to the defendants with regards to the two Laidlaw transactions. The companies were sophisticated corporations acting with legal advice. KFC's conduct in opposing the two transactions was not unconscionable.

Statutes, Regulations and Rules:
Courts of Justice Act, R.S.O. 1990, c. C-43.

Counsel:

David R. Byers, Katherine L. Kay, Christopher J. Cosgriffe and Eliot N. Kolers, for the plaintiff.
David T. Stockwood, Q.C., Nancy J. Spies, Robert MacKinnon, Timothy H. Mitchell and Faeron Trahearne, for the defendants.

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1 **STEELE J.**:-- This action and counterclaim involves the interpretation of a Master Franchise Licence Agreement between Kentucky Fried Chicken Canada, a division of Pepsi-Cola Canada Limited (KFC) as licensor (sometimes referred to as the franchisor) and Scott's Food Services Inc. (Scott's Food) as licensee (sometimes referred to as the franchisee) (the licence agreement) and a Master development Agreement as an addendum thereto (the addendum). The relevant portions of the licence agreement and addendum are attached as schedule A. Both documents were executed on June 9, 1989.

2 There are two main issues:

1. The ability of Scott's Food and Scott's Hospitality Inc. (Hospitality) to transfer shares of Hospitality, Scott's Food or other corporations under the licence agreement (the transfer issue);
2. The remodelling and upgrading of Scott's Food outlets covered by the licence agreement and addendum (the enhancement issue).

3 KFC is the registered owner in Canada of the trademarks Kentucky Fried Chicken, Colonel Sanders, and Its Finger Licking Good as well as other trademarks associated with KFC (collectively, the "KFC" Marks)

4 Hospitality is a widely held corporation whose shares prior to and at the commencement of this action were publicly listed on both the Toronto and Montreal Stock Exchanges. There was no shareholder holding more than 50% of the shares of Hospitality. The largest shareholder was Fairwater Capital Corporation (Fairwater) which is controlled by Michael Gardiner and his family. However, another corporation controlled by his relatives owned sufficient shares that they jointly had over 50%. There was no voting agreement between the two corporations, but they have always voted their shares in the same manner. I find that there was effective control by Fairwater.

5 Scott's Food was a wholly owned subsidiary of Hospitality at the commencement of this action. I will refer to Scott's Food and Hospitality collectively as Scott's unless the context otherwise requires.

6 The licence agreement covers approximately 400 Scott's Food stores or about one half of the total KFC stores in Canada. The Scott's Food stores are located in Ontario, Quebec and Alberta.

7 At the commencement of trial both parties presented opening addresses that took three days in total. These opening addresses set out the position of the parties in great detail and were of considerable help in understanding the complexities of the action, including the motion relating to the introduction of parole evidence. However, it must be remembered that opening statements are not evidence but merely what the parties respectively intend to prove by proper evidence introduced at trial.

8 At the conclusion of the opening statements counsel for KFC brought the following motion:

> THE MOTION IS FOR: a ruling that the following categories of evidence are inadmissible in this proceeding:
>
> (i) evidence of the negotiations and drafts leading up to the execution of the Master Franchise License Agreement and Addendum dated the 1st day of January, 1989 between the Plaintiff and the defendant Scott's Food Services Inc. (the "License Agreement");
> (ii) evidence of either party's actual subjective intention with respect to the License Agreement;
> (iii) evidence of other license and related agreements entered into between the Plaintiff and other franchisees in Canada;
> (iv) evidence of other license and related agreements entered into between companies associated with the Plaintiff and their franchises in other countries; and

(v) evidence in relation to the condition and upgrading of KFC outlets not owned by the Defendants and therefore not covered by the terms of the License Agreement.

THE GROUNDS FOR THE MOTION ARE:

(i) the terms of the License Agreement;
(ii) the License Agreement is clear and unambiguous and as such, no extrinsic parol evidence may be admitted to alter, vary, or interpret in any way the words used in the License Agreement.

9 In support of this motion he referred the court to ss. 18.4 and 18.5 of the licence agreement between the parties and the discovery evidence of Boyd Simpson (Simpson) who was the principal negotiator of both the licence agreement and the addendum for Scott's to the effect that the transfer provisions of the licence agreement are clear and should speak for themselves. He also referred to the other discovery evidence of Simpson, that the only thing that he was relying on in this transfer issue was the deletion from an earlier draft of the "deemed transfer" language during negotiations and his admission that this was a view formed internally at Scott's and that no confirmation of this view was sought from KFC and that KFC could have a completely different view.

10 All counsel agreed that the pleadings do not give rise to any exceptions to the parol evidence rule and that this motion does not relate to any claim for rectification, mistake, misrepresentation or collateral agreement. In fact both parties take the position that the words of the agreement on both issues are clear and unambiguous. However, they reach opposite conclusions as to their meaning.

11 All counsel for Scott's opposed the motion on the grounds that it was premature and that the court should not determine the issue of parol evidence in a vacuum and that, in any event, the law is in an unsatisfactory state and it is difficult to determine what evidence is part of the "factual matrix" which allows such evidence in certain circumstances.

12 At the conclusion of argument, subject to any further order, I reserved my decision until the end of trial. I stated that until I had heard all of the factual evidence I believed that it was premature to give a decision, even if I was so inclined, no matter how desirable it might have been to shorten the trial. There were no reported cases cited where blanket types of evidence were ruled out in advance. I stated that to rule on part only of the motion might create arguments during trial as to what was covered or not covered by my ruling. I stated that by reserving the decision, all of the evidence would be available for consideration by me at the end of the trial and, in the event that I should err in my conclusion, by an appellate court. The risk of an erroneous ruling on blanket areas of evidence is far greater than a ruling on an isolated question. The admission of evidence can create no harm. (see TransCanada Pipelines Ltd. v. Northern & Central Gas Corp. Ltd. 146 D.L.R. (3d) 293 at 298). I accepted that counsel for KFC would be taken to object to all questions relating to the issues covered by the motion and that he was not waiving his rights by not rising to object to individual questions. I also stated that either party could raise the issue of unduly lengthening the trial when the question of costs arose.

13 The motion raised a very important procedural issue because if I had ruled then as I now rule on some of the points of law relating to the admissibility of evidence it would have shortened the trial. At the time I was strongly inclined to rule against any evidence of either parties as to actual subjective intention with respect to the Licence agreement. To a lesser degree I was inclined to rule

against the evidence of the negotiations and drafts leading up to the execution of the licence agreement and the addendum. I was not so inclined with respect to items (iii), (iv) and (v) of the motion.

THE LAW

14 I adopt the basic rule of law respecting parol evidence as stated by Professor Fridman in The Law of Contract in Canada (3d) edition at p. 455 as follows:

> The fundamental rule is that if the language of the written contract is clear and unambiguous, then no extrinsic parol evidence may be admitted to alter, vary, or interpret in any way the words used in the writing.

Both parties say there is no ambiguity in the words of the licence agreement or the addendum, but they interpret the contract differently. However it is for the court to determine whether or not there is any ambiguity, blatant or otherwise. If there is no ambiguity then one of the parties is wrong in its interpretation.

15 I adopt the purpose of extrinsic evidence set out (in TransCanada Pipeline case), supra, at p. 298 as follows:

> The extrinsic evidence is admitted to assist the court to determine if there is in fact a latent ambiguity in the written document and, if there is, to ascertain how that ambiguity should be resolved.

16 I also adopt as applicable to this case the first three principles set out in the TransCanada Pipeline case, supra, at p. 298 as follows:

> (1) The extrinsic evidence admitted may establish that there is no latent ambiguity in the written document relevant to the issue in dispute. In such a case obviously the written document governs.
>
> (2) The extrinsic evidence may demonstrate that there is a latent ambiguity in the terms of the written document which are in dispute. Nonetheless, upon a consideration of all the surrounding circumstances, it requires the choice to be made in favour of the meaning of the agreement which would appear from a reading of the whole document without any extrinsic evidence to show ambiguity.
>
> (3) The extrinsic evidence establishes that there is a latent ambiguity. However, a consideration of the surrounding circumstances requires the choice of a meaning consistent with the words of the document but different from their patent meaning. The party contending that there is a latent ambiguity must not only establish that there is such an ambiguity but also resolve that ambiguity by evidence from which the court can find what agreement was made and what the choice of alternative meanings should be. The party contending for the latent ambiguity must show that the extrinsic evidence dictates the selection of a meaning which is generally consistent with the wording of the written document but different from its patent meaning.

17 In my opinion the principles set out in the TransCanada Pipeline case in 1983 are not in conflict with the decision of the same court in 1984 in Craighampton Investments Limited v. Ayerswood Developments Limited and Lynhurst Estate Limited 4 O.A.C. 124 that approved of the principles in Indian Molybdenum Ltd. v. The King, [1951] 3 D.L.R. 497 at 502. Those principles in the Indian Molybdenum case as stated therein are as follows:

> Where the language in a contract is clear and unambiguous, it alone can be looked at to ascertain the intent of the parties. Where, however, as here, the words are ambiguous, in the sense that they are susceptible of more than one meaning, evidence of the surrounding circumstances may be admitted, not to vary, add to, or contradict the terms of the contract, but to enable the Court to read and construe the language in relation to the facts and circumstances in which they adopted it to express their intention.
>
> The parties have adduced evidence of the surrounding circumstances. As part thereof they included declarations and statements of intention made during the course of negotiations, as well as certain drafts discarded in the process of arriving at the terms agreed upon and embodied in the letter of September 29, 1942 (to be hereafter further discussed). In Nat'l Bank of Australasia Ltd. v. J. Falkingham & Sons, [1902] A.C. 585, the Privy Council construed the terms of an assignment and, speaking particularly of the discarded drafts thereof, stated at p. 591: "No claim is made to rectify this deed. The drafts cannot, therefore, properly be received in evidence to alter its language; still less to explain or assist in the interpretation of the deed as finally executed."
>
> Not only are such drafts not admissible to assist in the construction of the language finally adopted by the parties, but words deleted by the drawing of a line through them, and this deletion initialled by the parties, cannot be looked at: A. & J. Inglis v. Jno. Buttery & Co., (1878), 3 App. Cas. 552. These drafts, deleted words, correspondence and statements made in the course of negotiations are superseded by the language finally adopted by the parties and embodied in the written agreement to express their common intention. Blackburn on Sale, 3rd ed., p. 51: "The general rule seems to be, that all facts are admissible which tend to show the sense the words bear with reference to the surrounding circumstances concerning which the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected." This is an oft-quoted passage: Grant v. Grant (1870), L.R. 5 C.P. 727 at p. 728; Bk. of New Zealand v. Simpson, [1900] A.C. 182 at p. 188; Gt. Western Ry. and Midland Ry. v. Bristol (1918), 87 L.J. 414 at p. 424.

I agree with the following statements made by Wilson J. in August SPA v. Unisys GSG Canada Inc., [1995] O.J. No. 1340 (Ontario Court General Division) at paragraphs 43, 44 and 46.

> When one speaks of the intention of the parties to a contract, one is speaking objectively. The parties cannot themselves give direct evidence of what their intention was. What must be ascertained is what reasonable people would have intended if placed in the situation of the parties. Similarly, in the business context, when one is speaking of aim or object or commercial purpose, one is speaking

> objectively of what reasonable persons would have had in mind in the situation of the parties.
>
> Evidence will generally not be admitted to show what were the parties subjective intentions with respect to the words used. Rarely , this principle will be departed from.
>
> Evidence of subjective intention is generally not admissible except where circumstances such as mistake or deceit are alleged.

18 I agree with the principle with respect to the interpretation of contract with the statement in Arthur Andersen Inc. v. T.D. Bank (1994), 17 O.R. (3d) 363 at 372 as follows:

> "First, the words of the contract must be analysed in its factual matrix', and a conclusion arrived at that there are two possible interpretations of the contract. Then, and only then, may the trial judge look at other facts, including facts leading up to the making of the agreement, circumstances existing at the time the agreement was made, and evidence of subsequent conduct of the parties to the agreement." [emphasis added]

19 This is a commercial contract entered into between two sophisticated well-advised parties. The whole of the agreement should be construed fairly and broadly to ensure that the basic intentions and objects of the contract can be carried out.

20 This principle was stated by Estey J. in Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co. 112 D.L.R. (3d) 49 at 58 as follows:

> 1. "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."

21 In the Craighampton Investments case the Court of Appeal approved the following statement of the trial judge as follows:

> "This case obviously demonstrates the practical sense of the parol evidence rule. When equals negotiate at length and arrive at a written agreement which can be interpreted by itself or by reference to matters which must be taken to have been known to both of them and which show the sense or meaning that the words must be taken to have had when the agreement was made, it verges on

idle activity for a court to rehash the negotiations, activities and conduct of the parties and hear their now professed expression of what their intentions were at an earlier time.

22 I reject all subjective evidence of the intention of both parties which I define as any intention of the parties that were not communicated to the other party. I also find that the various draft documents are not admissible.

23 I am not unmindful of the provisions of the non waiver clauses of s. 18.4 of the licence agreement or s. 9.1 of the development agreement. However the relationship between the parties and the custom in the industry are part of the factual matrix that must be looked at in interpreting the licencing agreement. Also in this case I believe that evidence of licence agreements entered into between the plaintiff and other franchisees in Canada and agreements between KFC's associated companies and franchisees elsewhere are relevant to the custom in the industry. Evidence of the conditioning and upgrading of KFC corporately owned outlets is also relevant to the claims for damages and relief from forfeiture and what the standards are for Canada. Much of this evidence is needed to interpret the addendum.

BACKGROUND

24 In 1969 Hospitality under the name of Scott's' Restaurants Co. Limited entered into a franchise licence agreement dated January 1, 1969, with Col. Sanders Kentucky Fried Chicken Limited (Colonel Sanders) for KFC outlets in Canada (the 1969 agreement). Subsequently Hospitality acquired other major businesses in the hotel, transportation and photographic industry. It also expanded into other food service businesses. Most of these other businesses were operated separately as subsidiary companies with Hospitality holding 100% of the shares thereof. As a result of this diversification of its overall business Hospitality changed its name to Scott's Hospitality Inc. The KFC business continued to be operated as part of an unincorporated division of Hospitality. I find that this unincorporated division was treated by Hospitality in the same manner as its wholly owned subsidiaries, each with a separate operating management structure. Hospitality acts as an investment holding company with the power to appoint or remove the officers of the subsidiaries and to require the subsidiaries to obtain its approval of all major capital expenditures or agreements that could have a major capital effect upon Hospitality. In other words, Hospitality controlled its food service division (including Scott's Food) but took no part in its day to day management. The offices of Scott's Food Services Division were in a different location than those of Hospitality.

25 The 1969 agreement was due to expire on January 1, 1994. It provided for a royalty of $.05 per head of chicken used. There were no share transfer restrictions or enhancement obligations in that agreement. It did not state that Hospitality's rights were personal to Hospitality and there were no provisions relating to the ownership of Hospitality or to its shareholders or directors. However, there was a provision restricting the transfer of the licence or an interest thereunder without the prior written consent of the licensor. The KFC Marks for Canada were owned by Colonel Sanders. All other world wide KFC marks were owned by Kentucky Fried Chicken Corporation (KFC Corp.) based in the United States of America. In 1986 Pepsico Inc. (Pepsico) purchased all of the shares of KFC Corp.

26 In 1987 Colonel Sanders was interested in selling its entire interest in the KFC Marks for Canada. Prior to this over a period of years both KFC Corp. and Hospitality were interested in acquiring this interest. It is not necessary to recite the details of prior discussion between KFC Corp.

and Hospitality or other possible purchasers or Hospitality's interest therein. I find that in 1987 there were discussions between KFC Corp. and Hospitality and it was agreed that Hospitality would not submit a competing bid on its own against KFC Corp. In exchange it was agreed, that upon completion of the purchase of the KFC marks for Canada, KFC Corp. would grant Hospitality a 10 year renewal of the 1969 agreement. In turn the royalty rate payable to KFC would be increased to 1% of all sales. A letter agreement was signed on July 16, 1987, by persons authorized by both parties setting out the proposed terms of the renewal agreement. Hospitality did not submit a bid and KFC Corp.'s offer to purchase the KFC Marks for Canada was accepted on July 24, 1987. I accept the evidence of Ben Orenstein on this issue.

27 While at one time it was argued that this July 16, 1987 letter was a binding agreement, I find that it was merely an agreement to enter into an agreement. However, Hospitality abstained from doing something relying upon it. Subsequent negotiations ended up with the execution of the licence agreement and the addendum that are in dispute. I find that once KFC had acquired the Canadian KFC Marks it exerted great pressure on Hospitality which resulted in the present licence agreement and addendum which do not reflect the simple renewal of the 1967 agreement. To this extent I find that KFC attempted to treat Hospitality as if it was just another ordinary franchisee and modified the letter agreement of July 16, 1987, and was not acting in good faith. However, Hospitality was a sophisticated Canadian company faced with the expire of its licence in 1994 and attempted to protect itself with the wording in the licence agreement regarding the transfer and enhancement issues.

28 The wording of the agreement was worked out by Franklin Ableman (Ableman) on behalf of the plaintiff. He was general counsel for KFC Corp. in St. Louis USA. Boyd Simpson (Simpson), the general counsel for Hospitality, acted for Hospitality. Neither party to this action called as witnesses the persons who signed the agreement and addendum. This is not surprising because they were merely officers of the parties thereto but had no part in the negotiations of the agreements. The agreement was negotiated by their parent companies.

29 The addendum was first drafted with the intention that it would be added to the 1967 agreement. However, Ableman convinced Simpson that the language of the 1967 agreement was outdated and that a new agreement should be entered into with the addendum thereto. Ableman then presented a draft agreement basically with the wording of the Colonel Sanders 1985 standard franchise agreement (the 1985 agreement). This was objected to by Simpson. Prior to the sale to KFC Corp. Hospitality had refused to enter into such an agreement with Colonel Sanders. I find that KFC was aware of this before the licence agreement was executed. I find that Abelman received this information in a copy of a memorandum supplied by Scott's. I do not accept his evidence that he surmised that it was received after the negotiations for the licence agreement were completed. Such a late receipt would not make any sense.

30 The 1985 agreement was a more sophisticated document than the 1967 agreement and provided that KFC could require renovations and remodelling to KFC standards and stated that the franchisee was personal to the franchisee with full disclosure of shareholders, officers and directors and contained the following restrictions on transfers:

> 16.2 The Franchisee agrees that it shall not sell, transfer, assign, encumber, sub-license or otherwise deal with this Agreement or its rights or interest hereunder (hereinafter referred to as "transfer"), and shall not suffer or permit any

deemed sale, transfer or assignment of this Agreement or its rights or interest hereunder (hereinafter referred to as "deemed transfer" and more particularly defined in paragraph 16.4), without KFC's prior written consent and Franchisee's compliance in all respects with the terms and conditions of this Paragraph 16. Any transfer or deemed transfer, or any attempt to do so, contrary to this Paragraph 16 shall be a breach of this Agreement and shall be void but shall give KFC the right of termination as provided in paragraph 17.2(d).

16.4 For the purposes of this Paragraph 16, a deemed transfer of this Agreement or the rights and interest hereunder shall include:

(a) ...

(b) in the event that Franchisee is a corporation, any change (including but without limitation any issuance, sale, assignment, transfer, redemption or cancellation of, or conversation of any securities into, voting shares of the corporate Franchisee or any such other corporation referred to in paragraph 16.1, or any amalgamation, merger or other reorganization of the corporate Franchisee or any such other corporation of the holdings of voting shares referred to in paragraph 16.1; provided that, in the case of any such corporation the voting shares of which are listed and publicly traded on a stock exchange, no such change in any of the holdings of its voting shares shall constitute a deemed transfer unless, in the sole opinion of KFC, direct or indirect control of the corporate Franchisee would thereby be changed.

It is admitted that clauses 16.2 and 16.4 were standard provisions in all other KFC franchise agreements in Canada from 1985 to 1991. The wording of the provisions of the licence agreement in question are unique in Canada. The evidence of the expert witnesses relating to standard industry practice must be reviewed to interpret the licence agreement and addendum.

INDUSTRY PRACTICE

31 KFC called Philip F. Ziedman (Ziedman) and Arthur J. Trebilcock (Trebilcock) and Scott's called Alexander S. Konigsberg Q.C. (Konigsberg) and Edward N. Levitt (Levitt) as experts on franchising law and contracts. In my opinion they all agreed on certain basic principles. The only basic point that I do not accept was Ziedman's evidence that a franchisor can restrict a right to transfer based on common law or practice. I accept the view of all the other experts, that the right must be determined by contract. I was not referred to any law that dealt with franchise agreements other than by contract.

32 The most precious possessions of a franchisor are its trademarks and system. The practice is to protect these interests in the terms of contracts with its franchisees for the benefit of the franchisor and other franchisees.

33 A franchisor takes care to ensure who are its franchisees. It is concerned about the character, financial resources, business ability and other business interests of the franchisee. It also wants control over its franchisee so that the appearance and operation of each franchise outlet is such that the consumer cannot tell the difference from one outlet to another, whether operated by a franchisee or the franchisor itself. In the case of a single unit franchisee there is very little that the franchisee can do to negotiate a change to the standard agreement of the franchisor. These agreements are very

much to the favour of the franchisor with its principle obligation being to act reasonably in its actions.

34 The agreements almost universally provide that the franchisee may not transfer or assign the agreement and include provisions as to transfer similar to s. 16.2 and s. 16.4 of the 1985 agreement. In the case of a corporation an alternative to these sections is to have a clause or separate agreement restricting transfer and have the directors and controlling shareholders sign a separate agreement binding them. It is not usual to expressly provide in an agreement that the agreement can be assigned. It is a question of whether the agreement prohibits the transfer. The franchisor wants control of any transfer to ensure that a transferee is as suitable as the original franchisee, whether it be a transfer of assets or shares in a corporate franchisee.

35 It is common for the franchisee to be required to comply strictly with the methods and requirements of the system insofar as equipment and operations are concerned. It is also normal to require that the physical appearance of the buildings conform to the standards of the franchisor and be upgraded. The upgrading is usually required only at the time of a renewal of the agreement or a transfer of the agreement. An exception to this is if there has been a change in the trademark when alterations must be made to comply with it. I accept the evidence of Konigsberg that there was no industry practice that would grant a franchisor the right to require a franchisee to relocate an outlet unless it was stated in the franchise agreement.

36 It is normal for there to be a difference in appearance of outlets in the overall system because there are changes over time and not all outlets will comply with the newest image at a given time. There was a difference of opinion of the experts as to what percentage of units that do not comply could be tolerated by a franchisor. This varied from 5% to 20%. This evidence applied to the entire franchise system and not to any particular franchisee's units. This evidence is relevant to whether or not there has been a material non-compliance with the terms of any particular agreement.

37 It is most unusual for a franchisee to set the standards or not to be required to meet the franchisor's standards because it is the industry standard that the franchisor has control over the franchisee.

38 To varying degrees the experts acknowledge that parties can negotiate out of the normal practice of the franchisor's control over transfers depending on the bargaining power of the parties. Evidence was given of a very few examples of this. None of the experts had seen a situation where the franchisee had been in operation for a long period of time with about 400 stores representing about one half of the outlets of the total franchise system at the time that the franchise agreement had been entered into.

39 Those experts who were asked said that the terms of a grant of franchise operate throughout the entire term of the licence and did not operate only at the time of execution of the agreement.

SCOTT'S BARGAINING POWER

40 Three of the experts agreed that Scott's was unique in Canada in its circumstances as a franchisee. The licence agreement is a form of development agreement as opposed to a typical unit franchise agreement. All four experts testified that development agreements are more typically negotiated and are more likely to depart from a standard form. Abelman agreed that Scott's had bar-

gaining power at least equal to KFC in the negotiations. Ziedman stated that it was not usual for a franchisee to have equal bargaining power in negotiating.

41 For these reasons the evidence of the experts as to the usual practice in the industry must be applied with caution. The words of the licence agreement must be interpreted as to whether they make commercial sense to the parties against the background of the industry.

42 There were business advantages to KFC in entering into the agreement such as increased royalties and the removal of the risk that Scott's would not renew the agreement on its expiry in 1994 leaving KFC unrepresented in one half of its outlets in Canada and in many major markets therein. There were business advantages to Scott's in having an extension of its term of franchise. I find that Scott's had sufficient bargaining power to negotiate a contract in which there would be no restriction on the transferability of shares.

43 While it is not directly material to the interpretation of the licence agreement I find that prior to and at the July 18, 1988 meeting between KFC and Scott's representatives, Ben Orenstein (Orenstein) clearly stated that Scott's would not agree to any restriction on changes of ownership in the licencee. I accept his evidence over that of Abelman, who I find was intent on achieving KFC's ends. I also find that Abelman knew long before the time of execution of the licence agreement that the party to the agreement was to be a subsidiary corporation of Hospitality and not Hospitality itself. I reject the evidence of Abelman to the contrary. In this regard I rely on the evidence of Simpson and Orenstein.

THE AGREEMENT AS EXECUTED

44 The licence agreement and addendum were executed on June 9, 1989. While there is no disagreement as to the contents of the licence agreement itself or the addendum at the time of execution there is a disagreement as to the schedules attached to the addendums.

45 There were eight schedules as follows:

> Schedule A - Territory
> Schedule B - Minimum Development Targets
> Schedule C - Evaluation Criteria for Siting of KFC outlets of licencee
> Schedule D - Site Evaluation Document
> Schedule E - KFC standard plans and specification
> Schedule F - Scott's KFC outlets
> Schedule G - Outlet Certification Agreement
> Schedule H - Approved Products.

46 Schedule C, D and E were the only ones originally in question. Subsequent to June 9 Abelman advised Simpson that Schedule C, D and E needed to be updated to the current versions that the parties were working on. Scott's' position is that the copy in its possession as signed contained the agreed Schedules C, D and E and that there was no need to alter them and that they never were altered. I find that Schedule E as set out in the Scott's' copy of the agreement in exhibit 2, tab 7 is the schedule in the agreement as executed on June 9, 1989. This schedule states as follows:

> The KFC Standard Plans and Specifications for Canada shall be as agreed to by the parties.

I also find that Schedules C and D in exhibit 2, tabs 5 and 6, were in the agreement at the time of execution.

THE TRANSFER ISSUE

47 The position of KFC is that the licence agreement gives it control over the transfer of shares or assets of not only Scotts Food, but also of Hospitality. The position of Scott's is that it gives no control over the transfer of either the shares of Scotts Food or Hospitality, but acknowledges that KFC acting reasonably has control with respect to any sale of assets by Scotts Food. Each party submits that the clear wording of the executed agreement supports its position. Neither party has claimed mistake, rectification or undue influence. It is for the court to decide first whether the agreement is clear and unambiguous and, second, if it is not, what extrinsic evidence may be relied on to interpret it.

IS HOSPITALITY BOUND BY THE TERMS OF THE LICENCE AGREEMENT?

48 KFC submits that Hospitality and Scott's Food act as a single business enterprise with all significant financial and strategic decisions for Scott's Food being made at the Hospitality level. It submits that Hospitality, at all material times, was in such an intimate and immediate domination of the actions of Scott's Food that Scott's Food had no independent functions or decision making ability on strategic or contractual issues. It submits that Hospitality is bound in law and in fact to the terms and conditions of the licence agreement because Scott's Food merely executed the licence agreement as the alter ego or agent of Hospitality.

49 At the time of execution of the licence agreement on June 9, 1989, Hospitality was the licencee under the 1967 agreement and was operating all of the outlets in Ontario. The outlets in Alberta and Quebec were operated through wholly owned subsidiary companies of Hospitality. The licence agreement was entered into by Scott's Food and backdated to January 1, 1989.

50 On January 1, 1989 and June 9, 1989 Scott's Food was a shell company having no assets or liabilities. The royalty cheques for the period from January 1, 1989, were paid by "Scott's Food Services, a division of Hospitality". The transfer of assets from Hospitality to Scott's Food was made as of May 1, 1990, but actually did not take place until some time after December 14, 1990. The evidence of Simpson, that I accept, was that it made no practical difference during this time whether the outlets were operated by Hospitality or its subsidiary, or Scott's Food because "all of the employees, all of the facilities, all of the money, everything else was identical".

51 The licence agreement was negotiated by officers of Hospitality. Simpson and John Lacey (Lacey) who were officers of Hospitality gave evidence that the officers of Scott's Food could not amend the terms of the licence agreement without the approval of Hospitality. The president of Scott's Foods needed the approval of Hospitality to make any capital expenditures other than those within a small discretionary amount. The president of Scott's Food reported to the president of Scott's Food Services Division of Hospitality who, based on the evidence of Lacey, had the ultimate responsibility for the day to day operations of Scott's Food. I do not accept this as meaning that he actually operated Scott's Food on a daily basis. The officers of Hospitality were the persons who discussed with KFC any major alterations to the relationship between the parties such as purchase of new outlets (see Lacey's evidence re the Canadian Development agreement and Frezzo's evidence re the transfer of Quebec companies). These negotiations were with officers of the parent company KFC and not with officers of KFC. The day to day operations of Scott's Food were carried on by its own officers and employees and routine dealing at the operation level with KFC were car-

ried on by them. The major decisions were made at the level of KFC International and Hospitality. All other dealings were between KFC and Scott's Food. Both sides knew that the licence agreement was between KFC and Scott's Food. Hospitality was basically a holding company with between 15 to 20 employees and Scott's Food had over 5,000 employees.

ALTER EGO

52 If Hospitality is to be the alter ego of Scott's Food the corporate veil of Scott's Food must be lifted. The law relating to lifting the corporate veil is set out in Aluminium Co. of Canada Ltd. v. Toronto, [1944] 3 D.L.R. 609 at 614 as follows:

> The question, then, in each case, apart from formal agency which is not present here, is whether or not the parent company is in fact in such an intimate and immediate domination of the motions of the subordinate company that it can be said that the latter has, in the true sense of the expression, no independent functioning of its own.

53 Earlier in the Aluminium decision it was stated that even if there is no independent function found, that for other purposes the subsidiary may be legally entitled to be dealt with.

54 In Tridont Leasing (Canada) Ltd. v. Saskatoon Market Mall Ltd., [1995] 24 B.L.R. (2d) 105 at p. 113 the Saskatchewan Court of Appeal referred to this domination as being to the extent that both corporations "constitute one common unit".

55 In Nedco Ltd. v. Clark, [1973] 6 W.W.R. 425 at p.433 the Saskatchewan Court of Appeal held that the facts of each case must be looked at. It found that the wholly owned subsidiary had been incorporated to take over what had been formerly a division of the parent company and that it was controlled, directed and dominated by the parent and was an integral component of the parent.

56 In Gregorio v. Intrans Corp. (1994), 18 O.R. (3d) 527 at 536 the Ontario Court of Appeal stated as follows:

> Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive the claimants of their rights.

57 The problem is how to apply this law to the present case. I have no difficulty in finding that Scott's Food is under the complete control of Hospitality for the principle purposes of the licence agreement even though it exists as a separate legal entity for other purposes. However, KFC knew this in advance and chose to execute the agreement with the subsidiary. KFC did not request that Hospitality sign or guarantee the licence agreement which would have been in accordance with normal industry practice. I cannot say that there was conduct akin to fraud or any act that would unjustly deprive the claimants of their rights.

58 While I am not aware of any case that deals with the situation where a subsidiary company has been held liable for the acts of its parent company, the principle of "alter ego" is that the two companies are to be treated as one and the same. For this reason the principle of "alter ego" could

apply to the present case. However, I do not find that Hospitality is the alter ego of Scott's Food or vice versa.

AGENCY

59 The law of agency was expressed in Smith, Stone & Knight Ltd. v. City of Birmingham, [1939] All E.R. 116 with respect to when a subsidiary corporation would be held to be the agent of its parent. The six factors set out are as follows:

(a) whether the profits were treated as profits of the parent or the subsidiary;
(b) whether the individuals involved in the day to day operations were appointed by the parent;
(c) whether the parent corporation was the brains behind the day to day operation;
(d) whether the parent corporation made policy and financial decisions that were merely carried out by the subsidiary;
(e) whether the profits were directly traceable to the skill and direction of the parent;
(f) whether control by the parent was constant, as would be the case in a typical principal agent situation, or merely periodic and long range, as might occur in a typical corporation shareholder situation.

60 I make the following comments with respect to each of the items:

(a) the profits of Scott's Food were treated in a consolidated balance sheet of Hospitality as the profits of Hospitality. There was no evidence that in fact all profits of Scott's Food were automatically syphoned off to Hospitality as opposed to being left within Scott's Food for its own operations.
(b) while there was evidence that the president of Scott's Food services, a subsidiary of Scott's Hospitality was appointed by Hospitality and that the president of Scott's Food was appointed by Hospitality all other employees of Scott's Food were appointed by the president of Scott's Food and it was these latter persons who were primarily involved in the day to day operations of Scott's Food.
(c) while officers of Hospitality were the brains behind many of the long range strategy and plans of the company, the day to day operations were not conducted by Hospitality and therefore Hospitality was clearly not the brains behind the day to day operations. In fact Hospitality was the owner of wholly owned subsidiaries that operated North America's third largest school bus business, North America's largest chain of franchise Chinese Food restaurant, a one hundred store pizza chain in the United Kingdom and a large collection of highway travel centres and at one time the entire Blacks Photography chain. It was also the largest franchise group of Holiday Inns and a substantial hotel chain in the U.K. It is inconceivable to say that Hospitality was the brains behind the day to day operations of Scott's Food or any other of its subsidiaries, particularly when Scott's Food itself had over 5,000 staff of its own conducting the day to day operations.

(d) Hospitality through its president at all times made the major policy and financial decisions that were carried out by Scott's Food. In my mind this is not indicative of agency because this is normal practice for all parent corporations to impose levels of fiscal discipline on the operations of its subsidiaries and overall policy criteria.

(e) while Hospitality made all major policy, financial, capital spending and other important decisions, it cannot be said that the profits of Scott's Foods are directly traceable to the skill and direction of Hospitality because the operation of 400 outlets with 5,000 employees working on a day to day basis are at least equal to the skills of the Hospitality executives, and therefore it cannot be said that the profits are directly traceable to the skill and direction of Hospitality alone.

(f) The question of control is one of degree. Hospitality had control over Scott's Food with respect to long range strategy decisions and its budget, but the evidence of Frezzo on behalf of KFC was that operational matters were dealt with between Frezzo himself or other executives of KFC Canada and the operational personnel who were Scott's Food employees such as George Heos and others. Hospitality's control over Scott's Food has been constant in the sense of budget and strategy might occur in a typical parent corporation and subsidiary.

61 I do not find that Scott's Food was the agent of Hospitality. If there was any agency it was Hospitality acting as agent for Scott's Food in negotiating the licence agreement just as KFC International was acting as agent to KFC Canada in negotiating the agreement.

62 For these reasons I find that Scott's Food was neither the alter ego nor agent of Hospitality.

63 I also find that Hospitality did not induce Scotts Food to breach the contract. In fact, it approved the expenditure of millions of dollars to upgrade outlets after this litigation commenced.

TERMINATION FOR BREACH OF KFC'S RIGHTS ON TRANSFER

64 KFC claims that Scott's Food is in breach of the agreement on three occasions and that KFC is entitled to terminate the agreement as a result of any one of these breaches. The breaches alleged are as follows:

1. In 1989 and 1990 by allowing Hospitality, Acadia (Hospitality's subsidiary company in Alberta) and Scott's Quebec (Hospitality's subsidiary company in Quebec) to use the KFC Marks and KFC Systems without authorization.
2. The first Laidlaw transaction
3. The second Laidlaw transaction.

1. THE 1989 AND 1990 OCCURRENCE

65 The licence agreement was executed on June 9, 1989, retroactive to January 1, 1989. In my opinion Scott's Food did not have the express right to authorize the use of the KFC Marks or KFC Systems by anyone other than itself. As stated earlier, Hospitality and its subsidiaries continued to use the Marks and Systems until Hospitality sold its outlets to Scott's Food as of May 1, 1990, or some later date when the transfer was actually completed. This would be a clear breach of the agreement.

66 However, KFC cannot be heard to say that there was a breach of the agreement for the period from January 1, 1989, to June 9, 1989. The agreement itself provided for this retroactive activity. It knew that Hospitality and its subsidiary companies were operating the outlets and using the Marks during that period under the 1967 agreement. It received royalty cheques from a division of Hospitality and not Scott's Food until May 1, 1990. In my opinion it was objectively obvious that Scott's had to reorganize to implement the licence agreement and this could not be done instantaneously. While it may have taken Scott's longer to reorganize than expected there was no evidence of any damages resulting to KFC and no such damages were claimed. In fact this allegation resulted by an amendment to the statement of claim after the commencement of the action. Admittedly, it was based on the fact that KFC did not know the details of the transfer to Scott's Food until the discoveries and productions in the action. However, this does not detract from the necessary implications to the agreement itself.

67 Even if KFC did not know the actual state of Scott's Food's assets during this period or the facts of the reorganization it must be inferred that they acquiesced in the principle of the reorganization taking time. No notice was given of any breach because the details were not known until after this action was commenced. I do not think that clause 18.4 of the agreement applies in the circumstance, but even if it does relief from forfeiture for such breach is hereby granted for the above reasons and the fact that there is no evidence that KFC suffered any damages therefrom.

2. THE FIRST LAIDLAW TRANSACTION

68 By September 1995 Hospitality had sold some of its subsidiary companies and remained only in the restaurant business (including KFC) and the bus business. Based on the evidence of Lacey, I find that from 1994 there were discussions between Lacey and KFC representatives regarding the future relationship between KFC and Scott's because neither party was entirely pleased with the relationship. On January 24, 1996, Lacey met with David Novak (Novak) of KFC and proposed that Scott's buy KFC's corporate outlets in Canada and that Scott's develop Taco Bell in Canada in order for Scott's to grow and improve its business. Novak was to respond to Lacey in March 1996. Also in January 1996 Lacey met with a representative of Ryder Bus Lines operations to explore the possible purchase by Hospitality of Ryder's bus operations. Ryder was not interested in selling but was interested in the possible merger of the two companies' bus operations. Lacey was not interested in selling its bus operation because of a potential $90 million tax liability.

69 I accept the evidence of James Bullock the president and CEO of Laidlaw Inc. (Laidlaw) that he unsolicitedly approached Michael Gardiner (Gardiner) the controlling shareholder of Fairwater in January 1996 with a view to purchasing all of the shares of Hospitality. Gardiner referred Bullock to Lacey and other officers of Hospitality but this did not occur until late in January. Without any involvement on the part of Scott's, Laidlaw had arrived at an agreement with A & W Food Services of Canada Inc. (A & W) for A & W to purchase Scott's Food from Laidlaw after its successful takeover of Hospitality. Laidlaw advised Scott's that it had a food partner but did not disclose the name until some time later during negotiations on price. These price negotiations took place during February and March.

70 I find that prior to the Laidlaw offer no properly authorized person on behalf of Hospitality had ever attempted to sell Scott's Food with exception of such possibility in negotiations with KFC of it being sold to KFC.

71 During March 1996 Hospitality attempted to engineer a situation in which KFC would have the opportunity to participate in a competing bid jointly with Ryder against Laidlaw. KFC refused to participate and advised Hospitality that any sale of Hospitality shares required the approval of KFC and that KFC had a right of first refusal and that any purchaser of Hospitality or Scott's Food would be required to execute a new franchise agreement including an amendment with respect to current royally terms. These current royalty terms were 6% of sales versus the 1.7% of sales under the 1989 agreement.

72 The share price ultimately agreed to between Laidlaws and Hospitality was $14 per share for a total price of approximately $803 million. The value attributed to Scott's Food between Laidlaw and A & W was approximately $200 million. I find that on April 2, 1996, John Cahill on behalf of KFC indicated that it would be interested in purchasing Scott's Food. At a subsequent meeting on April 9, 1996, he proposed that Scott's wind down its KFC businesses by breaking it up and selling it off to other franchisees in small groupings. This made no economic sense to Hospitality and was rejected. KFC indicated that it preferred to have Scott's exit the KFC business.

73 On April 9, 1996, Laidlaw entered into a tender offer agreement with Hospitality and a lockup agreement with Fairwater. The bid was publicly announced. This offer contained a condition that Laidlaw be satisfied that there was no impediment to Laidlaw disposing of the shares of Scott's Food to A & W and that Scott's Food's rights under the 1989 licence agreement would be unaffected by such disposition.

74 Lacey advised KFC immediately in advance of the public announcement of the Laidlaw offer. By letter of April 23, 1996 KFC advised Scott's that it believed that the proposed sale was in violation of the transfer provisions of the licence agreement and raised the issue that Scott's was in breach of the remodelling and upgrading obligations under the licence agreement and addenda.

75 Scott's brought an application to court for a declaration as to the effect of par.16 of the licence agreement. KFC commenced the present action. The proceedings were consolidated and Winkler J. refused to split the issues of transfer and enhancement. As a result the first Laidlaw transaction could not be completed within its time frame.

3. THE SECOND LAIDLAW TRANSACTION

76 Scott's then proposed and Laidlaw accepted a transaction whereby Hospitality would sell to Laidlaw all of its business other than the KFC business and the travel centre business operated by Scott's Management Services Inc. (SMSI). The second Laidlaw offer was then made and completed. The second Laidlaw transaction was implemented as follows:

1. The tender offer was amended to provide the alternative method of satisfying the transfer condition in the first tender offer and was for Hospitality to dividend out Scott's Food and SMSI shares to the existing shareholders of Hospitality prior to Laidlaw closing its takeover bid.
2. The value to be placed on the KFC and the travel centre businesses to be dividended out and therefore the value to be deducted from the original $14 per share offer was the value assigned to those businesses pursuant to the agreement between Laidlaw and A & W.
3. Hospitality intended this to satisfy the transfer condition by having its existing shareholders step into the shoes of A & W.

4. A new holding company Scott's Restaurants Inc. (SRI) was incorporated as a subsidiary of Hospitality. This company duplicated the share structure and voting provisions of Hospitality in SRI.
5. The shares of Scott's Food and shares of SMSI and the real estate and other physical assets of Hospitality that were used by Scott's Food and SMSI including $30 million in cash were transferred by Hospitality to SRI in exchange for shares of SRI.
6. The shares of SRI were then dividended to the shareholders of Hospitality.
7. The shares of Hospitality were then purchased from the shareholders of Hospitality by Laidlaw for a price of $10.25 per share being the original offer price of $14 less the value attributed to the dividend of SRI shares.

77 Hospitality kept KFC fully informed of the proposed transaction, but KFC continued its opposition to it. KFC did not attempt to enjoin the second Laidlaw transaction, but it instructed its counsel to seek to impede the transaction by writing to he Ontario Securities Commission to protest the form of the Scott's Director Circulars regarding the transaction. Neither Pepsi or KFC were shareholders of SHI and these complaints were without merit and were not acted upon by the Ontario Securities Commission.

78 There was no evidence introduced by KFC of any damages suffered as a result either of the alleged 1989 breach, the first Laidlaw transaction or the second Laidlaw transaction.

79 In March 1996 when KFC was first advised that Hospitality was considering selling its interest in the KFC outlets. KFC advised Hospitality that any sale or transfer of shares or assets would require the written consent of KFC and that KFC would be provided with an opportunity to exercise its right of first refusal under paragraph 16 of the licence agreement. Hospitality took the position that the licence agreement applied only to the sale of assets and did not apply to the sale of shares of either Hospitality or Scott's Food. I find that the positions taken both by KFC and Hospitality were reasonable in light of their respective interpretations of the licence agreement. In neither the first or second Laidlaw transactions did Hospitality request the approval of KFC or grant it the right of first refusal. I find that the directors and officers of Hospitality did everything they could to facilitate the first Laidlaw transaction.

80 In construing the licence agreement, I agree with the comments of Then J. in Buildevco Ltd. v. Monarch Construction Ltd. (1990), 73 O.R. (2d) 627 at 633 as follows:

> The Court must not deviate from the literal force of a particular expression if the intention of the parties is clearly and unequivocally expressed, unless such clear intention is plainly controlled or contradicted by other parts of the instrument. (See Chitty on Contracts, A.G. Guest, ed. 25th ed. (London: Sweet & Maxwell), 1983, vol. 1, at p. 521; Odgers, Construction of Deeds and Statutes, 5th ed. (London: Sweet & Maxwell, 1967), at p. 56). Thus, unless the court finds from other parts of the contract expressions which show that the parties could not have had the intention which the literal force of the particular expression would impute to he parties, the court is bound to give effect to the clear intention expressed in he particular words.
>
> ...

> The general rule is that the words in a contract are to be given their plain, literal and ordinary meaning. In the absence of ambiguity, it is the plain meaning that is to be adopted in interpreting the contract. In a commercial contract the words must be construed in a business fashion and in accordance with business common sense so as to avoid any interpretation that would result in commercial absurdity. (See Chitty on Contracts, supra, at p. 518; Toronto v. W.H. Hotel Ltd. [1966] S.C.R. 434, 56 D.L.R. (2d) 539)

81 Section 2.2 of the Licence Agreement refers to the continued uniformity of the KFC's System and Marks and KFC's present and future requirements regarding use of such System and Marks. It also states that the rights granted are for a limited time. Section 3.1 grants Scott's Food the right to use the System and Marks during the licence term which in the Addendum is set out to be at least until December 31, 2003. Clearly the grant is not only for a second in time when the document was signed.

82 Section 16.1 states that the grant is personal to Scott's Food and is based upon full disclosure to, and approval by, KFC of all directors and holders of the majority control of the voting shares of Scott's Food and any corporations that own or control or have an interest in the shares of Scott's Food. At the time of execution of the Licence Agreement, KFC did not request and Scott's Food did not provide such disclosure. By virtue of s. 18.4 this does not preclude KFC's rights. At the time KFC had had lengthy dealings with Hospitality and had been assured that Scott's Food was a wholly owned subsidiary of Hospitality (as it was in fact). KFC knew that Hospitality was a public company listed on stock exchangers. It also knew the directors of Hospitality and that Gardner was the controlling shareholder of Hospitality through Fairwater. In s. 16.1 Scott's Food acknowledged that the restrictions were reasonable and necessary to protect the KFC System and Marks and were for the benefit and protection of all KFC licencees as well as KFC.

83 It should be borne in mind that the Licence Agreement provides for Scott's Food having access to trade secrets and confidential practices that are proprietary to KFC. In accordance with the evidence of all expert witnesses, the franchisor is concerned with whom it is dealing and whether such person is a competitor and that it is normal in the industry that the franchisor has a right to approve a transferee as a matter of good business sense.

84 In my opinion the disclosure and approval of the directors and holders of majority control would be meaningless unless it was a continuing obligation and not merely at the time of execution. Based on good business sense section 16.1 must be construed as being a continuing obligation.

85 Section 16.2 prohibits Scott's Food from transferring, or otherwise dealing with the Licence Agreement without consent and Section 16.3 and 16.4 deal with the procedure if a bona fide offer to purchase is received from a third party.

86 Counsel for Scott's concedes that if Scott's Food were to sell or receive an offer for the franchise agreement itself, or any one or more individual outlets, that section 16 would apply. They refer to this as an asset sale. However, their position is that section 16 has no application to the transfer of the shares of Scott's Food itself or the transfer of the controlling shares of Hospitality. They refer to this as a share sale.

87 From the parole evidence of Orenstein it is clear that Hospitality was concerned about its position as a public company and the normal public trading of its shares and the possibility of a

change of control of it. KFC was not prepared to waive its position that it should have a right of approval of any change of control. Orenstein told Mr. Meyer of KFC International that Hospitality would find an entity that would satisfy both of them with regards to signing the Agreement. The drafting of the Licence Agreement was left to Ableman and Simpson. Ableman obviously felt that he had protected KFC's position by section 16 and Simpson felt that he had protected Hospitality's position by having a subsidiary, Scott's Food, execute the Agreement. It is for this court to determine from the words of the Agreement who succeeded and to what extent.

88 In my opinion there is nothing in section 16 that prohibits or gives the right of approval to KFC of trading of shares of Scott's Food or Hospitality provided that there is no issue of a change of control.

89 There are no clearly expressed words requiring the approval of KFC to any transfer of the shares of Scott's Food or its controlling shareholders. However section 16.1 referring to the grant being personal and the reference to the directors and holders of majority control of the shares of Scott's Food and the broad reference to any other corporations with control make it clear that any transfer of the controlling shares of Scott's Food or Hospitality are subject thereto. To interpret the section otherwise would defeat the personal aspect and not make good business sense and would be contrary to the generally accepted practice in the franchise industry.

90 For these reasons section 16 was applicable to the first Laidlaw transaction. This transaction was made conditional upon KFC approving the transfer of the Scott's Food shares to A & W after Laidlaw acquired Hospitality or Laidlaw being satisfied that no approval from KFC was required. While KFC indicated that it would consider an approval upon terms, no approval was given and this action was commenced. The transfer to Laidlaw under the first Laidlaw transaction was not made. However, an attempt to transfer the Agreement was made and under the provisions of section 16.2 there was a breach of the Agreement and KFC has the right to terminate the Agreement under paragraph 17.2(d) subject to any claim for relief from forfeiture.

THE SECOND LAIDLAW TRANSACTION

91 After this action was commenced it became obvious that the condition in the first Laidlaw transaction could not be met within a reasonable time. Scott's then proposed an amendment which was agreed to by Laidlaw and resulted in the second Laidlaw transaction. Scott's took the position that no approval of KFC was required and proceeded with the transaction. KFC advised Scott's that it was opposed to it and would do all in its power to stop it. Notwithstanding this the second Laidlaw transaction was completed.

92 For the reasons stated with respect to the first Laidlaw transaction, section 16 of the Licence Agreement is applicable. Therefore, KFC has the right to terminate the Agreement under paragraph's 17.2(d) subject to any claim for relief from forfeiture. No Notice of Termination has been given and no claim is made in this action for a declaration that the Agreement is terminated.

93 I wish to comment on an additional point. SRI has the identical corporate structure as Hospitality with the same shareholders, directors, officers and employees. It has the same assets as Scott's Food. The only difference is that it does not have Hospitality as its parent company. In considering an approval of a transfer or in effect the approval of a new franchisee, KFC must act reasonably. One of the items that a franchisor may consider is the financial viability of the new franchisee. The evidence is that Hospitality had very substantial cash assets that it could make available to Scott's Food. SRI has only approximately $30 million in available funds. This seems to be a great

difference but KFC had no assurance that Hospitality would in fact make the funds available to Scott's Food. In fact in 1995 and 1996 I find that Hospitality was making fewer funds available to Scott's Food as will be described under the enhancement portion of these reasons. However, because KFC was never asked for its approval of a transfer and no financial statements of SRI have been made available to KFC or filed in this court, I am not prepared to make a decision as to what would be the reasonable thing for KFC to do if it had been requested to approve a transfer.

94 KFC has asked in the alternative for a declaration that it is entitled to terminate the Licence Agreement as a matter of equity or law by reason of the conduct of Scott's in relation to the first Laidlaw transaction and/or the second Laidlaw transaction. I reject this claim. Counsel for KFC argues that Scott's could either sell the shares of Scott's Food to SRI or sell the assets to SRI and that it chose the share sale in an attempt to avoid its obligations to KFC. They rely on part of a memorandum (Exhibit 1 - 14, Tab. 672) indicating that Gardner wanted a file to indicate that Laidlaw insisted on the share sale route and Lacy's evidence in relation thereto as indication that Scott's was acting in bad faith. This reference is mere speculation. In any event it is not sufficient evidence of bad faith bearing in mind the overwhelming evidence of the belief of Scott's throughout that it had the right to do as it did under the Licence Agreement. The fact that Scott's chose a route that it believed that it had as opposed to a route that it acknowledges that it did not have is not an act of bad faith.

95 Having found that KFC had a right of approval over the transfer in he first and second Laidlaw transactions, the submissions of counsel for Scott's as to KFC's obligation to exercise such approval reasonable and in good faith must be considered. Counsel for KFC rightly concedes that KFC when considering consent to approve a prospective purchaser must act reasonably and in good faith. However, there is not sufficient evidence covering all the detailed matters that KFC would have to take into consideration for this court to declare what should be considered, let alone to declare whether or not a hypothetical decision would be reasonable and in good faith.

RELIEF FROM FORFEITURE

96 In view of my findings with respect to the first and second Laidlaw transactions I must consider Scott's alternative claim for relief from forfeiture.

97 The principles involved are set out in Saskatchewan River Bungalows Ltd. v. Maritime Life Insurance Co. (1994), 115 D.L.R. (4th) 478 as follows:

> The Power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach.

98 In my opinion Scott's knowingly committed what has turned out to be a breach of the Licence Agreement on these transactions. Scott's is a large, sophisticated corporation acting with legal advice. It made a decision to adopt a particular course of action knowing that a court could find against it on the interpretation of the Licence Agreement. The action was not taken unknowingly, unwittingly or unavoidably. Relief from forfeiture is not an insurance policy in the event that a party takes a chance on its interpretation of an essential term of its contractual rights and loses.

99 The conduct of KFC in vigorously opposing what it considered to be a breach of the Licence Agreement by the first and second Laidlaw transactions was not exceptional or unconscionable. There is no valid reason to grant relief from forfeiture under section 98 of the Courts of Justice Act, R.S.O. 1990, c. 43 and such is refused with respect to these transactions.

KFC MOTIVATION

100 Scott's raised the issue of KFC's motive for bringing this action and in particular the claims relating to the enhancement issue. Their counsel rightly concedes that motivation is irrelevant to the interpretation of the contract relating to the transfer issue. In my opinion it is also irrelevant to the interpretation of the contract relating to the enhancement issue. However they allege that it is relevant in considering equitable relief, damages, relief from forfeiture, the credibility of witnesses and the bona fide's of KFC's arguments regarding various issues. While motivation may be relevant in some of the purposes mentioned by Scott's' counsel, the evidence must be such that it actually affects those purposes and be considered only as one element therein. KFC's alleged motive was to acquire Scott's Food operations at a price that Scott's considered to be inadequate.

101 I am satisfied that from 1991 KFC wanted to acquire Scott's outlets so that it could increase its royalty revenue. From its own internal memoranda KFC was not willing to pay a fair price for such outlets. KFC wanted to terminate its relationship with Scott's. It refused to cooperate with Scott's in considering an alternative proposed by Scott's to the First Laidlaw Transaction. I am satisfied that KFC believed that blocking the Laidlaw Transactions was in its best financial interest. In other words KFC had a motive in bringing the present action. However regardless of its motive, KFC is entitled to any relief that it is entitled to under the licence agreement and addendum.

102 I have considered this motive in assessing the credibility witnesses and the other items raised by counsel for Scott's.

ENHANCEMENT ISSUE

103 At the time of execution schedule E provided as follows:

> "The KFC Standard Plans and Specifications for Canada shall be as agreed to by the parties."

104 I accept the evidence of Paul Lollar (Lollar) that World Wide Image (WWI) had been discussed with Scott's as early as 1987. WWI was a major change of image of the exterior, interior and equipment of all KFC outlets. I accept the evidence of Simpson that he had no dispute with the proposition that KFC wanted all KFC outlets to be WWI outlets and that Scott's had no objection to the appearance of the outlets and the image elements as WWI. Scott's was concerned with the larger size of the new WWI outlet and KFC requirement that service options be added. Most of Scott's outlets were on small lots and did not have seats or drive through (service options). Scott's was familiar with the WWI in the United States of America where it owned and operated many outlets. Scott's was also concerned that KFC wanted it to relocate some stores. I accept the evidence of Orenstein that apart from concerns about economic viability, Scott's recognized that it had to meet WWI enhancement standards as long as they would be cosmetic changes to existing outlets to be recognizable as KFC outlets for some uniformity.

105 I find that Abelman and Simpson left the task of negotiating and agreeing on standards to the companies respective operations personnel. Lollar was the only operations level individual in-

volved in the negotiation of the enhancement standards who testified at trial. No such operations personnel gave evidence on behalf of Scott's and no reasons were given by Scott's for many of them being unavailable to give such evidence. I, therefore, accept Lollar's evidence that an agreement had been reached in 1989 prior to the execution of the agreements that WWI would be implemented across the Scott's system in Canada. In fact, Scott's had built four new outlets in Alberta in 1988 in compliance with or in excess of WWI standards. There was evidence of such acceptance of the operating concept by Scott's in the letter of March 22, 1989, from Mr. Brunet to the President of KFC (Exhibit 1-2, tab 76). This letter contained some concerns with respect to refinements to protect Scott's financial concerns but really accepted the WWI standards. I accept Lollar's evidence that the agreed enhancement standards were contained in KFC's 1989 manual which had been agreed to by operations personnel of the two parties and included various examples of building designs (but not all) for remodelling and upgrading of various types of outlets (i.e. in-line and free standing) with various service options and also a take-out only outlet. I find that the enhancement models were based in part on the 1200 square foot outlets that represented the majority of Scott's outlets at the time.

106 I accept the evidence of Abelman that at the time of execution of the agreements on June 9, 1989, that Schedule E was not in final form and that it was agreed that he and Simpson would finalize this after the execution. The fact that sec. 4.3 of the addendum refers to standards that "have been agreed" shows that those standards had at least been substantially agreed to and the parties knew it. I accept Abelman's evidence, over that of Simpson, that he and Simpson exchanged correspondence and telephone calls between June 9 and June 20, 1989, which resulted in a final Schedule E being inserted into the agreement on June 20, 1989, which was agreed to and inserted into that agreement at that time. This Schedule E (Exhibit 2-11) included the 1989 manual which is Exhibit 1-13, tab 606. After June 20, 1989, there were no further discussions with respect to schedules.

107 Exhibit 2-11 provides as follows:

> KFC STANDARD PLANS AND SPECIFICATIONS
>
> KFC Standard Plans for Canada are referred to under Article 4.3 of the Addendum. In this respect the document attached hereto entitled Kentucky Fried Chicken Facility Direction manual contains the basic standards for some types of Kentucky fried Chicken Outlets. Detailed design control Standard Plans for various types of units shall be submitted for review and agreement by the parties following which they will be initialed and deemed to be made part of this Schedule.

108 Schedule E acknowledges that not all of the potential building designs are listed in the direction manual, and that various other types may be agreed upon and added. I find that Exhibit 1-13, tab 606, was the agreement of the parties and that there was no need for anything more to be done in writing to implement it because sec. 7.2 of the Development Agreement did not require them to be in writing.

109 After the execution of the agreements, with certain exceptions that will be noted, Scott's performed its upgrading in accordance with the 1989 manual and subsequently with the standard KFC 1990 manual as updated from time to time. While there is no evidence that Scott's agreed to the additions in the 1990 manual in advance, nor that it initialled them, in practice it followed them

without complaint except for the degree of service options and the extent of work that had to be done within the standards. The same applies to the regular updates revising the 1990 manual.

110 I do not need to comment of the 1995 limited image enhancement guide because KFC has never attempted to force it upon Scott's and Scott's has never used it.

111 Scott's never adopted or used any other standards than those in the KFC manuals. This is indicative of the fact that it knew what the standards were. The only difference of view was the extend to which the standards were to be applied.

112 Over the years Scott's upgraded some outlets fully to WWI standards and received Outlet Certification Agreements (OCAs) for them as contemplated by s.6 of the Addendum. In other cases it substantially upgraded outlets to WWI standards and later performed extra work on them to fully comply and then received OCAs therefore. In many cases Scott's did not upgrade the outlets to WWI standards. In 1995 and 1996 it did not complete work to fully comply with the WWI standards on all its outlets. An OCA grants a licence term of 15 years from the effective date thereof and increases the royalties payable after December 31, 2003. It also obligates Scott's to fully remodel and upgrade the facility again between the 7th and 10th year thereof.

113 At least as early as August 1991 at a meeting held at the Royal Canadian Yacht Club both KFC and Scott's knew the other party's respective interpretation of the License Agreement and addendum. At that meeting, held one month after Scott's had sold all of its US outlets to KFC, KFC advised Scott's that it was in breach of its enhancement obligations. That is, that KFC felt that Scott's was not upgrading its outlets to the required full WWI standards and obtaining OCAs therefore in sufficient numbers to comply with the agreement. Scott's felt that it had no obligation to upgrade its outlets fully to WWI standards provided that it upgraded ten percent of its outlets in each year and spent $6 million thereon in each year. Notwithstanding this known disagreement, the parties cooperated in the upgrading and approval of outlets at an operations level.

114 Part of the agreement to sell Scott's U.S. outlets to KFC was that the parties would enter into an agreement with respect to Scott's acquiring additional Canadian outlets.

115 On July 1, 1991, KFC and Scott's Food entered into a letter agreement (the Canadian Development Agreement) in which KFC agreed that it would not exercise its rights of first refusal under its franchise agreements with other franchisees and would allow Scott's to acquire a specified number of outlets. In fact Scott's acquired 26 additional outlets under this agreement. The Canadian Development Agreement (exhibit 1-4, tab 224) provided that Scott's rights to acquire was subject to material compliance by Scott's with the terms and conditions of the licence agreement and the addendum as they both may be amended from time to time and the annual business plan, if any, to be jointly developed by them for each year of the letter agreement. The agreement also contained the following paragraph 4:

> The letter agreement may not be transferred or assigned in whole or in part by you whether by way of sale of stock or assets, merger transfer or ownership of control, operation of law, or otherwise without prior approval of KFC -C.

116 Lacey admitted that paragraph 4 is consistent with the views expressed to him by KFC as to its rights under the licence agreement, but he did not admit that the licence agreement actually provided the same terms.

117 Scott's submits that the Canadian Development Agreement showed that when KFC wanted to expressly restrict the transfer shares it did so and that it did so in the licence agreement. I reject this view. I find that the terms of the Canadian Development Agreement are consistent with my findings that the shareholders' control of Scotts could not be transferred without the approval of KFC under the licence agreement. To hold otherwise would not make any business sense.

118 In my opinion when the provisions of sec. 2.2, 2.3, 3.2, 5.2, 5.3, 6.2, and 6.3 of the License Agreement are read with the recitals and other provisions of the addendum, I find that the agreements give KFC the overall control of the plans and specifications and require Scott's to upgrade all of their outlets in accordance therewith to WWI as set out in the 1989 and 1990 manuals as updated from time to time by KFC, and obtain OCAs for each outlet. In fact, in 1990 Scott's internal documents showed that they completed the upgrading of 54 outlets but they only applied for OCAs for thirty-seven stated to represent their obligations under the License Agreement. I believe that this shows that Scott's knew that it was obliged to obtain OCAs notwithstanding its statements made to the contrary. There are other examples of Scott's acknowledgement that OCAs were required. I refer only to one, namely a document provided to KFC dated January 22, 1996, (Exhibit 1-10, tab 501) that states that over two-thirds of Scott's system is now certified and that all outlets will be renewed by the end of calendar 1996. I do not accept Lacey's evidence that "renewed" was made in error. I find that this meant that all outlets would be certified by the end of 1996.

119 Schedule E contemplates only that detailed design control standard plans for various types will be reviewed and agreed upon. In my opinion that is what Scott's was seeking, namely that a wider variety of outlets would be considered. There is nothing in Schedule E that detracts from the provisions of sec. 2.2, 5.2, and 5.3 of the License Agreement that requires full compliance. This view is supported by the provisions of sec. 6.1 of the addendum relating to OCAs and that s. 3.2 of the OCA requires Scott's to upgrade to the image required by KFC.

120 I do not interpret the agreements as saying that Scott's need only do as much work as it deems fit. If that were the case, Scott's could work on ten percent of its stores in any year without ever obtaining an OCA provided that it spent $6 million per year in total. From the evidence at the time of the execution of the agreement, Scott's had approximately 359 outlets and the cost of upgrading each to full WWI standards was approximately $240,000. This would require an expenditure of approximately $86.5 million in total. The evidence also was that at the time of execution Scott's had the required funds to meet this expenditures. This indicates that Scott's was aware of the extent of its commitment.

121 To comply with the WWI standards necessary for an OCA, I accept the evidence of Lollar that the four "sacred cows" must be present. Namely, the WWI exterior elevations (a flat mansard roof), approved signage, WWI equipment and approved interior decor package. The exterior elevations can vary slightly to accommodate landlord and municipal restrictions or unique building configurations. However, KFC must be satisfied that these variations are required. In addition, the ideal WWI requires service options. The WWI exterior image is a flat roof line with signage and illumination. The equipment includes new computer-controlled cooking equipment as well as at least modified back pack changes in the interior of the store, and the interior decor package is that as set for seating and other decorations within the store.

122 I found the evidence of George Heos on behalf of Scott's showed the fallacy of Scott's argument that the agreements only called for such upgrading as Scott's considered appropriate. Heos admitted that more work than an simple change of pylon signage was required to be considered an

upgrade but he could not explain how much was in fact required. This could not be a proper interpretation of the agreement. He is correct in saying that a change of signage would not be an upgrade because sec. 5(f) of the License Agreement required signs to be modified to KFC standards. Obviously a change in signage is not an upgrade as contemplated by the addendum.

123 While Scott's is quite properly concerned about expenditures producing a suitable return on investment, there is nothing in the agreements that mentions economic feasibility. Therefore Scott's is obliged to fulfill its commitments even if in their view they are uneconomic. The evidence discloses that on some occasions when Scott's raised the issue of economic viability of some upgrades, KFC was willing to modify the requirements by not insisting on full service options or totally remodelled roof lines. This merely shows that KFC was acting reasonably. It does not detract from the overall terms of the agreement.

ANNUAL OUTLET ENHANCEMENT PROGRAM

124 Sec 7.3 of the addendum provides for the parties to agree in writing to an annual enhancement program at least 60 days prior to a calendar year and to cover not less that ten percent of the outlets. There is no provision as to how the outlets were to be proposed or how the parties were to agree. There is no express obligation for Scott's to propose the outlets for the program although from a business sense, and in practice, Scott's did propose the outlets. Except for the first year of 1990 these proposals were made by Scott's to KFC prior to 60 days (or close to that) in each year. This did not give KFC time to inspect them and agree to them in writing prior to the 60 days. I find that there were negotiations each year as to the individual outlets within the program. I also find that because Scott's Food could not actually implement its proposals until Hospitality approved them for budget purposes in late March or April of the proposed year which would follow, that there were frequent changes to the proposals. I also find that the actual work was not done except in the summer and fall building season and that this delay did not seriously affect either party. There were also construction problems and frequently the outlets listed in the proposal were deleted and others substituted -- sometimes without prior notification to KFC. This created some inconvenience to KFC. Notwithstanding this, KFC granted OCAs to those outlets that complied with the appropriate criteria.

125 On July 10, 1989, the parties agreed to a protocol (Exhibit 1-3, tab 106) with respect to new outlets. It was attempted to be followed with respect to upgrades. I accept the evidence of Lollar that the ideal procedure with respect to the annual outlet enhancement program was as follows:

1. Scott's would prepare a market plan of its trade areas and study its existing outlets;
2. Scott's would propose the facility direction for each outlet that was to be included on that year's Annual Outlet Enhancement Program;
3. KFC and Scott's would discuss, and possibly alter, the proposed facility directions. The parties would reach agreement on the facilities proposed;
4. Scott's would submit construction drawings for KFC's review;
5. KFC would review and approve Scott's construction plans. Where KFC did not approve of the plans, they were sent back for amendment by Scott's;
6. Scott's would perform the work pursuant to the approved drawings;
7. Scott's would advise KFC that the work at the outlets had been completed by submitting OCAs to KFC for execution;

8. KFC would note and list the deficiencies at the outlets and communicate these to Scott's;
9. Scott's would fix the outstanding deficiencies at the outlets, if any; and
10. KFC would execute OCAs, thereby indicating that the outlets had been remodelled and upgraded in accordance with approved standards.

126 The normal practice was that if this was followed an OCA would issue. However, it was Scott's usual practice to send in one batch of requests for OCAs for all the outlets upgraded in that year, whether or not they expected to receive OCAs for all of them. Many requests showed the upgrades as "limited" and I find that KFC knew that this meant not totally upgraded with all service options. There was no urgency upon Scott's to fulfil deficiencies because OCAs were back-dated to the date of substantial completion.

127 I also accept Heos' evidence that the ideal normal practice was never fully followed by the parties. Lollar admitted that KFC imposed the same procedures for upgrades on Scott's as on other franchisees. At no time until this litigation did KFC threaten to terminate the contract by reason of Scott's' failure to upgrade to certification standards or that there was any failure to comply with any procedure of agreeing upon an annual outlet enhancement procedure or program.

128 Miss Linda A. Robinson made a careful analysis of the records of Scott's relating to its expenditures on its outlets in each year and the number of outlets that were upgraded in each year. She prepared a report (the Lindquist Avery Macdonald Baskerville Report (Exhibit 4)). Her evidence was that she relied primarily upon Heos as to whether an outlet had been upgraded but she confirmed this by inspecting the financial records of Scott's which showed that substantial money was expended on that outlet in that year. Her review was not an audit but it was extensive and I find it reliable. Her report shows the outlets certified separately from the outlets claimed by Scott's to be upgraded but not certified in each year and the totals of each. She did not attempt to interpret the agreement and the term upgrade is based on Scott's interpretation.

129 Notwithstanding extensive cross-examination relating to the proper Scott's accounting codes into which expenditures may have been placed, I accept her evidence that Scott's spent over $6 million on upgrading in each of the years 1990 to 1996 inclusive, for a total of $106 million. With the exception of 1991, I find that in its own opinion Scott's upgraded more than ten percent of its outlets in each year from 1990 to 1996. With respect to the year 1991 there are various points to be considered. In Miss Robinson's report she found that Scott's had upgraded only 9.7 percent of its outlets in that year. However, she stated that she counted any upgrade in only one year. There were two outlets that were upgraded in 1991 with further upgrading in 1994. She therefore counted these two stores in 1994 only. If these had been counted in 1991, Scott's would have exceeded the ten percent in 1991 without falling below the ten percent in 1994. However, there is another factor that must be considered. That is, there were eleven outlets that were substantially completed by Scott's in the latter half of 1990 but which Scott's always counted in their 1991 totals. I find that these eleven outlets would equal approximately three percent of the outlets in both 1990 and 1991. I find that Scott's upgraded approximately 15.8 percent of its outlets in 1990 and only approximately 6.7 percent in 1991. I therefore find that while far exceeding its requirement in 1990 if failed to upgrade ten percent of its outlets in 1991.

130 According to Miss Robinson's evidence, Scott's failed to have ten percent of its outlets certified in the years 1990, 1991, 1995, and 1996. In every case, Miss Robinson incorrectly based her

percentage on the number of outlets open at the end of each year. This was always less than that at the beginning of each year, but I find that this error would not affect the result.

131 Because of the present litigation, KFC has refused to certify any outlets for the years 1995 and 1996, regardless of the amount of upgrading done thereon. Miss Robinson's evidence was that 46 outlets were upgraded in 1995 and 63 in 1996. These would be sufficient to exceed ten percent in both of these years if they are certifiable. Because of the practice of both parties in considering the year of certification as being the year that the work was substantially completed, and that certification is not granted until KFC approves the total work, it will be for the Court to decide whether Scott's has complied in the years 1995 and 1996 based on the evidence before it.

132 Miss Robinson also made a comparison of the growth of the average weekly sales of Scott's Food outlets as opposed to the KFC corporate outlets between 1993 and 1997 where they operated in the same provinces. This showed that in all areas Scott's sales grew faster than KFC corporate outlet sales. I need not comment further because counsel for KFC has conceded that KFC has not suffered any monetary damages by reason of any failure of Scott's to perform its obligations under the contract.

133 Before turning to the details of the disputes about the practice of KFC relating to the granting of OCAs and the disputes over individual groups of outlets, I wish to comment on the provisions of sec. 17.1 of the License Agreement. This gives a right to Scott's to close "any or all" of the outlets. The proviso relating to other provisions of this agreement being complied with cannot relate to a breach by Scott's of the transfer or upgrading requirements. It must relate to matters that apply after the outlet is closed. Therefore Scott's had and has the right to close whatever outlets it chooses.

RE SCHEDULE C

134 Sec. 3.5 of the development agreement specifically refers to Schedule C as being applicable to new outlets. On its face Schedule C is designed for new outlets. There is no dispute in this action relating to new outlets that have or have not been opened by Scott's.

135 Sec 7.2 provides that Scott's will cooperate with KFC in its review of the enhancement of existing outlets on the basis of the methods and criteria established in Schedule C or other appropriate criteria. The criteria include a trade area definition, site location and site size, facility characteristics to allow for facility image and service requirements with reference to seating and drive through. It provides that KFC will undertake a market analysis in each territory to identify the optimal trade areas with KFC to determine the optimal trade area. Once they are determined, both KFC and Scott's must complete an outlet certification checklist. It is clear that KFC makes the final decision with respect to the action to be taken with respect to an outlet site.

136 Nowhere in the License Agreement or the development agreement is there any express obligation on Scott's to relocate any of its outlets. Therefore, it can only be this Schedule C that gives any such obligation. In almost all cases KFC did not undertaken market analysis and convey such information to Scott's. In fact, Scott's did extensive market mapping and studies but did not always make the results available to KFC except to support its argument for the reduction of requirements that KFC was otherwise demanding. I find that after Scott's studies in Calgary and Montreal were supplied to KFC that Scott's had good reason not to give the overall information to KFC because of two unreasonable demands triggered thereby made by KFC under other provisions of the License Agreement.

137 The references in Schedule C are to the site and not the outlet itself. In my opinion, Schedule C does not give KFC the right to direct Scott's to relocate an existing outlet. The exhibit attached to Schedule C is for an optimal trade area. From the evidence it is clear that both parties knew that a substantial number or possibly the majority of Scott's outlets could not meet this optimal criteria. A majority of Scott's outlets were free standing take out units on small lots. To apply the criteria under Schedule C strictly would mean the relocation of a large number of outlets. Lollar admitted that to apply Schedule C to an existing site requires a certain amount of subject judgment. I accept the evidence of Heos that market mapping or in effect reference to Schedule C is subjective and does not tell you whether you should do a major or minor upgrade to a particular outlet. It is clear that the facility profile must be at a high level to compare to recent major competitors in the area. This confirms my view that Scott's is obliged to upgrade to full WWI standards and obtain certification where possible. Relocation is a drastic action. There is no industry practice that requires it. In my opinion to require relocation there must be clear words to that effect. I believe that schedule C is applicable to the type of upgrade possible on existing sites.

138 Scott's may have found that its return on the investment in the upgrades was not what it desired and preferred not to invest in uneconomic upgrades. However, this is what it contracted for and it must comply. Its only recourse was to convince KFC to modify its requirements on any particular outlet and have KFC act reasonably in connection therewith or for Scott's to close the outlet.

139 At the time of the agreement KFC owned few outlets in Canada. The overall corporate KFC experience was in the Unites States of America. In the early years KFC insisted upon seats and drive-throughs to be added to outlets, as it had the right to do. Scott's resisted this in many cases because it was uneconomic or impossible because many of its stores were in-line outlets on restricted rental premises. KFC relented in some cases and agreed to certify some stores. Later when KFC had more experience with its own stores and had listened to Scott's, it realized that it was not reasonable to expect seats and drive throughs at all outlets. Its attitude changed and it certified some outlets that it had earlier rejected. A similar change in attitude occurred with respect to its desire to have Scott's relocate stores where it deemed appropriate. There was friction between the companies because of their different interpretations of the License Agreement. But as a general rule I do not find that KFC acted unreasonably. I do not find KFC to be unreasonable merely because it insisted upon full WWI standards and later agreed to modify these requirements after it was convinced that they were economically unreasonable. I find that this was in fact acting reasonably.

140 The failure to follow the alleged procedure under Schedule C and the protocol of July 10, 1989, created an inconvenience to KFC. It requested Scott's to comply but it carried on notwithstanding Scott's failure so to do. Not only did it allow Scott's to continue upgrading but it certified many stores that were not part of any agreed program. I am not satisfied that any formal procedure was adopted and mutually agreed to for any year. Even if it were and was breached by Scott's, KFC has certified over half of the Scott's outlets and therefore has received the benefit from such upgrades. I grant relief to Scott's from any forfeiture for any breach of such procedure or protocol.

ALLEGED CHANGE OF CONDUCT OF SCOTT'S IN 1995 AND 1996

141 KFC states that Scott's failed to remodel and upgrade ten percent of its facilities in each year except 1992, 1993, and 1994. It submits that from a business point of view it was prepared to live with those breaches in the expectation that Scott's would upgrade all of its outlets by December 31, 1996. It alleges that the most important factor regarding Scott's breach of the agreement, is Scott's conduct regarding upgrades in the 1995 and 1996. It submits that Scott's deliberately chose

to ignore its contractual obligations and assumed the risk that KFC would commence an action to terminate the agreements. Scott's position is that its conduct remained constant and supports this by saying that it upgraded 46 outlets in 1995 and 63 outlets in 1996 (see Exhibit 4). Counsel for KFC concedes that if the License Agreement is not terminated that 57 additional outlets of Scott's will be certified. It is not clear whether or not all of these certifications relate to 1995 and 1996. At this point in my reasons it is also not clear whether or not the degree of upgrading was consistent with prior years.

142 From Exhibit 4 there were a large percentage of stores that Scott's said it upgraded but were not certified in the years 1990 and 1991 inclusive. In the years 1992, 1993, and 1994 very few outlets were upgraded that were not certified. As mentioned above, the outlets alleged to be upgraded but not certified would have to be analysed to determine the category in which they fit. However, even if all the 57 outlets to be certified are in 1995 and 1996 this would be about 50 percent of those upgraded. This would indicate a substantial departure from the years 1992 to 1994 inclusive. There are, however, 74 outlets that are in dispute as to whether or not they comply with WWI standards, in addition to those above mentioned.

143 I am satisfied that until August 1995 Scott's used the word "limited" in its communications with KFC to mean WWI but without the addition of service options in most cases. After August 1995 Scott's used the word limited to mean any change including cosmetic changes and not WWI without service options. This is not conclusive of any lack of good faith. While Scott's consistently, including in 1995 and 1996, told KFC that it would meet its obligations under the contract, KFC knew from as early as 1991 that Scott's had a different interpretation of those obligations than did KFC. I find that in 1995 or 1996 Scott's did not tell KFC that it would certify all of its outlets by December 31, 1996.

144 Scott's position is that it became apparent in later years that the return on investment was not adequate on many stores, and therefore it decided not fully upgrade those stores for economic reasons. Scott's has never supplied KFC with its profit and loss statements across the system. This is irrelevant because as I have found economics is not a term found in the agreements.

145 Lacey admitted that Hospitality reduced the amount of funds available to Scott's Food in 1995 and that this reduced the money available to upgrade the outlets. I find that, commencing in 1994, Scott's decided to "manage for cash" and knew that KFC might initiate a beach of contract suit in 1997 based on Scott's alleged failure to comply with the development agreement (see Exhibit 1-8, tab 404) as KFC interpreted it.

PRESENT STATE OF SCOTT'S SYSTEM

146 Scott's obligation to upgrade its outlets relates only to those set out in Schedule F to the addendum and to existing outlets acquired after the signing of the agreement.

147 Scott's says that the total number of applicable outlets operating on December 31, 1996, was 325. KFC says that the number was 323. The difference of two results from a dispute over two outlets that are the subject of separate litigation as to whether they are new or relocated. I make no comment on these two.

148 The parties have agreed that three outlets may be closed by Scott's in 1997 and 1998, and two may be remodelled and upgraded after December 31, 1996.

149 For the purpose of argument, KFC has acknowledged that the obligation applies to 318 outlets.

150 KFC submits that 74 outlets have not been upgraded and certified. Scott's acknowledges that 69 outlets have not been upgraded to full WWI standards but that they have been upgraded within its interpretation of the agreements. Of the other five outlets, KFC says four do not service their trade areas and the other one KFC says "it does not contain a WWI image interior.

151 The 69 outlets consist of 54 free standing, 12 in-line, 2 highway, and 1 mobile unit. Having review the evidence of all parties and considering the photographs in Exhibit 6 and any additional photographs of these 69 outlets I found that they have been upgraded to varying degrees but the great majority of the total not to WWI standards, and that the majority would not be certifiable subject to my further comments. Some appear to have so little amount of work to their exterior that they do not even qualify within Heos' vague criteria. The mobile unit is a unique unit and Scott's has never allowed KFC to inspect its interior. Scott's has such an obligation and therefore I find that it has not been upgraded to WWI standards.

152 I now deal with the four outlets that KFC says do not cover the trade area. I find that all required work has been done on three of these outlets. Insofar as KFC submits that construction drawings have not been submitted, I find that none are available because of the limited amount of work that was needed to be done. KFC has not required construction drawings in all similar cases and I find it unreasonable to demand such drawings. I make this statement notwithstanding the provisions of sec 9.1 of the development agreement because there is no express requirement that construction drawings be provided where in fact construction drawings are not required by any objective standard and only because of KFC's subjective standard.

153 Outlet 6280 was upgraded in 1996 to WWI standards in every respect except the interior decor. I accept the evidence of Heos that the dining room area was renovated in the late 1980s and that KFC previously has granted certification to other outlets with similar interiors. I believe that KFC is acting unreasonably in this respect and I suspect that this litigation is part of such position. Notwithstanding s. 9.1, I find that outlet 6280 should be certified.

154 Of the 69 outlets, 28 were alleged to be upgraded prior to 1996 and 41 in 1996. The 1996 upgrades consist of two categories. First, 17 outlets that Scott's proposed to be in the Queensway image which KFC has refused to certify. Scott's says it upgraded them in such image. The other 24 Scott's considered relocating and wanted KFC's approval of the use of stretch A-frame signage similar to what KFC has used on some of its A-frame outlets. KFC has refused such use. Such use by KFC is immaterial to Scott's obligation under the License Agreement. KFC did not agree that all its stores would be upgraded to WWI, whereas Scott's has. I am satisfied that the equipment in all of these 69 stores complies with WWI image and the interior of the 28 outlets upgraded prior to 1996 have WWI interiors. This, however, does not answer the question of whether or not Scott's has totally fulfilled its obligations. Scott's argument is that it is not economically feasible to spend additional capital to obtain certification. As I have said, economic consideration is not mentioned in the licence or addendum. They may be considered by KFC to dispense with some of Scott's obligation but KFC is not obligated to do so. On the other hand, Scott's can close any store that it wishes if it feels it uneconomic.

155 With respect to the 17 stores in the Queensway image, I find the KFC has consistently refused to certify the Queensway store (#6026). From an inspection of the exhibits, it appears not to

comply with full WWI image. In addition, Heos admitted that it did not comply. Scott's argues that because KFC certified the Calgary outlet (6358) in much the Queensway image that it is acting unreasonable in refusing to certify the 17 stores. I accept the evidence of Johnstone that he approved outlet 6358 on a temporary basis because he was advised that there were structural problems with it and that the outlet would be relocated. Scott's has not given any undertaking to relocate the 17 stores in question and KFC is not acting unreasonably in refusing to certify them.

156 I have dealt or will deal with 46 of the 74 outlets in issue (24 A-frame stretch signage + 17 Queensway image + 4 trade area + outlet 6280). I have reviewed the evidence of the witnesses and Exhibit 6 and subsequent photographic exhibits and find that the balance of the 74 outlets do not comply with WWI image and therefore KFC has not acted unreasonably in refusing to certify them. In conclusion on this point of the evidence, I find that Scott's failed to comply with the terms of the agreement to upgrade all of the outlets in question except four outlets (6033, 6051, 6077 and 6280). My reasons relating to outlets 6019, 6033, 6051 and 6077 are further set out under the heading "Pending Certification Outlets".

PENDING CERTIFICATION OUTLETS

157 KFC says there are 74 outlets which were pending certification either as of the date of the Statement of Claim or by December 31, 1996. Of these, KFC has conditionally certified 57 which I understand from counsel to mean that KFC acknowledges that they comply with WWI and that if it was not for the alleged breach of the agreement and this litigation by Scott's that they would have been certified in normal course.

158 Scott's says that there are 61 such outlets but agrees that 57 are conditionally certified. The other four outlets are outlet #s 6019, 6033, 6051, and 6077. The main issue relating to these four outlets is that KFC deems that they should be relocated. KFC does not have the right to so order. Having inspected Exhibit 6, I accept the evidence of Heos that outlets 6033, 6051 and 6077 have been upgraded to WWI standards. I reject his evidence with respect to outlet 6019. Therefore outlets 6033, 6051 and 6077 are declared as certified.

159 In my opinion, the License Agreement has not been terminated. In fact KFC does not ask for a declaration that it is terminated. It only asks for a declaration that it has the right to terminate it. The agreement still being in force, KFC acting reasonably is obligated to grant certification to the 57 outlets that are conditionally certified. Counsel for KFC gave an undertaking to the Court that KFC would certify these outlets if the License Agreement was not cancelled. Because the certification is in the control of KFC I think that it is more appropriate that the Court declare that these stores are to be certified.

CLOSED OUTLETS

160 In 1995 and 1996 Scott's closed 41 outlets that were subject to the License Agreement. In prior years it closed an average of three outlets per year for a total of 19 (see Exhibit 4). There is no evidence of any issue raised by KFC prior to the commencement of this litigation concerning the closure by Scott's Food of some of its outlets. Frezzo was advised in April 1994 that Scott's might close outlets. On August 14, 1995, KFC first became aware that Scott's and Foods intended to close a substantial number of outlets in 1996. I accept the evidence of Heos that the general reason for closing the outlets was that the outlets did not make enough money, that it was not economically feasible to spend additional capital because they were marginal stores and that leases were being terminated or it was part of a consolidation strategy where the market was being adequately served

by other Scott's Foods outlets. I do not accept KFC's allegation that the outlets were being closed to avoid Scott's Foods contractual obligations under the contract because $1.8 million was spent by Scott's on the upgrading of these stores between 1989 and December 31, 1996.

161 Other than raising the claim in these proceedings KFC has taken no action and in particular it has not issued a notice under s. 3.6 of the licence agreement for the territories included in the areas where the stores were closed. In any event, the agreement gives Scott's the unfettered right to close outlets. I believe that Scott's motive for closing the outlets is not relevant to this action any more than KFC's alleged motive for bringing this action with respect to the enhancement issue.

COMPARISON OF SCOTT'S SYSTEM WITH KFC AND OTHER FRANCHISEES' SYSTEMS

162 Scott's gave extensive evidence of the comparison of the exterior of Scott's outlets with the exterior of KFC's corporate outlets and other franchisees' outlets on December 31, 1996. This evidence was alleged to show that Scott's had not failed to meet its obligation in a material and substantive manner, and in any event to show that KFC had not suffered any damages. I accept the evidence that at December 31, 1996, Scott's had more outlets in compliance with WWI image than did either KFC itself or the other franchisees in total. However, this is immaterial. Scott's, by contract, was obligated to upgrade all of its outlets by December 31, 1996. While KFC should take the lead, there was no obligation upon it to upgrade its own outlets by December 31, 1996. The evidence was that it planned to have all of its outlets upgraded to WWI image by the year 2000 and that its franchisees were also obligated to do so.

SUBSTANTIAL BREACH

163 If Scott's had failed to obtain certification of a small number of outlets by December 31, 1996, it would not be in substantial breach of the agreement and Scott's would be allowed to operate those outlets until December 31, 2003. The question is whether or not there was a substantial breach of the agreement in order that KFC may terminate it. The evidence of the expert witnesses varied as to what would be a tolerable non-compliance. Zeidman's opinion was 5-10% and he had never heard of anything over 15%. Trebilcock said the range was 5-10%. Konigsberg said that at any one time it is usual to find even significant differences in the appearance of franchise outlets in an entire system. He gave no evidence of what would be tolerable within a particular franchisee system. Levitt did not give any percentage other than to say that it must be more than a trivial breach and you must look at the overall and then even a minor breach might be material under certain circumstances. I accept the evidence of Zeidman and Trebilcock that anything over 5-10% of the outlets not being in compliance is a substantial breach of the agreements.

164 At December 31, 1996, there were 166 outlets certified (Exhibit 4) as well as 61 (57+3+1) additional outlets that should be certified making a total of 227 outlets that complied with the upgrade provisions of the development agreement. At that time Scott's operated 325 outlets (Exhibit 4) to be considered under the upgrade provisions of the development agreement. It, therefore, had approximately 28% of its outlets not in compliance with the agreements. This is far in excess of even some of the speculative opinions that both Konigsberg and Trebilcock referred to of other parties. I find that Scott's was in substantial breach of the provisions of sec. 7.2 of the development agreement.

SPECIFIC PERFORMANCE

165 KFC claims specific performance by both Scott's Food and Hospitality to upgrade the outlets that I have found that are not certified or certifiable within three months of judgment. I am not prepared to grant this order even though I have found that KFC has not suffered any monetary damages. Firstly, I have found that KFC is entitled to terminate the agreements based on the transfer issue and it would be inequitable to order the defendants to expend substantial sums of money to remedy breaches of the enhancement provisions. Second, the enhancement to WWI while covered by the standards referred to involves cooperation between the parties for each individual outlet. There can be disagreements between them as to what service options are appropriate and whether or not an outlet should be relocated. To a degree these decisions are subjective. They include external considerations such as municipal landlord regulations and the availability of suitable sites. The Court should not order specific performance in a case such as this where there would likely be further proceedings to determine whether or not Scott's has complied with its obligations.

RELIEF FROM FORFEITURE

166 Scott's has claimed relief from forfeiture with respect to its failure to enhance the outlets. It asks that the License Agreement be terminated only with respect to the outlets not certified. This might be an available remedy if only a few of the outlets had not been certified. If there were only a few, then the development agreement itself would support the granting of relief by allowing them to remain open until December 31, 2003, and no relief from forfeiture would be required.

167 However, I have found that there is a material and substantive breach. In view of the past history of the relationship between the parties and the degree of breach, I refuse to grant such relief.

TERMINATION

168 KFC has not asked for an order declaring the License Agreements to be terminated. It has only asked for a declaration that they may be terminated by KFC based on the findings of this Court.

169 Section 17.2 of the License Agreement lists the events of default. I have found two such defaults. Section 17.3 sets out the procedure of formal notice. In the case of the default on the transfer issue KFC may give immediate notice under section 17.3. In the case of the default on the enhancement issue, three months notice of such failure must be given and Scott's may remedy the failure within that time. I am of the opinion that the issuance of Statement of Claim was only notice of KFC's allegation of default. Scott's did not believe there was a default. Therefore, KFC must give three months notice from the date of this judgment to Scott's to allow it to remedy the default found in this decision on the enhancement issue. In order words, Scott's must be given three months in which to upgrade all of its remaining outlets to certification standards. If it chooses not to do so, it may close those stores under other termination procedures.

THE JUDGMENT TO ISSUE

170 In their written arguments the parties have set out very extensive claims for the relief requested and in order that there be no confusion the following claims are set out with my decision on each of them.

KFC'S REQUESTED JUDGMENT

(a) a declaration that pursuant to paragraph 16 of the License Agreement, the Defendants are obligated to seek the approval and consent of the Plaintiff

to any sale of the majority control of the voting shares of Scott's Hospitality or Scott's Food and that failure to obtain such approval and consent is a breach of sections 16.1 and 16.2 of the License Agreement entitling KFC to terminate the Agreement;

This declaration will issue.

(b) a declaration that pursuant to section 16.3 of the License Agreement, if a bona fide third party offer for the purchase of majority control of Scott's Food or Scott's Hospitality is received, the Defendants are obligated to offer the same to the Plaintiff at the same price and on the same terms and conditions as the third party's offer and that the failure to make such offer to sell to the Plaintiff is a breach of the License Agreement entitling the Plaintiff to terminate the Agreement;

This declaration will issue.

(c) a declaration that the Plaintiff is not obligated to consent to the sale of majority control of the voting shares of Scott's Food or Scott's Hospitality unless the Defendants and the purchaser are prepared to comply with the conditions set out in section 16.4(a)-(d) of the License Agreement and that any failure to comply with (a)-(d) of section 16.4 of the License Agreement is a breach of the License Agreement entitling the Plaintiff to terminate the Agreement;

This declaration is will issue.

(d) a declaration that the Plaintiff is entitled to terminate the License Agreement for the 1989 Breach, the First Laidlaw Transaction and/or the Second Laidlaw Transaction as described herein;

The declaration will issue with respect to the First Laidlaw Transaction and the Second Laidlaw Transaction but is dismissed because I have granted relief from forfeiture on the 1989 breach.

(e) in the alternative, a declaration that the Plaintiff is entitled to terminate the License Agreement as a matter of equity or law by reason of the conduct of the Defendants in relation to the First Laidlaw Transaction and/or the Second Laidlaw Transaction;

This claim is dismissed.

(f) in the further alternative, a declaration that Scott's Hospitality is bound by the terms of the License Agreement (on the basis of alter ego or agency) and has breached the License Agreement by participating in the First Laidlaw Transaction and/or the Second Laidlaw Transaction;

This claim is dismissed.

(g) a declaration that Scott's Food and Scott's Hospitality have failed to satisfy, in a material and substantive manner, the requirements for enhancement and development contained in paragraphs 7.2 and 7.3 of the Addendum to the License Agreement and that the Plaintiff is therefore entitled, as of the date of issuance of the Statement of Claim, to terminate the License Agreement pursuant to paragraph 17.2 thereof;

This declaration will issue but qualified with respect to the notice on the enhancement issue under paragraph 17.3.

(h) a declaration that the Defendants have breached their obligations pursuant to sections 3.2, 5 and 6 of the License Agreement and that KFC is therefore entitled to terminate the Agreement;

This declaration will issue but again upon appropriate notice under 17.3 with respect to the enhancement issue.

(i) in the alternative, an order requiring Scott's Food and Scott's Hospitality to remodel and upgrade all of their outlets to KFC's worldwide image standards within three months of the date of judgment herein;

This application is dismissed.

(j) in the alternative, damages for the Defendants' breaches of the License Agreement;

This application is dismissed.

(k) a declaration that Scott's Hospitality is liable for inducing Scott's Food to breach the Agreement;

This application is dismissed.

(l) costs of this proceeding on a solicitor client basis plus GST thereon;

Section 18.3 of the licence agreement provides that a successful party is entitled to recover all of its expenses in connection with the litigation. However this only applies if the party prevails entirely and and if not then each party will bear its own costs. In my opinion KFC has not prevailed entirely. This application is dismissed.

(m) pre-judgment and post-judgment interest pursuant to the Courts of Justice Act, R.S.O. 1990, c. C.43 as amended; and

I have found no monetary damages and therefore this application is dismissed.

SCOTT'S CLAIMS FOR JUDGMENT

171 In its Statement of Defence, Scott's claims that the action be dismissed with costs. I have already dealt with that matter because the action is not dismissed.

172 In its Counterclaim it claims as follows:

(a) a declaration that the Agreements in issue contain no impediment to the shareholders of Scott's Food, selling, transferring, pledging or otherwise dealing with their shares in Hospitality;

This claim is dismissed.

(b) a declaration that the Agreements contain no impediment to Hospitality or SRI, the parent company of Scott's Food, selling, transferring, pledging or otherwise dealing with its shares in Scott's Food;

This claim is allowed to the extent only that such transaction does not involve the control of Scott's Food.

(c) a declaration that the Agreements contain no impediment to future shareholders of Hospitality and Scott's Food selling, transferring, pledging or otherwise dealing with the shares of Hospitality and Scott's Food;

This claim is allowed to the extent only that such transaction does not involve the control of Scott's Food.

(d) more particularly, and without limiting the generality of the foregoing, a declaration that any sale, transfer or pledge of, or any dealing with the shares of Hospitality and Scott's Food does not require the approval of the Plaintiff and does not trigger: a right of first refusal; a requirement that a new owner of Scott's Food require Scott's Food to execute a new License Agreement, or any other contractual right or obligation;

This claim is allowed to the extent only that such transaction does not involve the control of Scott's Food.

(e) in the alternative, a declaration that any right of approval established in paragraph 16 of the MFLA must be exercised reasonably, objectively and in good faith, and, specifically, must be exercised through the application of the four criteria set out by Mr. Cahill as referred to within these submissions;

The declaration would issue with respect to the first half of this claim but it is not to be declared that it must be exercised through the application of the four criteria set out by Mr. Cahill.

(f) a declaration that the sale, transfer or pledge of Scott's Food or Hospitality shares by Hospitality or future shareholders of Scott's Food does not constitute a breach of the terms of the Agreement and does not affect the rights of Scott's Food under the terms of the Agreement, and, more particularly, does not entitle the Plaintiff to terminate the Agreement;

This claim is allowed to the extent only that such transaction does not involve the control of Scott's Food.

(g) a declaration that the First Laidlaw Transaction, the A&W transaction, and the Second Laidlaw Transaction, as referred to in the Amended Statement of Claim and the Statement of Defence do not affect the right of Scott's Food under the Agreement and, more particularly, do not permit the Plaintiff to terminate the Agreement;

This claim is dismissed.

(h) a declaration that the Scott's Food outlets listed in the Schedule be certified by KFC-C on the basis that, using reasonable judgment, KFC-C is obligated to certify these outlets since:

i) certification deficiencies as notified to Scott's Food by KFC-C have been completed and KFC-C has agreed to certify after completion of these deficiencies;
ii) certification deficiencies as notified Scotts's Food by KFC-C have been completed by December 31, 1996;
iii) upgrading to the outlets has been completed in a manner similar to other Scott's Food outlets which have been previously certified; or
iv) with respect to the 57 outlets conditionally certified, there are no factual disputes.

A declaration will issue that the outlets listed in Schedule B to these reasons be certified by KFC.

(i) a declaration that pursuant to paragraph 6.3 of the MDA, Scott's Food is permitted to operate any Scott's Food outlets which are not certified by

KFC-C until December 31, 2003;

A declaration to this effect will issue provided that KFC does not terminate the agreement as otherwise provided for in these reasons.

(j) a declaration that any notice provided by KFC-C to Scott's Food alleging breaches of paragraphs 7.2 and/or 7.3 of the MDA is not effective until this Honourable Court determines whether Scott's Food is in breach of the MDA or MFLA, and that Scott's Food has three months from the date of a final judgment to cure any breach;

This claim is allowed. Scott's Food has been found in breach of the agreements. It is entitled to notice and three months to cure the breaches.

(k) a declaration that pursuant to paragraph 17.1 of the MFLA, Scott's Food can permanently close any or all of its KFC outlets by giving thirty days prior notice to KFC-C and that this constitutes a cure of any alleged breach with respect to any or all such outlets in accordance with paragraph 17.2(e) of the MFLA;

This claim is granted.

(l) alternatively, a judgment granting the defendants relief from forfeiture with respect to all of the breaches alleged by the plaintiffs;

Except with respect to the 1989 transaction, this claim is dismissed.

(m) costs of this proceeding on a solicitor and client basis plus GST thereon;

Scott's has not prevailed entirely. This claim is dismissed.

(n) pre-judgment and post-judgment interest to the Courts of Justice Act, R.S.O. 1980, c. 43, as amended; and

173 There being no monetary damages this claim is dismissed.

STEELE J.

* * * * *

SCHEDULE A

MASTER FRANCHISE LICENSE AGREEMENT

This agreement is entered into as of the 1st day of January, 1989 by and between Kentucky Fried Chicken Canada, a division of Pepsi-Cola Canada, Ltd., a company registered in and in accordance with the laws of Canada, with a principal place of business at 10 Carlson Court, Suite 300, Rexdale, Ontario, Canada (hereinafter referred to as "KFC"), of the first part; and Scott's Food Services Inc., a company registered in and in accordance with the laws of Ontario, Canada with its principal place of business at 2000 Jane Street, Weston, Ontario, Canada (hereinafter referred to as "Licensee"), of the second part.

WITNESSETH

WHEREAS KFC has agreed to grant to Licensee the right and license to use the KFC System and KFC Marks subject to the terms and conditions of this Agreement and its Addendum, Master Development Agreement - Canada ("Addendum"), for the purpose of preparing and marketing Approved Products and performing related services only at the Kentucky Fried Chicken outlets ("Outlets") provided for therein. ...

2.2 The Licensee acknowledges the value of the KFC System, the KFC Marks and the continued uniformity thereof to itself, KFC and other KFC licensees, and acknowledges KFC's past and present ownership and the validity of the KFC System and the KFC Marks and agrees not to dispute or to contest the same. The Licensee shall take any actions and enter into whatever agreements may be required by KFC to document its status as a Registered User of the KFC Marks. In order to enhance, maintain and protect the value of the KFC System and the KFC Marks and the goodwill associated therewith, this Agreement places detailed and substantial obligations on the Licensee including strict adherence to KFC's present and future requirements regarding use of the KFC System and the KFC Marks and related matters such as menu items, advertising and physical facilities. The rights granted to the Licensee hereunder are for a limited time and are subject to the terms and conditions as herein set forth. The value of such rights is derived principally from the KFC System and the KFC Marks and the goodwill associated therewith developed by KFC at considerable expense and effort to KFC. Before signing this Agreement, Licensee should read the Agreement carefully with the assistance of legal counsel.

2.3 The Licensee acknowledges (1) the success of the businesses contemplated herein involves substantial risks and depends upon the ability of Licensee as an independent business, and (2) no assurance or warranty, express or implied, has been made or given by KFC as to the potential success of such businesses or the gross revenues, volume or earnings likely to be achieved therefrom, and (3) no statement, representation or other act, event or communication, except as set forth herein, is binding on KFC in connection with the subject matter of this Agreement. ...

3.1 (a) Subject to the terms and conditions of this Agreement and its Addendum, KFC hereby grants to Licensee during the License Term the right and license (the "License") to use the KFC System and the KFC Marks for the purpose of preparing and marketing Approved Products and performing related services only at the Outlets. The grant of the License to Licensee to use the KFC System and the KFC Marks is non-exclusive and KFC retains the right to use the KFC System and the KFC Marks at any location other than the Outlets of Licensee and to grant to others the right and license to use the KFC System and the KFC Marks at locations other than the Outlets of Licensee.

(b) KFC hereby designated Colonel Sanders' Kentucky Fried Chicken Original Recipe ("Original Recipe"), french fries, gravy and coleslaw as required Approved Products for all Outlets. KFC may from time to time, in its sole discretion, designate other products as required Approved Products for all Outlets and determine that any product previously designated as an Approved Product shall no longer be an Approved Product. In addition, KFC shall provide for other initial Approved Products for the Licensee in a schedule to the Addendum.

(c) KFC may, from time to time, in its sole discretion, authorize in writing one or more Outlets (but not necessarily all Outlets) to sell, for such period of time as KFC determines, optional products which have not been designated as approved Products. Any such optional products so authorized by KFC shall be deemed to be designated as Approved Products only for the Outlet or Outlets so authorized.

3.2 Licensee agrees to operate the Outlets and to use the KFC System and KFC Marks strictly as provided therein and in the Addendum. Licensee acknowledges that the KFC System and the KFC Marks strictly as provided herein and in the Addendum. Licensee acknowledges that the KFC System and the KFC Marks and the goodwill associated therewith and will remain the exclusive property of KFC and that Licensee will derive no benefit therefrom except as Licensee hereunder. Any enhancement of the goodwill associated with the KFC System and the KFC Marks during the License Term will enure to the benefit of KFC except to the extent of such profits, if any, realized by Licensee during the License Term or a renewal term, following which no value shall be attributable for the benefit of Licensee to any goodwill associated with the KFC System and the KFC Marks and all right to use the KFC System and the KFC Marks shall revert automatically to KFC at no cost to KFC.

4. Term and Renewal

4.1 The License Term shall commence on the 1st day of Janaury, 1989 and shall continue in effect until the 31st day of December, 2003 (unless terminated earlier pursuant to the terms hereof). During the License Term the royalty payable hereunder shall be at the rate of one and seven-tenths (1.7%) per cent of Gross Revenues as provided in Paragraph 8.1. The royalties and fees payable shall be at the rates and in the amounts as more particularly provided for in Section 9 of the Addendum. ...

5.2 KFC and Licensee agree that as from the date of this Agreement all Outlets are or pursuant to obligations in the Addendum and Outlet Certification Agreements, shall be in accordance with the plans, standards, and trademark usage specifications prescribed by KFC. These compliance requirements are more particularly dealt with in the Addendum.

5.3 Licensee agrees to comply strictly with all the terms and conditions of this Agreement and the Addendum and all standards, processes, procedures and other requirements or instructions regarding the KFC System, the KFC Marks and the operation of the businesses of the Outlets which exist or may be prescribed by KFC from time to time. Licensee will take such action and precautions as necessary to assure that: ...

(f) All equipment, signs, menu-boards, supplies, and other items are added, eliminated, substituted, and modified at the Outlets in accordance with KFC's standards and specifications.

(g) The Outlets and everything located at or in the Outlets are maintained in first-class condition and repair and are kept clean, neat and sanitary; the Outlets are adequately lighted and are operated in a clean, wholesome and sanitary manner in accordance with KFC's standards and speci-

fications; all maintenance and repairs requested by KFC or needed in connection with the Outlets are made promptly and all employees are clean and neat in appearance.

(h) No image, usage of trademarks, or other major alterations of the Outlets are made except with KFC's prior approval, and any such alteration strictly conforms to KFC's then current standards and specifications. ...

6. Maintenance and Upgrading of Outlets

6.1 Licensee shall at all times maintain the physical facilities of the Outlets and all facilities at which or by means of which Licensee is permitted by KFC to store, handle, prepare or transport Approved Products or ingredients used in preparing them in accordance with all standards and specifications prescribed from time to time by KFC.

6.2 KFC shall have the right to require Licensee to perform such renovations and remodelling of the Outlets as KFC deems necessary so that the Outlets comply at all times with the standards and specifications then applicable to new KFC outlets. Such renovations and remodelling shall include upgrading all equipment, furnishings, signs and menu-boards now used at or in connection with the business of the Outlets or which may be required to be used as a result of the introduction of new Approved Products. KFC will use reasonable judgment with regard to such renovation and remodelling requirements. These requirements for outlet enhancement are more particularly provided for in the Addendum.

6.3 The cost of all maintenance, renovations and remodelling shall be for the account of Licensee, which Licensee acknowledges are required to keep the Outlets up to the latest standards and specifications prescribed by KFC. ...

16. Transfer

16.1 The grant of the License hereunder is personal to Licensee. The grant of the License hereunder is based upon full disclosure in writing by the Licensee to KFC, and approval by KFC, of all directors and holders of majority control of the voting shares of Licensee and of any corporation or corporations which directly or indirectly (whether by means of any intermediate corporations or otherwise) own or control or have an interest in the shares of the Licensee. Licensee acknowledges that the restrictions provided in this Paragraph 16 are reasonable and necessary to protect the KFC System and the KFC Marks and are for the benefit and protection of all KFC licensees as well as KFC.

16.2 Licensee agrees that it shall not sell, transfer, assign, encumber, sub-license or otherwise deal with this Agreement or its rights or interest hereunder (hereinafter referred to as "transfer"), without KFC's prior written consent and Licensee's compliance in all respects with the terms and conditions of this Paragraph 16. Any transfer or any attempt to do so, contrary to this Paragraph 16 shall be a breach of this Agreement and shall be void but shall give KFC the right of termination as provided in Paragraph 17.2(d).

16.3 In the event that Licensee receives a bona fide offer, which Licensee is wiling to accept, from a third party to purchase or otherwise acquire any of the Licensee's rights and interest in this Agreement, and/or Licensee's rights and interest in all or a substantial part of the other assets of Licensee's business carried on at or from an Outlet, Licensee shall first offer to sell the same to KFC at the same price and on the same terms and conditions as in the third party's offer, by notice in writing to

KFC accompanied by a copy of the third party's offer and full disclosure in writing of the identity of the third party (including corporate directors and shareholders as referred to in Paragraph 16.1) and of all information given by Licensee to the third party concerning the said business of Licensee. KFC shall have sixty (60) days after the giving of the said notice from Licensee within which to accept such offer to sell by notice in writing given by KFC to Licensee. In the event that KFC so accepts such offer to sell, a binding agreement of purchase and sale shall thereby be constituted between Licensee and KFC at the said price and upon the said terms and conditions but with the additional provision that KFC shall have the right to assign the said agreement of purchase and sale and its rights thereunder to a nominee designated in writing by KFC provided such nominee agrees in writing with Licensee to be bound by all the terms and conditions of the said agreement of purchase and sale and KFC agrees in writing with Licensee to indemnify Licensee with respect to any default thereunder by such nominee. Notwithstanding failure of KFC to so accept such offer to sell, the sale or other disposition by Licensee to the third party shall not be proceeded with without KFC's prior written consent, and compliance in all other respects with the terms and conditions of this Paragraph 16 and such failure by KFC shall be without prejudice to its rights hereunder with respect thereto.

16.4 Licensee shall promptly make application in writing to KFC for consent prior to any transfer hereunder and shall provide to KFC, at the time of such application or thereafter as KFC may reasonably require, full disclosure in writing of the identity of the parties (the "Transferor" and "Transferee") to such transfer and their relationship to Licensee (including by way of any corporate shareholdings as referred to in Paragraph 16.1) and of all information given to the transferee concerning the said business of Licensee. KFC agrees to deal with such application as expeditiously as possible. Any such consent which may be given by KFC shall in any event be conditional upon:

(a) All obligations of Licensee to KFC pursuant to this Agreement and the Addendum and to the national advertising program and any local media purchasing co-operative in which Licensee is a participant shall have been performed or satisfied in full. For this purpose KFC may conduct an investigation and audit under Paragraph 11 in order to determine the extent of accrued monetary obligations and may inspect the Outlets to determine the extent of the performance of other obligations hereunder;

(b) If any other person is to replace Licensee hereunder, such person shall execute and deliver to KFC such agreements required by KFC of new KFC licensees, and shall agree in form and terms satisfactory to KFC to assume all the obligations of Licensee to KFC under this Agreement or otherwise and to perform such renovations, modernization and remodelling of the Outlets as KFC deems necessary so that the Outlets and all physical facilities, signs, menu-boards, equipment and furnishings comply with the standards and specifications then applicable to new KFC outlets;

(c) If any other person is to replace Licensee hereunder, Licensee executes and delivers to KFC a General Release under seal, in form satisfactory to KFC, of any and all claims against KFC; and (d) Payment to KFC of such reasonable fee as KFC may require to compensate for KFC's costs of considering the transfer.

17. Termination of License

17.1 If Licensee desires to permanently close any or all the Outlets as KFC outlets, Licensee may terminate the License for such Outlet or Outlets by giving thirty (30) days prior notice to KFC, pro-

vided that the Outlet or Outlets are permanently closed as KFC outlets and the other provisions of this Agreement are complied with.

17.2 KFC may, without prejudice to any other rights or remedies contained in this Agreement or at law or in equity, terminate the License upon immediate notice (or in the event advance notice is required by law, upon the giving of such notice) in the event that: ...

(d) Licensee makes or permits a transfer contrary to the provision of Paragraph 16; or

(e) Licensee fails to satisfy, in a material and substantive manner, the requirements for enhancement and development contained in Articles 3.3, 3.4, 7.2 and 7.3 of the Addendum, provided that notice of any such failure is delivered to Licensee and Licensee shall not have corrected such failure within (3) months from the delivery of such notice.

17.3 The License will terminate on the termination date specified in any notice by KFC to Licensee (without any further notice of termination unless required by law), provided that (a) the notice is hand delivered or mailed at least thirty (30) days (or such longer period as may be required by law) in advance of the termination date, (b) the notice reasonably identifies one or more breaches or defaults in Licensee's obligations or performance hereunder, (c) the notice specifies the manner in which the breach(es) or default(s) are not fully remedied before, and as of, the termination date. ...

17.4 Upon termination or expiration of the License, Licensee and its officers, directors and shareholders shall immediately discontinue use of the KFC System, the KFC Marks and all other trade secrets, confidential information, know-how and processes developed or owned by KFC and shall immediately and at no cost to KFC remove all signs, menu-board inserts, point-of-sale material and otherwise change the exterior and interior appearance of the Outlets so that they are no longer confusingly similar to KFC outlets and no longer bear any KFC Marks or any indicia of the KFC System. If Licensee fails to do so immediately KFC may do so by entering the Outlets and Licensee shall pay to KFC the costs it so incurs. Licensee shall also return the Confidential Operating Manuals and all other confidential materials to KFC and at KFC's option, upon payment of the fair market value thereof by KFC, return to KFC all supplies and any other materials bearing the KFC Marks and other indicia of the KFC System. Licensee agrees that any breach of its obligations hereunder will cause immediate and substantial irreparable injury to KFC giving KFC the right to obtain immediate injunctive relief without limiting any other rights or remedies of KFC. This Agreement and the obligations of the parties hereunder shall survive the termination or expiration of the License except to the extent expressly otherwise provided herein.

18.3 Cost of Enforcement If KFC or Licensee institutes any action at law or in equity and KFC prevails entirely, based entirely or in part on the terms of this Agreement and the Addendum, KFC shall be entitled to recover, in addition to any judgment entered in KFC's favour, all of KFC's expenses in connection with the litigation including reasonable legal fees and court costs. If Licensee

prevails entirely in any such action instituted by KFC or Licensee, Licensee will be entitled to such expenses. If neither party prevails entirely, then each party will bear its own costs.

18.4 Non-Waiver No failure, forbearance, neglect or delay of any kind or extent on the part of KFC in connection with the enforcement or exercise of any rights under this Agreement shall affect or diminish KFC's right to strictly enforce and take full benefit of each provision of this Agreement at any time, whether at law for damages, in equity for injunctive relief or specific performance, or otherwise. No custom, usage, concession or practice with regard to this Agreement, Licensee, or other KFC licensees shall preclude at any time the strict enforcement of this Agreement (upon due notice) in accordance with its literal terms. No waiver by KFC of performance of any provision of this Agreement shall constitute or be implied as waiver of KFC's right to enforce such provisions at any future time.

18.5 Scope of Agreement, Changes, Consents, Etc. This Agreement and the Addendum constitute the entire understanding and agreement of the parties concerning the KFC System, the KFC Marks, the Outlets and the business of the Outlets and supersedes all prior and contemporaneous understandings and agreements of the parties, whether oral or written, pertaining thereto. No interpretation, change, termination or waiver of any provision hereof, and no consent or approval hereunder, shall be binding upon the other party or effective unless in writing and signed by Licensee and KFC's President or authorized employee in charge of franchising, except that the waiver need be signed only by the party waiving.

18.6 Severability. All provisions of this Agreement
shall be severable and no such provision shall be affected by
the invalidity of any other such provisions to the extent that
such invalidity does not also render such provision invalid.
In the event of the invalidity of any provision, this
Agreement shall be interpreted and enforced as if all
provisions thereby rendered invalid were not contained herein. ....

18.10 Successors and Assigns. This Agreement shall enure to the benefit of and be binding upon KFC and its successors and assigns and, subject always to the terms and conditions of Paragraph 16, the heirs, executors, administrators, successors and assigns of Licensee.

ADDENDUM

MASTER DEVELOPMENT AGREEMENT -- CANADA

THIS AGREEMENT is entered into as of the 1st day of January, 1989 by and between Kentucky Fried Chicken Canada, a division of Pepsi-Cola Canada, Ltd., a company registered in and in accordance with the laws of Canada, with a principal place of business at 10 Carlson Court, Suite 300, Rexdale, Ontario, Canada (hereinafter referred to as "KFC"), of the first part; and Scott's Food Services Inc., a company registered in and in accordance with the law of Ontario, Canada, with its principal place of business at 2000 Jane Street, Weston, Ontario, Canada (hereinafter referred to as "Licensee"), of the second part.

WITNESSETH

WHEREAS Licensee and its predecessors have been licensed to own and operate Kentucky Fried Chicken Outlets in parts of the Canadian territory as a valued Licensee of KFC and

its predecessors under the terms of various license and franchise agreements and in particular the License Agreement and Contract made as of January 1, 1969.

WHEREAS KFC and Licensee desire to provide for and guarantee the full future development and further beneficial exploitation by Licensee of the Kentucky Fried Chicken System in parts of the Canadian territory and have contemporaneously with this Addendum executed a Master Franchise License (hereinafter referred to as "License") with a term to expire on December 31, 2003.

WHEREAS KFC is willing to grant to Licensee certain rights and expects of Licensee certain responsibilities in addition to those provided in the License for the detailed development of its Kentucky Fried Chicken Outlets in Canada on terms and conditions set forth below.

WHEREAS Licensee is willing to accept such rights and perform such additional responsibilities and to document the terms and conditions under which its obligations shall be performed and executed. ...

1. Grant

KFC hereby grants to Licensee rights, and Licensee hereby accepts certain responsibilities, to provide for the development of Kentucky Fried Chicken Outlets under the terms of this Agreement. All Kentucky Fried Chicken outlets developed under this Agreement will be subject to the License Agreement and the Outlet Certification Agreement executed for each Outlet. This grant is personal in nature and no rights hereunder may be assigned or transferred by Licensee in whole or in part without the prior written approval of KFC.

2. Term

The term of this Agreement shall commence as of the date first written above and shall expire on December 31, 2003.

3. Territory Development

...

3.3 The parties will agree annually on the schedule for the development of Outlets to be opened in the Territory. In Schedule "B" hereto the parties set forth the agreed minimum numbers of Outlets to be opened by Licensee during the initial three (3) calendar years of development hereunder. The parties agree that these are minimum Outlet openings only and that additional Outlets may be opened during each year, if such additional Outlet openings are approved in advance. ...

3.5 KFC and Licensee agree that the formula contained in schedule "C" attached hereto sets out the method and criteria under which KFC and Licensee will determine a new Outlet site. ...

4. Outlet Approval Procedure

4.1 The parties agree that each Kentucky Fried Chicken Outlet that is opened by Licensee must be approved in compliance with the following Outlet Approval Procedure.

4.2 Evaluation of Sites. Licensee shall prepare for a proposed site for a new Kentucky Fried Chicken Outlet a written Site Evaluation in accordance with the Site Evaluation Document attached hereto as Schedule "D" showing site dimensions, building type and placement on site, proposed ingress and egress and layout. Upon receipt of the Site Evaluation Document, KFC shall have twenty-one (21) days to evaluate each proposed site and notify Licensee of any comment or objection or, failing timely reply, approval of the site will be deemed to have been given.

4.3 The Site Evaluation Document shall indicate whether or not Licensee will be constructing the Outlet in accordance with KFC Standard Plans and Specifications that have been agreed by the parties for application in Canada. The KFC Standard Plans and Specifications (hereinafter referred to as "Plans") for Canada are attached hereto under Schedule "E". The Plans may be changed or augmented on an annual basis by agreement of the parties in writing. If the Site Evaluation Document indicates that Licensee is not able to utilize the Plans, then the plans and specifications proposed to be used shall be submitted to KFC with the Site Evaluation Document. Licensee acknowledges and agrees that in the event modification of the Plans becomes necessary then Licensee must bear the sole responsibility and cost associated with any such modification and KFC approval of such modification shall be obtained. ...

6. Outlet Certification

6.1 The document attached hereto as Schedule "F" entitled "Scott's KFC Outlets" includes all Licensee Kentucky Fried Chicken Outlets operating as of the date of this Agreement. KFC acknowledges that no initial fees are owing for any listed location and accepts each location as a Kentucky Fried Chicken Outlet subject to this Agreement. Following the execution of this Agreement the parties shall execute an Outlet Certification Agreement for each Outlet listed in Schedule "F" upon the completion and acceptance of the enhancement actions agreed to be taken under sub-section 7.2 below. (The form of agreement to be used for each Outlet Certification Agreement is attached hereto as Schedule "G".) The term to be included in the Outlet Certification Agreements for the enhanced Outlets shall be for a fifteen (15) year period from the date of completion of these said enhancement actions.

6.2 Upon the acceptance of an existing Outlet and not less than thirty (30) days before each new Outlet is to be opened by Licensee, the parties shall execute an Outlet Certification Agreement in the form of Schedule "G" certifying that the proposed Outlet has been reviewed and approved by KFC in accordance with the specific terms hereof and that the Outlet will be operated or continue to be operated in compliance with and subject to the terms of the Outlet Certification Agreement, this agreement and the License. Signature by KFC shall constitute KFC's permission for Licensee to operate the Outlet for the Outlet Term as long as the terms of this Agreement are enforceable and Licensee is not in breach of any of the terms hereof.

6.3 In the event an Outlet is not approved pursuant to sub-section 7.2 below, an Outlet Certification Agreement will not be executed for the Outlet. Licensee will be permitted to continue to operate such Outlet subject to the terms of this Agreement and the License for an agreed period of time until the parties implement their agreement with respect to such outlet under sub-section 7.2, at which time an Outlet Certification Agreement will be executed for the Outlet. Failing this, the term of such Outlet will expire on the date agreed by the parties or at the end of the License Term at the latest.

7. Annual Outlet Enhancement Program

7.1 The parties fully understand the importance and value of uniform concept standards and uniformity of image and trademark usage. Licensee agrees that it shall undertake and maintain a defined program with regard to the remodelling and upgrading of all Kentucky Fried Chicken Outlets to comply with the applicable current Kentucky Fried Chicken standards.

7.2 Licensee agrees to remodel and upgrade each of its Outlets as set out in Schedule "F" within a period not to exceed seven (7) years from January 1, 1990. The enhancement actions to be taken will be pursuant to the agreed enhancement standards for Canada. Licensee will co-operate with KFC in its review of the Outlets on the basis of the methods and criteria established in Schedule "C" or other appropriate criteria.

7.3 At least sixty (60) days prior to the commencement of each calendar year the parties will agree in writing on the Annual Outlet Enhancement Program ("Program") for the succeeding year. The annual Program will cover a reasonable number (not less than ten (10%) per cent) of Outlets in proportion to the total requirements set above under Section 7.2. The Program will list the targeted Outlets and will define the action plan for the improvement or other actions to be taken with respect to each Outlet scheduled for image enhancement during the year. The Program will result in an annual capital investment by Licensee of not less than Six Million ($6,000,000) Dollars.

9. Interpretation

9.1 Non-Waiver No failure, neglect or delay of any kind or extent on the part of KFC in connection with the enforcement of exercise of any rights under this Agreement shall affect or diminish KFC's right to strictly enforce and take full benefit of each provision of this Agreement or otherwise. No custom, usage, concession or practice with regard to this License, Licensee or KFC's other licensees shall preclude at any time the strict enforcement of this Agreement in accordance with its literal terms. No waiver by KFC of performance of any provision of this Agreement shall constitute or be implied as a waiver of KFC's right to enforce such provision at any future time.

9.2 Severability. All provisions of this Agreement shall be severable and no such provision shall be affected by the invalidity of any other such provisions to the extent that such invalidity does not also render such other provision invalid. In the event of the invalidity of any provision, this Agreement shall be interpreted and enforced as if all provisions thereby rendered invalid were not contained herein.

SCHEDULE B

Scott's Store	Address	City	Province

6002	3765 Keele Street Downsview Ontario
6003	1225 Danforth Avenue Toronto Ontario
6006	1638 Avenue Road Toronto Ontario
6030	3517 Dundas Street W. Toronto Ontario
6032	2799 Kingston Road ScarboroughOntario
6033	9025 Torbram Road Brampton Ontario
6035	1221 Dundas Street W. Toronto Ontario
6045	2774 Victoria Park Willowdale Ontario
6049	2377 Finch Avenue W. Weston Ontario
6051	55 Harvest Moon Dr. Markham Ontario
6055	891 Pape Avenue Toronto Ontario
6060	1091 Bloor Street W. Toronto Ontario
6063	433 Roncesvalles Ave. Toronto Ontario
6066	66 Wellesley Street E. Toronto Ontario
6068	1891 Rathburn Road MississaugaOntario
6070	5109 Sheppard Avenue E.ScarboroughOntario
6073	467 Main Street W. StouffvilleOntario
6075	1340 Kingston Rd. #1 Pickering Ontario
6077	4678 Highway #7 Unionville Ontario
6084	896 Burnamthorpe Rd. MississaugaOntario
6085	1971 Finch Avenue W. Downsview Ontario
6088	2002 Middlefield, Unit #2 Markham Ontario
6116	353 Duckworth Street Barrie Ontario
6149	28 Dumfries Street Paris Ontario
6172	1916 Wyandotte St. W. Windsor Ontario
6174	4320 Tecumseh Road E. Windsor Ontario
6189	1314 Dufferin Street WallaceburgOntario
6197	582 Kathleen Street W. Sudbury Ontario
6235	1117 bd Manseau Joliette Québec
6246	291 bd des Laurentides St-Jerôme Québec
6251	590 rue Principale Ste-Agathe Québec
6257	180 rue Fiset Sorel Québec
6271	1465 rue King Sherbrooke Québec
6297	2975 bd Laframboise St-Hyacinthe Québec
6301	115 rue Fraser Rivière du LoupQuébec
6310	2020 bd Mellon Jonquière Québec
6311	936 bd Ducharme LaTuque Québec
6312	230 8e avenue Dolbeau Québec
6313	991 bd Marcotte Roberval Québec
6321	650 bd Paquette Mont Laurier Québec
6324	1605 bd St-Joseph Drummondville Québec
6326	14 rue Fusey Cap Madeleine Québec
6328	1483 rue St-Marc Shawinigan Québec

6341	3035 le Carrefour Carrefour Lava Québec
6358	2439 54 Avenue S.W. Calgary Alberta
6361	1000-200 Crowfoot Cres. N. Calgary Alberta
6372	5006 Centre Street N. Calgary Alberta
6377	244 Edmonton Trail Airdrie Alberta
6385	224 2 Avenue W. Cochrane Alberta
6456	785 Wonderland Rd. S. London Ontario
6461	500 Rexdale Blvd. Rexdale Ontario
6542	3rd Avenue East Owen Sound Ontario
6552	486-500 Crantham Ave.St.CatharinesOntario
6559	311 Main Street Dunnville Ontario
6599	1687 Montreal Rd. Ottawa Ontario
6604	1677 Bank Street Ottawa Ontario
6616	21 Main Street E. Smiths FallsOntario
6620	70 Raglan St. N. Renfrew Ontario
6622	45 Munro Street Carleton Place Ontario
6625	1943 Baseline Rd. Ottawa Ontario

qp/d/ln/ala/mjb/DRS/DRS/DRS

Tab 2

Case Name:

Allen-Vanguard Corp. v. L'Abbé

RE: Allen-Vanguard Corporation, and Richard L'Abbé et al

[2013] O.J. No. 1074

2013 ONSC 1098

Court File No. 08-CV-43544

Ontario Superior Court of Justice

Master C.U.C. MacLeod

February 21, 2013.

(33 paras.)

Civil litigation -- Civil procedure -- Pleadings -- Amendment of -- Statement of claim -- Adding new cause of action -- To alter or add to claim for relief -- Motion by plaintiff for leave to amend its pleadings allowed -- Plaintiff sued defendants for damages for breach of warranty, misrepresentation, and fraud as a result of a share purchase transaction -- Plaintiff wanted to increase damages claim from $40 million to $650 million and add a clam for fraudulent misrepresentation -- There was sufficient ambiguity in provisions of share purchase agreement that it could not be said that on face of agreement plaintiff could never succeed -- No actual prejudice to defendants was established which could not be addressed in costs or other reasonable terms.

Motion by the plaintiff for leave to amend its pleadings. The proposed amendments increased the claim for damages from $40 million to $650 million and added a clam for fraudulent misrepresentation. The defendants alleged that the amendments fundamentally changed the nature of the litigation and opposed the amendments. The plaintiff purchased all of the outstanding shares of Med Eng Systems in 2007. One of Med Eng's major customers was the US military. The rights of the parties were governed by a share purchase agreement which intended, in part, to protect the offeree shareholders from liability by limiting any claims to claims against an escrow fund. All of the critical representations and warranties were given by Med Eng management on behalf of the corporation being acquired and not by the vendors, the offeree

shareholders. The plaintiff alleged in the current action that the management of Med Eng failed to disclose material risks in relation to the continuation of the key US military contract and also misrepresented the extent of contingent liabilities, tax liabilities, warranty claims and other contractual and litigation risks. The action was based on breach of warranty, misrepresentation, and fraud.

HELD: Motion allowed. The claim was not rendered untenable by these amendments and the amendments were not for an improper purpose. The increased claim might not be tenable at law because the provisions of the share purchase agreement limited any claims to claims against the escrow fund. If the plaintiff could show fraud, however, it would not be limited to the amount in the escrow fund. There was sufficient ambiguity in the interrelated provisions of the share purchase agreement that the court was unable to find only one possible interpretation of the contract. It could not be said that on the face of the agreement the plaintiff could never succeed. The litigation risk to both parties was increased if the amendment was granted, but the court was unable to infer irreparable prejudice. In the absence of specific evidence, the court was unable to find actual prejudice on the part of the defendants which could not be addressed in costs or other reasonable terms.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, Rule 25, Rule 26.01

Counsel:

Eli S. Lederman for Allen Vanguard Corporation.

Thomas. G. Conway for the "offeree shareholders."

REASONS

1 **MASTER C.U.C. MacLEOD**:-- This is a motion by Allen-Vanguard Corporation to amend its pleadings. Most of the amendments simply particularize the allegations or update the pleadings. The only controversial amendments are those proposed to paragraphs 1(a) and 2(f). The first of these is a proposed amendment to the prayer for relief to increase the claim from $40 million to $650 million. The second is the addition of the phrase "fraudulent misrepresentations and" to the paragraph which currently reads "breaches of representations and warranties" and claims indemnification for damages from the defendants.

2 Ordinarily amendment to raise the quantum of damages is granted as a matter of course because of the mandatory language of Rule 26.01. In this case however the defendants allege that the amendments fundamentally change the nature of the litigation. They oppose this on the basis that read in context it is untenable at law, is highly prejudicial and is an abuse of process.

3 I have given these submissions careful consideration but ultimately conclude that pursuant to Rule 26.01 leave must be granted.

Background

4 The facts and allegations underlying this litigation have been set out in some detail in earlier reasons.[1] For purposes of this motion it is simply necessary to repeat that Allen-Vanguard Corporation purchased all of the outstanding shares of Med Eng Systems Inc. in September, 2007 for roughly $650 million. Subsequently Med Eng was merged with another subsidiary of Allen Vanguard to become AVTI and ultimately was merged with Allen Vanguard itself so that currently Med Eng and Allen Vanguard are one and the same.

5 Med Eng was in the business of supplying protective products for military, police and security services. One of its major customers was the U.S. military. Central to this litigation is the allegation that management of Med Eng failed to disclose material risks in relation to the continuation of the key U.S. military contract and also misrepresented the extent of contingent liabilities, tax liabilities, warranty claims and other contractual and litigation risks. The action was based on breach of warranty, misrepresentation, and fraud.

6 The central document which governs the rights between the parties is the Share Purchase Agreement (SPA) dated August 3rd, 2007. This is an agreement between Allen Vanguard, Med Eng and the Offeree Shareholders. The Offeree Shareholders are the defendants to this action. They are Richard L'Abbé, 1062455 Ontario Inc., Growth Works Canadian Fund Ltd., and the Schroder entities collectively referred to as Schroder Canada and Schroder UK. These were the controlling shareholders of Med Eng. There were also minority shareholders who are not party to the SPA but whose shares were also acquired and who would have received their proportionate share of the purchase price. Other than Richard L'Abbé, none of the offeree shareholders are individuals and none of the members of Med Eng management were offeree shareholders.

7 The structure of the SPA is very particular in its structure. Ordinarily in an agreement of purchase and sale one would expect the vendors to give or withhold representations and warranties and to be liable for breach of the agreement. In this case however, other than the warranties concerning ownership of the shares, it is Med Eng itself which gives the warranties and representations concerning its books, records, financial statements, assets, contracts, commitments, employees, taxes, regulatory compliance, and other material disclosure under the signature of its then CEO.[2] Pursuant to the agreement part of the purchase price, $40 million, was deposited into an escrow fund and is available as a price adjustment fund to satisfy any claims for breach of warranty. Though this fund is the property of the offeree shareholders in the absence of proven claims, it is available to indemnify Allen Vanguard for any breach of the warranties and representations given by Med Eng.

8 For purposes of this motion, the critical provision of the SPA is Article 7 dealing with indemnification. The clear intent of Article 7 is to limit any liability of the offeree shareholders and to limit any remedy by Allen Vanguard to a claim against the escrow fund. There are however exceptions for fraud. A critical question for purposes of the motion (and at trial if the amendment is granted) is whether or not a claim for more than $40 million may be maintained against the offeree shareholders if Med Eng management acted fraudulently?

9 Subsequent to the closing of the transaction and assuming control of Med Eng , Allen Vanguard was

disappointed to find that the new acquisition did not live up to its promise. Difficulties developed in the contract with the U.S. military and with certain other relationships. Allegedly as a result of "MES's misrepresentations and breaches of representations, warranties and covenants" Allen Vanguard itself, in the words of the amended statement of claim, "spiralled into insolvency in the months following the transaction."[3] In 2009 Allen Vanguard sought protection from creditors and a plan of arrangement and reorganization under the CCAA.[4]

10 When this litigation was commenced, Allen Vanguard pleaded as follows:

1. (a) "indemnification and/or damages for fraudulent and/or negligent misrepresentation and breach of contract in the amount of $40,000,000 which shall be distributed to Allen-Vanguard Corporation in accordance with the terms of the Escrow Agreement as defined herein".[5]
2. (e) "as a result of the breaches of representation and warranties by MES, the Defendants are directly liable to indemnify Allen-Vanguard for the damages which have been caused to Allen-Vanguard".[6]

11 At no time has it been asserted that any of the offeree shareholders committed fraud nor that the offeree shareholders made any representations or misrepresentations. With the exception of Paul Timmis, who is party to a related proceeding and who figures prominently in the statement of claim, none of the individuals who are said to be responsible for the misrepresentations are the subject of individual claims. For obvious reasons (since it would have made no sense to sue its own subsidiary when the action was commenced and since Allen Vanguard cannot maintain an action against itself now that it is amalgamated) Med Eng is not a defendant to Allen Vanguard's claim. Nevertheless throughout the statement of claim the misrepresentations and breaches of duty are pleaded as acts of "MES". That is Med Eng. Of course the former shareholders generally and the offeree shareholders in particular were the beneficiaries of the fraud, if fraud there was, so as vendors it is from them that Allen Vanguard seeks damages.

12 The disputed amendments would change the claim to read as follows:

1. (a) "indemnification and/or damages for fraudulent and/or negligent misrepresentation and breach of contract in the amount of $650,000 of which $40,000,000 shall be distributed to Allen-Vanguard in accordance with the terms of the Escrow Agreement as defined herein."
2. (f) "as a result of the fraudulent misrepresentations and breaches of representations and warranties by MES, the Defendants are directly liable to indemnify Allen-Vanguard for the damages which have been caused to Allen-Vanguard."

13 The change to paragraph 2 (e) (now paragraph 2 (f) as a consequence of other amendments which are not opposed) is by itself of little moment. Firstly it is in a paragraph headed "overview" and secondly it is already pleaded that the "misrepresentations" were "fraudulent and or negligent misrepresentations". But there can be no doubt that the change to the prayer for relief from $40,000,000 to $650,000.00 read in combination with this change is a fundamental change to the litigation in substance if not in form. What is

happening is that instead of simply laying claim to the entire escrow fund, Allen Vanguard is now seeking a full refund of the purchase price. The original claim was almost a claim in rem since, apart from the claim for pre-judgment interest and costs, it sought damages to be distributed to the plaintiff from the escrow fund. Now the damages in excess of the escrow fund will be sought at large against the "defendants" jointly and severally.

14 At all previous stages in the litigation it has been conducted on the basis that the entitlement to the escrow fund was the ultimate question in issue. This is apparent not only from the pleading but from the previous endorsements and case conference orders. The allegation of fraudulent misrepresentation in that context appeared almost gratuitous because it has never been necessary to prove that the misrepresentations were fraudulent to lay claim to the fund. Conversely this change to the pleading will be totally dependent on proving fraud. The limiting words of Article 7 clearly apply except in case of fraud. The plaintiff does not seek rescission of the SPA nor of the sale itself.

15 Because this amendment is thus potentially "game changing" and is made only 8 months before the scheduled trial date, the defendants view it as an improper tactic designed to strengthen the hand of the plaintiff in upcoming mediation. Their position is that it should be refused by the court on the basis that the claim is untenable at law, is highly prejudicial and is an abuse of process.

The test for amending pleadings and refusing an amendment

16 I need not repeat at length the test for amending a pleading. "On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment."[7] Of course the proposed pleading must be a proper pleading. It must therefore meet the requirements of Rule 25 and must be tenable at law, It may be refused if it creates unreasonable prejudice for the defendants or if it is a mere tactical amendment sought for an improper purpose.[8]

17 It follows that if the amendment is indeed untenable at law, highly prejudicial or an abuse of process it may be refused. A plea is untenable if it is impossible of success at trial otherwise it should not be refused at the pleadings stage.[9] Though prejudice may be inferred in certain circumstances, the prejudice must be such that it cannot be remedied by a costs award or by other terms such as adjournments, setting peremptory dates for the party seeking the amendment, additional discovery rights or security for costs. Moreover the prejudice must be prejudice that flows from the fact of the amendment and not from the claim itself. Simply facing the prejudice that would be inevitable as the result of any successful plea is insufficient.[10] As for abuse of process, it is for the party asserting abuse to demonstrate that there is an illicit purpose for the amendment constituting grounds for refusal. If I am not persuaded that one or more of these barriers exists then the amendment must be granted on appropriate terms.

Analysis

18 The court is constrained to decide a motion such as this on the basis of the evidence actually before it and not on the basis of speculation and supposition or of positions put forth in argument that are not supported by the record. The only affidavit evidence before the court is an affidavit of an associate lawyer tendered on behalf of the moving party. That affidavit addresses the reasons for seeking the amendment

but little else. The defendants have not tendered any affidavit. Accordingly the motion must be decided on the basis of the one affidavit, certain discovery and cross examination transcripts, the pleadings, the proposed amended pleading and the documents incorporated into the pleadings by reference. In particular I have before me the SPA and the Escrow Agreement. As this matter is case managed and I have heard all of the motions and case conferences I am also familiar with previous findings, the timetable for the proceeding and the litigation history which I would be entitled to take into consideration as well.

19 Dealing firstly with the question of whether or not the increased claim is tenable at law, it may not be. This is because the rights of the parties are governed by the SPA and as described above the intent of that document is in part to protect the offeree shareholders from liability by limiting any claims to claims against the escrow fund. All of the critical representations and warranties were given in fact and in law by Med Eng management on behalf of the corporation being acquired and not by the vendors, the offeree shareholders.

20 In article 7.06 which expressly survives termination or rescission of the contract, all parties agree that the sole remedies of any party against the others for any inaccuracy or misrepresentation are the remedies under Article 7 itself. The same article contains a provision that all parties waive any remedies against the other parties except for those set out in Article 7 "other than those arising with respect to any fraud". Read in the most favourable light to the plaintiff this means that in the case of fraud the plaintiff is not limited to the remedies set out in Article 7. But of course that does not create a right of action against the offeree shareholders.

21 Similarly Article 7.02 which provides that the corporation will indemnify the purchaser for any breaches of representation and warranty and that such claims are limited to the amount in the escrow fund contains the words "except in cases of fraud". This clearly anticipates that if the plaintiff can show fraud, it will not be limited to the amount in the escrow fund. Once again however, notwithstanding that it would in most cases be impractical for a purchaser to assert a claim against the corporation it is purchasing, the liability is expressed to be liability of Med Eng and this paragraph does not create a specific right of action against the offeree shareholders. 7.02(5) on the other hand specifically provides that the sole recourse of the purchaser against the corporation or the offeree shareholders shall be the "Indemnification Escrow fund" except in the case of deficiency of title to the shares or "in respect of liability of any Shareholder ... under any claim attributable to fraud of that shareholder".

22 Since there is no fraud asserted against any defendant offeree shareholder, the defendants contend that this provision in article 7.02(5) is a complete defence to a claim beyond the $40 million in the escrow fund. They may be right. Mr. Conway puts this argument persuasively and it is consistent with the intent of the agreement to limit the exposure of the vendors. Nevertheless I am not able to say with certainty that this is the only possible interpretation of the agreement. Mr. Lederman argues that no court can condone an interpretation which would unjustly enrich the former shareholders at the expense of the plaintiff if it was a victim of fraudulent misrepresentation. There is sufficient ambiguity in these interrelated provisions that I am unable to find only one possible interpretation of the contract. I cannot say that on the face of the agreement the plaintiff could never succeed.

23 Accordingly the claim must be regarded as tenable. I could not strike it under Rule 25.11 nor, were I a judge, under Rule 21.01.

24 The question of delay in seeking the amendment is more troubling. The affidavit evidence is to the effect that the decision to amend the claim was made after the discovery of Mr. Timmis. The plaintiff believes that evidence given by Mr. Timmis is an admission of material misrepresentation and non disclosure concerning amongst other things knowledge that the U.S. military was proposing "head to head tests" between the Med Eng product and the products of competitors. In other words the affidavit explains why Allen Vanguard now believes it has stronger evidence of fraudulent misrepresentation. There is however nothing in the affidavit that asserts that anything has occurred to suggest that the damages incurred by Allen Vanguard have changed or why Allen Vanguard earlier believed it was limited to claiming against the escrow fund and has now apparently changed its view. It appears the explanation is simply that encouraged by the discovery evidence and believing it has a better chance of success, the plaintiff has reconsidered its upside on damages and now wants to "go for broke".

25 There is authority from the Court of Appeal that "while delay is not in and of itself a basis for refusing an amendment, there must come a point where the delay is so long and the justification so inadequate that some prejudice to the defendant will be presumed absent a demonstration by the party seeking the amendment that there is in fact no prejudice".[11] There would certainly have been nothing preventing the plaintiff from seeking to increase its claim earlier. On the other hand there are eight months until the trial, the discovery of the plaintiff has not concluded and expert reports have not yet been delivered. The litigation risk to both parties is increased if the amendment is granted but I am unable to infer irreparable prejudice.

26 It was suggested that the offeree shareholders would be prejudiced by this massively inflated claim in various ways. Common sense would suggest this will be so. Instead of merely facing the loss of the $40 million escrow fund that was always at risk of adjustment under the terms of the contract, the offeree shareholders will now have to make provision for a potential contingent liability of $610 million. This however is precisely the prejudice they would have faced had the claim been for $650 million in the first place. Since I have no affidavit evidence, there is nothing before me by which I can conclude that they have taken steps in reliance upon the size of this claim that cannot now be undone. While it is possible that a different litigation strategy might have been adopted or will now have to be adopted, that is nothing more than speculation. In the absence of specific evidence, I am not able to find actual prejudice which cannot be addressed in costs or other reasonable terms. Even unfairness is not enough to create prejudice according to the Court of Appeal.[12]

27 A finding of abuse of process is ordinarily though not invariably related to a finding of prejudice. Pursuing an aggressive litigation strategy does not rise to the level of abuse of process unless it can clearly be shown to be directed at an improper purpose. Specifically the evidence I would find compelling would be evidence that the amendment would give an unfair advantage to one party over another or was designed to undermine a ruling of the court or the provisions of the rules. I do not have such evidence here.

28 In summary I am not able to find that the claim is rendered untenable by these amendments nor that the amendments are for an improper purpose nor that the defendants will suffer a high degree of prejudice.

Conclusion and terms

29 In conclusion the plaintiff has brought itself within the mandatory wording of Rule 26.01 and accordingly leave will be granted to amend the statement of claim in the form proposed.

30 The court is obliged to address any prejudice to the defendant by an award of costs or by other relief which may be granted consequent to amendments. No such terms of relief were proposed as the defendants were requesting the motion be dismissed but notwithstanding the lack of a fall-back position, it seems reasonable to allow for the possibility that terms should be imposed.

31 At a minimum the defendants may amend their statement of defence and may discover on the amendments but they may also have to respond to the amendments in other ways. For example 1 can envision (though it was not in evidence) that due to the vastly increased exposure the offeree shareholders may now have to reconsider cross claims or claims against the former managers. Conceivably some of these decisions could impact on the trial date, could require other adjustments to the timetable or require more substantial relief. The plaintiff will also have to review its productions to ensure it has produced any damage documentation relevant to the increased claim.

32 The costs of the motion will also have to be decided. As always 1 invite counsel to agree on costs but otherwise 1 will hear submissions.

33 An order will therefore go as follows;

a. The plaintiff's motion to amend the claim is granted and the amended statement of claim in the form set out at Tab 1 A of the motion record may issue. The amended claim is to be issued within the next 10 days.

b. The defendants may amend the statement of defence and may discover on the amendments. The plaintiff is to advise whether these amendments will require additional production and when a supplementary affidavit of documents can be available.

c. The amended claim is to be issued within the next 10 days. Further direction regarding the timing of the amended statement of defence and any other steps consequent on the amendment will be given at one of the upcoming case conferences.

d. I will hear further submissions if the defendants seek additional terms.

e. I will hear submissions on costs should that be necessary. If either party seeks to make submissions they are to advise my office within 30 days failing which there will be no order as to costs.

MASTER C.U.C. MacLEOD

cp/s/qljel/qlrdp

1 2011 ONSC 4000; 2011 ONSC 7331; 2011 ONSC 7575 (Master); see also 2011 ONCA

125 (C.A.) in related litigation.

2 This includes the warranty that the corporation is not aware of any intention on the part of any of its 10 largest customers to cease doing business with the corporation or to materially change their existing arrangements with the corporation and that there are no material unresolved disputes with its principal suppliers, shippers or customers. (Article 3.01 (12) (k)).

3 Paragraph 6, amended statement of claim.

4 The CCAA proceeding has been the subject of much activity on the Commercial List in Toronto. See for example 2010 ONSC 2676; 2011 ONSC 733; 2011 ONSC 5017.

5 Paragraph 1 (a), original statement of claim.

6 Paragraph 2 (e), original statement of claim.

7 Rule 26.01.

8 The parties both refer to Plante v. Industrial Alliance Life Insurance Company (2003) 66 O.R. (3d) 74 (S.C.J. -Master) as setting out the test. With respect to abuse of process see also National Trust Co. v. Furbacher [1994] O.J. No. 2385 (S.C.J.) citing with approval C. Evans & Sons Ltd. v. Spritebrand Ltd. and another [1985] 2 All E.R. 415 (C.A.).

9 Plante, supra. See also Chinook Group Ltd. v. Foamex International Inc. (2004), 72 O.R. (3d) 381 (S.C.J. - Master).

10 Hanlan v. Sernesky (1996), 3 C.P.C. (46) 201 (Ont. C.A.).

11 Family Delicatessen Ltd. et. at v. The Corporation of the City of London et. al. [2006] O.J. No. 669 (C.A.) 12.

12 See Kings Gate Developments Inc. v. Colangelo (1994), 17 O.R. (3d) 841 (C.A.).

Tab 3

Case Name:

Allen-Vanguard Corp. v. L'Abbé

RE: Allen-Vanguard Corporation, Respondent (Plaintiff), and Richard L'Abbé et al, Appellants (Defendants)

[2013] O.J. No. 2324

2013 ONSC 2950

Court File No. 08-CV-43544

Ontario Superior Court of Justice

C.T. Hackland J.

May 22, 2013.

(12 paras.)

Appeal From:

On appeal from the Order of Master MacLeod pursuant to which he granted leave to the respondent to amend its statement of claim to increase its claim for damages from $40 million to $610 million against the former shareholders of Med-Eng Systems Inc. (Med-Eng shareholders) for alleged misrepresentations and breaches of contract of Med-Eng in the course of the sale of the business of Med-Eng to the respondent. The Master's order also permitted the respondent to add the phrase "Fraudulent misrepresentations and ..." such that the relevant paragraph now reads: As a result of the fraudulent misrepresentations and breaches of representations and warranties by MES, the Defendants are directly liable to indemnify Allen-Vanguard [the respondent] for the damages which have been caused to Allen-Vanguard.

Counsel:

Ronald G. Slaght, Q.C. for the Respondent (Plaintiff).

Thomas G. Conway and Calina N. Ritchie for the Appellants (Defendants).

ENDORSEMENT

1 C.T. HACKLAND J.:-- The Master held that the proposed amendment fell within the mandatory wording of Rule 26.01 of the *Rules of Civil Procedure* which provides:

> On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.
>
> (underlining added)

2 The Master was well aware of the fact that the amendment if granted would expose the Med-Eng shareholders to potential liability for the full purchase price of the business and not simply for their respective interests in the $40 million holdback fund created on closing in order to secure any possible claims for misrepresentation and breach of warranty, as provided for in an escrow agreement. The amendment in issue is indeed potentially "game changing", as the Master observed.

3 The appellants challenge the Master's order on the basis that the proposed amendment was not tenable. The law is clear that an amendment to a pleading should not be granted if it is clearly untenable in law or on the facts as pleaded. Whether or not the amendment is tenable depends significantly on the interpretation of the Share Purchase Agreement which governed the sale of the business.

4 On the facts of this case, it is common ground that all of the critical representations and warranties were given by Med-Eng management on behalf of the corporation being acquired and not by the vendors, the offeree shareholders. Furthermore, it is well settled that shareholders are not vicariously liable for the acts of corporations in which they hold shares. This common law principle is enshrined in section 92 of the *Ontario Business Corporations Act*. The Master's reasons reflect that he was well aware of these considerations.

5 It would appear to be common ground in this case that any liability on the part of the vendor shareholders could only be based on an obligation arising from the Share Purchase Agreement in the context of fraud. As the Master accurately observed, the effect of this amendment to the pleading will be totally dependent on proving fraud. Obviously in the context of this pleadings motion the court is not in a position to assess whether fraud can be proven on the evidence.

6 Mr. Conway for the appellants argued persuasively that Article 7.02 of the Share Purchase Agreement was designed to limit any claims for damages for misrepresentation to the $40 million escrow fund. However the waiver or limitation of claims in Article 7.02 itself contains the limitation "other than those [remedies] arising with respect to any fraud". As the Master observed, this limitation does not itself create a right of action against the offeree shareholders. It is less than clear what the exclusion of fraud from Article 7.02 actually means. This may be a matter for parol evidence at trial. The Master held that he was unable to find only one possible interpretation of the contract and accordingly could not definitively say that the proposed amendment was untenable.

7 I respectfully agree with the Master's analysis, which is captured in paragraph 22 of his careful

reasons:

> Since there is no fraud asserted against any defendant offeree shareholder, the defendants contend that this provision in article 7.02 (5) is a complete defence to a claim beyond the $40 million in the escrow fund. They may be right. Mr. Conway puts this argument persuasively and it is consistent with the intent of the agreement to limit the exposure of the vendors. Nevertheless I am not able to say with certainty that this is the only possible interpretation of the agreement. Mr. Lederman argues that no court can condone an interpretation which would unjustly enrich the former shareholders at the expense of the plaintiff if it was a victim of fraudulent misrepresentation. There is sufficient ambiguity in these interrelated provisions that I am unable to find only one possible interpretation of the contract. I cannot say that on the face of the agreement the plaintiff could never succeed.

8 The respondent submits that on this pleadings motion, the court lacks the necessary evidence of the factual matrix within which the Share Purchase Agreement was negotiated. It is suggested that such evidence will help to explain how it was intended that the parties deal with claims for fraud in excess of the $40 million escrow fund. It is submitted by the respondent that Article 7.07 of the Share Purchase Agreement is not simply a tax adjustment clause, rather it was intended as a post closing remedial provision which, in the case of fraud, would result in an actual reduction or partial refund of the purchase price.

9 Like the Master, I cannot say that the proposed amendment was untenable in the sense that it could never succeed. And I specifically do not accept the appellants' submission that it was an error of law for the Master to fail to articulate the specific ambiguity in the Share Purchase Agreement on which the respondent's amendment could succeed. Such a requirement could not be met on the evidentiary record available on a pleadings motion and would be contrary to the mandatory requirement in Rule 26.01 that leave to amendment pleadings shall be granted in the absence of prejudice that cannot be compensated in costs or by an adjournment.

10 On the question of delay and abuse of process, I decline to interfere with the Master's exercise of discretion on this largely factual consideration. I understand and expect that the Master will hear submissions on whether an adjournment of the current trial dates is required in view of the amendments herein or whether any other terms are necessary to avoid prejudice to the appellants.

11 In summary, I can find no error of law in the Master's reasons nor any error in the manner in which he has exercised his discretion in allowing the respondent to amend its pleadings. The appeal is therefore dismissed.

12 The respondent may make a written submission on costs within 14 days of the release of this endorsement and the appellants may respond within 14 days of receiving the respondent's submission.

C.T. HACKLAND J.

cp/e/qlcct/qlrdp

Tab 4

ONTARIO CIVIL PRACTICE 2014

by

PROFESSOR GARRY D. WATSON, Q.C.

and

MICHAEL McGOWAN
of the Ontario Bar

Contributing Editor

Derek McKay
of the Ontario Bar

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RULE 6.1 — SEPARATE HEARINGS

Highlights

This Rule, introduced in 2010, permits separate hearings on different issues, such as liability and damages, provided the parties consent.

On the issue of separate hearings, Justice Osborne recommended that the Civil Rules Committee (CRC) "should consider addressing bifurcation in a rule that would permit an order for bifurcation to be made on motion by any party or on the court's own initiative, after hearing from the parties. Any rule permitting bifurcation could reference some or all of the 14 factors listed in *Bourne v. Saunby"* (1993), 38 O.R. (3d) 555, [1993] O.J. No. 2606 (Gen. Div.). The CRC did not accept this recommendation and the new rule requires the consent of the parties to the making of such an order: rule 6.1.01.

An action with an extant jury notice may be bifurcated on consent, but not if any party objects: *Kovach (Litigation Guardian of) v. Kovach*, 2010 CarswellOnt 846, 80 C.P.C. (6th) 40 (C.A.); leave to appeal refused 2010 CarswellOnt 4832, 2010 CarswellOnt 4831 (S.C.C.).

For the prior case law on ordering split trials or hearings see the cases under rule 5.05, and for cases on ordering divided discovery (and hence split hearings) see the cases under rules 30.04(8) and 31.06(6).

SEPARATE HEARINGS

6.1.01 With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.

O. Reg. 438/08, s. 9

Cross-Reference: With respect to ordering separate hearings on a contested basis, see rules 5.05 (Relief Against Joinder), 30.04(8) (Divided Disclosure or Production) and 31.06(6) (Divided Discovery) and the cases collected there.

Case Law

Kovach (Litigation Guardian of) v. Kovach, 2010 CarswellOnt 846, 2010 ONCA 126, 80 C.P.C. (6th) 40, 92 M.V.R. (5th) 39, 316 D.L.R. (4th) 341, [2010] O.J. No. 643, 100 O.R. (3d) 608, (sub nom. *Kovach v. Kovach)* 261 O.A.C. 190; leave to appeal refused 409 N.R. 399 (note), [2010] S.C.C.A. No. 165, 2010 CarswellOnt 4832, 2010 CarswellOnt 4831, (sub nom. *Kovach v. Kovach)* 276 O.A.C. 399 (note) (S.C.C.)

An action with an extant jury notice may be bifurcated on consent, but not if any party objects.

Tab 5

Case Name:

Kovach (Litigation guardian of) v. Kovach

Between
Andrew Kovach and Sarah Kovach, minors by their Litigation Guardian, Wayne Kovach and Wayne Kovach, personally, Plaintiffs, (Respondents), and
Pauline M. Kovach, Mackenzie E. Linn and Barry H. Linn, Defendants, (Appellants)

[2010] O.J. No. 643

2010 ONCA 126

80 C.P.C. (6th) 40

92 M.V.R. (5th) 39

261 O.A.C. 190

2010 CarswellOnt 846

316 D.L.R. (4th) 341

186 A.C.W.S. (3d) 71

100 O.R. (3d) 608

Docket: C50398

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, J.C. MacPherson and R.A. Blair JJ.A.

Heard: November 9, 2009.
Judgment: February 18, 2010.

(46 paras.)

Appeal by the defendants from a decision restoring a Master's order refusing to bifurcate the trial of the liability and damages issues. The respondents sued the appellants for personal injuries suffered in a motor vehicle accident. The action was scheduled to be heard by a jury. The Master held that she had no jurisdiction to make such an order absent the consent of the parties. The order was set aside on the ground that the Master had jurisdiction to bifurcate based on the court's inherent jurisdiction to control its own process. The judge further held that bifurcation was appropriate based on the facts of this case. On appeal, the Master's order was restored on the ground that a jury trial could not be bifurcated if one party objected. The Court also concluded that the judge had applied an incorrect test in evaluating the appropriateness of bifurcation on the facts.

HELD: Appeal dismissed. The case law that upheld the proposition that jury trials could not be split in the absence of consent had not been misunderstood and misapplied. It was a well-entrenched principle in Ontario that a litigant had the inherent right to have the issues of fact or of mixed fact and law decided by a jury, as provided for in s. 108(1) of the Courts of Justice Act. Section 108(1) left no legislative gap to be filled by the exercise of the court's inherent jurisdiction. The word "a" jury in s. 108(1) should not be interpreted as "any" jury. To interpret s. 108(1) in a fashion that permitted the trial of different issues by different juries -- absent consent -- would be inconsistent with the well-entrenched principle that once a trier of fact was seized of an action, it remained seized of it until judgment was pronounced.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 108(1), s. 108(3), s. 138

Rules of Civil Procedure, Rule 6.1.01, Rule 77.02

Appeal From:

On appeal from the Order of Justices James D. Carnwath, Katherine E. Swinton and Denise E. Bellamy of the Divisional Court dated January 15, 2009, with reasons reported at (2009), 95 O.R. (3d) 34, [2009] O.J. No. 150.

Counsel:

Alan L. Rachlin, for the appellants.

Kirk F. Stevens, for the respondents.

The judgment of the Court was delivered by

R.A. BLAIR J.A.:--

Introduction

1 Does the Superior Court of Justice have jurisdiction to bifurcate the trial of liability and damages issues where there is a valid jury notice in place and the parties do not consent? That is the fundamental question raised on this appeal.

2 For quite some time now, it has been accepted that the answer in Ontario was "no." We are now asked to reconsider, or to re-affirm, that understanding, at least for the period prior to January 1, 2010 - the effective date of new rule 6.1.01, which states:

> With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.

Background

The Accident

3 The Kovach plaintiffs and the Linn defendants are parties to an action arising out of a motor vehicle accident that occurred on Halloween in 1999. The action is scheduled to be heard by a jury.

4 Pauline Kovach was out "trick or treating" that evening with her two children, Andrew and Sarah, and two of her nephews. She reversed her van out of a private driveway onto a public road where her van collided with a pickup truck operated by Mackenzie Linn and owned by Barry Linn.

5 Although there were other injuries, Andrew - eight years old at the time - suffered a serious brain injury and pelvic fractures in the crash. The parties agree that his impairments are "catastrophic".

6 As it happens, Aviva Canada Inc. insured both the Kovach and Linn vehicles under separate and unrelated policies. Each policy has third party liability limits of $1 million. It is quite likely that Andrew's damages, if the plaintiffs are successful, will exceed the limits of both policies. His claim is for $11.5 million. If the Linn defendants are found to be even 1% liable, he will have access to coverage under both policies.

7 Both the Kovach plaintiffs and the Linn defendants have served jury notices. The Linn defendants seek to have the trial of the liability and damages issues bifurcated, however. They propose that the trials of these issues be dealt with by different juries.

The Proceedings

8 On November 26, 2007, Master Egan dismissed the Linns' motion to bifurcate the action. She held that she was bound by the decisions of the Divisional Court in *Duffy v. Gillespie* (1997), 36 O.R. (3d) 443, and *Carreiro (Litigation Guardian) v. Flynn* (2005), 195 O.A.C. 315, and had no jurisdiction to make such an order absent the consent of the parties. Those decisions, in turn, relied upon the authority of this Court in *Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills* (1986), 55 O.R. (2d)

56 and on another decision of the Divisional Court in *Shepley v. Libby McNeil & Libby of Canada Ltd.* (1979), 23 O.R. (2d) 354.

9 I will return to a discussion of these authorities later in these reasons.

10 Master Egan did not consider whether, if there were jurisdiction, bifurcation would have been appropriate in the circumstances of this case.

11 On May 2, 2008, Justice Chapnik set aside the Order of Master Egan. She concluded that, on a close reading, *Shepley* did not stand for the proposition that the court lacks jurisdiction to bifurcate a trial where one party has served a jury notice, absent consent, and that the reference to *Shepley* in *Elcano* was *obiter*. Relying on the court's inherent jurisdiction to control its own process and the purposive direction in case management rule 77.02 encouraging expeditious and less costly proceedings, she was satisfied that the Master had jurisdiction to make such an order.[1]

12 Chapnik J. was also satisfied that bifurcation was appropriate on the facts of this case because the liability issue was completely distinct from the damages issues, which were more complex. As well, a finding in the Linns' favour would render the damages trial unnecessary. She therefore concluded that the moving parties had met the onus of establishing a "clear benefit in terms of time and expense", shifting the onus of showing a "real prejudice" outweighing the expediency of bifurcation to the Kovachs, which they had not done: see *General Refractories Co. of Canada v. Venturedyne Ltd.*, 6 C.P.C. (5th) 329 (Ont. S.C.) and *Bourne v. Saunby*, 23 C.P.C. (3d) 333 (Ont. Ct. J.).

13 Lax J. granted leave to appeal and, on January 15, 2009, the Divisional Court (Carnwath, Swinton and Bellamy JJ.) allowed the appeal, set aside the Order of Chapnik J. and restored the Order of Master Egan. The Court held that the Master was correct in concluding that she was bound by the decisions in *Duffy* and *Carreiro* and that there was no good reason to depart from the decision of other panels of the Divisional Court: the law in Ontario is that a jury trial cannot be bifurcated if one party objects. The Court also concluded that Chapnik J. had applied an incorrect test in evaluating the appropriateness of bifurcation on the facts. The power to bifurcate is a "narrowly circumscribed power" to be exercised only in the "clearest cases". This was not one of those exceptional cases.

14 On April 23, 2009, this Court granted leave to appeal from the decision of the Divisional Court.

Analysis

Jurisdiction to Bifurcate an Action Where a Jury Notice Has Been Served

15 Prior to January 1, 2010, neither the *Courts of Justice Act*, R.S.O. 1990, c. C.43, nor the *Rules of Civil Procedure* expressly conferred the power to bifurcate a civil trial. As Justice Morden noted at p. 59 in *Elcano*, however, this fact "does not ... mean that [the power to bifurcate] may not be part of the inherent jurisdiction of the court". Indeed, as he said, the jurisprudence accepts that the power exists on this basis, to be exercised with caution, but in the interests of justice. But he added a clarification - the statement that underlies the debate on this appeal:

> It has been held that the power may not be exercised where one of the parties has served a jury notice: *Shepley v. Libby McNeil & Libby of Canada Ltd; Clifford McKenzie et al., Third Parties* (1979), 23 O.R. (2d) 354, 9 C.P.C. 201.

16 Rightly or wrongly, jury cases have long been considered to provide an exception to the court's power to split a trial based on its inherent jurisdiction. The power was not to be exercised in such cases. On behalf of the appellants, Mr. Rachlin argues that the jurisprudence on which this principle is based has been misunderstood and misapplied, and that it does not support the jury exception proposition. Moreover, he submits, Justice Morden's exclusion of jury trials from the reach of inherent jurisdiction in *Elcano* - based on *Shepley* - was *obiter dicta*, and is therefore not binding.

17 I do not accept these submissions.

18 First, Justice Morden's comment in *Elcano* is not *obiter dicta*, in my view. An expert in procedural matters, Justice Morden was not given to discursive comments. It is true that *Elcano* was not a jury case. Having concluded that the court's inherent jurisdiction empowered it to bifurcate a trial in appropriate circumstances, however, it was necessary for him to state the exception in order to make the proposition he was enunciating accurate. This does not make the caveat he expressed *obiter*; it was essential to his reasoning process, and therefore part of the *ratio decidendi* of the decision.

19 Secondly, the *Shepley* decision does stand for the proposition for which it was cited. At p. 355, the Divisional Court said:

> Assuming, without deciding, that a Judge sitting in Motions Court has the authority under the Rules or the inherent jurisdiction of the Court to direct the trial of this issue at this stage of the proceedings, in our opinion he does not have jurisdiction to sever an issue of fact or mixed fact and law ... for determination before trial where there is a valid jury notice subsisting. The plaintiff, having properly served the jury notice, has a right which is conferred by s. 62(1) of the *Judicature Act*, R.S.O. 1970, c. 228 [the old equivalent of what is now s. 108(1) of the *Courts of Justice Act*] to have all the issues of fact tried by a jury subject only to the jury notice being struck out by a Judge, or subject to the discretion of the Judge at trial (s. 62(3)).

20 In *Shepley*, the motion judge relied on the inherent jurisdiction of the court to sever a limitation issue for determination prior to the pending jury trial. For the reasons outlined above, the Divisional Court held that he could not. Mr. Rachlin contends that *Shepley* does not stand for the proposition that a jury matter may never be severed, but rather for the proposition that bifurcation is inappropriate where the result will deprive a party of the right to have all issues raised determined by a jury (the plaintiff in *Shepley* had been deprived of his right to have the limitation issue decided by a jury). Here, the appellants argue, they do not seek to deny the respondents of the right to trial by jury; at most, the order sought would require separate trials of liability and damages by *different* juries.

21 *Shepley* may indeed stand for the proposition that it is *inappropriate* to split a trial where a party

will be deprived of the right to have factual issues determined by a jury. However, the *ratio* of the case is that the court lacks *jurisdiction* to do so in a jury case. The plaintiff in *Shepley* argued *in the alternative* that, if it had the jurisdiction to do so, "the Court *ought not to* have made the order because it thereby deprive[d] the plaintiff of his right to have that issue tried by a jury..." (emphasis added). Thus, the argument only arose in that case if the court decided there was jurisdiction to make the bifurcation order in the first place.

22 *Shepley* is the lynch-pin in the appellants' analysis because the attempt to undermine the authority of *Elcano* - and of *Duffy* and *Carreiro* in the Divisional Court, which are both founded on *Elcano* and *Shepley* - depends upon the conclusion that *Shepley* has been misunderstood and misapplied. But it has not been misunderstood and misapplied, in my view. Given the foregoing analysis, the appellants' attempts to distinguish the line of jurisprudence upholding the proposition that jury trials may not be split, in the absence of consent, fall away.

23 There is a further basis upon which the appellants' position founders.

24 It is a well-entrenched principle in Ontario that a litigant has the inherent right to have the issues of fact or of mixed fact and law decided by a jury (except in cases where the right has been taken away by statute). This principle is embodied in subsection 108(1) of the *Courts of Justice Act*, which states:

> In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided.

25 The language of s. 108(1) provides legislative support for the notion that a party may require the issues to be tried by a single jury, i.e., "by a jury." Subsection 108(3) provides an exception to this principle by stipulating that the court may order issues of fact to be tried, or damages assessed, or both, by a judge alone. But - contrary to the appellants' argument - s. 108(1) leaves no legislative "gap" to be filled by the exercise of the court's inherent jurisdiction: see *Re Stelco Inc.* (2005), 75 O.R. (3d) 5 (C.A.), at para. 35. This conclusion is reinforced by the decision in *Shepley* where, on the basis of the substantially identical predecessor of s. 108(1),[2] the Divisional Court held that there is "[no] jurisdiction to sever an issue of fact, or mixed fact and law ... for determination before trial where there is a valid jury notice subsisting."

26 Moreover, I do not accept the appellants' submission that the word "a" jury in s. 108(1) should be interpreted as "any" jury. Had the legislature intended such a marked departure from the normal and long-standing practice of trials by "a" judge or "a" jury, it would have said so by using the words "trial by any jury" or, simply, "trial by jury." It did not do so.

27 To interpret s. 108(1) in a fashion that permits the trial of different issues by different juries - absent consent - would also be inconsistent with the well-entrenched principle that once a trier of fact is seized of an action, it remains seized of it until judgment is pronounced. The following passage from the decision of Martin J.P.C. in *The "Leonor"*, [1917] 3 W.W.R. 861, at p. 871 - cited with approval in *Re Regina and Breckner* (1983), 6 C.C.C. (3d) 42 (B.C.C.A.), at p. 52 - captures this principle well:

> Once a Judge is so seized of a cause or motion he is the sole and only tribunal which can exercise jurisdiction over it (unless prohibited by a Higher Court) and from the time he takes his seat upon the bench at the beginning of the hearing till he leaves it after judgment is pronounced, no other Judge of co-ordinate jurisdiction can either by physical force or by writing under his hand usurp his functions or eject him from his seat, or constitute another forum to which the parties may lawfully resort, which is simply usurpation and ejection in another form.

28 Juries are judges of the facts, and the same principle applies once a matter has been submitted to the jury for determination.

29 Mr. Rachlin asks why in principle, if there is inherent jurisdiction to bifurcate in judge alone cases, or as between a judge and jury, it should be different for jury cases (acknowledging that there may be differences in the factors to be considered in determining whether to bifurcate or not in the different types of cases). He submits that to permit bifurcation of issues into different jury trials - even with different juries - does not deprive a litigant of the right to have all issues of fact or of mixed fact and law determined by a jury - the impediment identified in *Shepley*. Furthermore, it is consistent with modern principles of case management, as expressed in former rule 77.02, and various judicial pronouncements about the need for courts to control their own processes and the need to conserve scarce public resources: see, for example, *Ashmore v. Corp. of Lloyd's*, [1992] 2 All E.R. 486 (H.L.); *General Refractories* at paras. 12-13; *Woodglen & Co. v. Owens*, [1995] O.J. No. 1360, at paras. 10-13.

30 There are a number of answers to this hypothetical question. For one, when issues are separated in a judge alone trial, it is the same judge - absent consent to the contrary - who deals with all the issues. He or she simply does so at different times. This is because of the principle of seizure discussed above. For another, s. 108(3) of the *Courts of Justice Act* provides specific statutory authority in a jury case for issues to be removed from the jury to be tried by judge alone. No such authority exists for the splitting of issues to be tried by two or more juries.

31 In addition, neither the provisions of former rule 77.02 nor the *Ashmore* line of jurisprudence assists the appellants in these circumstances.

32 Rule 77.02 stated:

> The purpose of this Rule is to establish a case management system throughout Ontario that reduces unnecessary cost and delay in civil litigation, facilitates early and fair settlements and brings proceedings expeditiously to a just determination while allowing sufficient time for the conduct of the proceeding.

33 This rule accurately reflects an important philosophy underpinning the introduction of case management in Ontario: the expeditious, but just and less costly, determination of case managed civil proceedings. However, bifurcation is broader than case management, and there is nothing in former Rule 77 - the case management rule - that touches on the severance of issues in an action for separate trials. Indeed, when the Rules Committee enacted the new rule governing separate hearings, it placed it in a part

of the rules far removed from case management. Rule 6.1.01 - effective January 1, 2010 - is the first time a rule speaking to bifurcation has been promulgated. It signals that, in the opinion of the Rules Committee at least, the bifurcation of a trial, jury or non-jury, is not generally a good idea unless the parties consent. To repeat, rule 6.1.01 states:

> With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.

34 This new rule may well permit the bifurcation of issues of fact or of mixed fact and law even where a jury notice has been filed, *where the parties consent*, thus surmounting the jurisdictional impediments previously in place. But the new rule does not apply to the case at bar.

35 In *Ashmore*, Lord Roskill made the following oft-cited remark, at p. 488:

> The Court of Appeal appear to have taken the view that the plaintiffs were entitled as of right to have their case tried to conclusion in such manner as they thought fit and if necessary after all the evidence on both sides had been adduced. With great respect, like my noble and learned friend, I emphatically disagree. In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues.

36 Without in any way detracting from the force of Lord Roskill's reflections, however, I make the following observations. First, *Ashmore* was a commercial case and did not involve the question of severing issues in a proceeding (jury or non-jury). Secondly, I agree with the statement of E. Macdonald J. in *Woodglen*, at para. 11, concerning the *Ashmore* comment:

> Opposite this objective, I am mindful of the very persuasive argument ... that this objective should not compromise or prejudice either party to the litigation by the making of orders such as the one sought today by the plaintiffs. I agree that, as a general proposition, convenience, the saving of time and the saving of costs for the litigants, as well as for the State, are secondary to the overriding concern that no party should be prejudiced as the result of an order such as the one sought today by the plaintiffs.

37 The key is prejudice to the rights of a party in the litigation. In the absence of statutory or rules-based authority to do so, there are sound reasons in principle for adopting the view that a court does not have jurisdiction to bifurcate issues in a jury trial - or, to put it in the words of Justice Morden in *Elcano* - "that

the power *may not be exercised* where one of the parties has served a jury notice."

38 First, there is the familiar injunction in s. 138 of the *Courts of Justice Act* that, as far as possible, multiplicity of proceedings is to be avoided. Since they do not want to transgress the right to have one's issues tried by a jury, the appellants assert that the issues in a bifurcated jury trial can be tried by two (or more) juries. Mr. Rachlin was not able to refer us to a single case where that had ever been done, however, and the implications inherent in such an order are disquieting. Multiple appeals in the same action, with the delays and substantial costs accompanying them? Multiple juries, with the possibility of inconsistent findings between them? Questions about two triers of fact being "seized" of the same action? As a practical matter, the ability of a judge at the motion stage to determine whether there will be no overlap on the evidence relating to both liability and damages at trial, is something that is almost impossible to predict accurately. The safer approach - for which the Rules Committee has now opted - is not to permit bifurcation in jury cases unless there is consent. Where there is consent, one party freely gives up its right to have the issues tried by a single jury.

39 Related to these concerns is the long-ago expressed judicial admonition of Meredith C.J. in *Waller v. Independent Order of Foresters* (1905), 5 O.W.R. 421 (Div. Ct.), at p. 422, that bears repeating:

> Experience has shewn that seldom, if ever, is any advantage gained by trying some of the issues before the trial of the others is entered upon...

40 This statement was cited with approval in *Elcano*, at p. 59, and more recently, it has been reiterated at the trial level by Shaughnessy J - a former Regional Senior Justice familiar with the challenges of allocating judicial resources - in *Blanchette v. Jody Squires*, 76 C.C.L.I. (4th) 304 (Ont. S.C.), at paras. 23-24.

41 A number of the considerations I have touched on may not go directly to jurisdiction. They are more clearly tied to the *appropriateness* of granting a bifurcation order in particular circumstances - which this Court has said in *Elcano*, at p. 59, is only to be done "in the clearest cases." Nonetheless, they underscore the rationale behind the interpretation I have given to s. 108(1) above.

42 The practice in Ontario has long been understood to preclude the bifurcation of trials where a jury notice has been served, in the absence of consent. To reverse that practice, as the appellants seek, would be a major change in the law. In Ontario, it is primarily the role of the Rules Committee to develop new rules respecting the practice and procedure in civil matters. In doing so, it takes into account the needs of the system viewed through the experience of judges and practitioners across the province. Much better that a stark change in practice, such as that proposed by the appellants - reversing a long-standing and fundamental right to trial by a single jury - be left to the legislature or the Rules Committee - a responsibility that the Rules Committee has now fulfilled.

43 I would not give effect to this ground of appeal.

The Appropriate Test for Bifurcation

44 In view of my conclusion that the court did not have jurisdiction to order the bifurcated trial of issues

sought by the appellants in this case, it is unnecessary to consider whether Chapnik J. erred in applying a "clear benefit of time and expense" test, as opposed to a "clearest of cases" test, and I decline to do so.

Disposition

45 For the foregoing reasons, I would dismiss the appeal.

46 The respondent is entitled to its costs, fixed in the amount of $8,000.00, inclusive of disbursements and GST.

R.A. BLAIR J.A.
S.T. GOUDGE J.A.:-- I agree.
J.C. MacPHERSON J.A.:-- I agree.

cp/e/qlaim/qlpxm/qljyw/qlhcs/qlcas/qljyw/qlana

1 Rule 77.02 was amended on January 1, 2010. References to the rule throughout these reasons refer to the old rule 77.02 which was in effect during all of the proceedings under appeal.

2 *Judicature Act*, R.S.O. 1970, c. 228, s. 62(1); *Judicature Act*, R.S.O. 1980, c. 223, s. 60(1).

Tab 6

Case Name:

Mazza v. Smith

Between
Antonio Mazza, Rose Mazza, Grazia Gaio and Kristy Feeny by her Litigation Guardian, Grazia Gaio, Plaintiffs, and
Jeffery Smith and Allstate Insurance Company of Canada, Defendants, and
Gregory Laird, Pilot Insurance Company, and Haber Blain Insurance Brokers Ltd., Third Parties
And between
Eva Grof, Frank Grof Jr., Jeffrey Grof and Jason Grof, Plaintiffs, and
Jeffery Smith and AXA Canada Inc. and Greg Laird, Defendants, and
Pilot Insurance Company and Haber Blain Insurance Brokers Ltd., Third Parties
And between
Jeffery Smith, Plaintiff, and
Gregory Laird, Pilot Insurance Company and Haber Blain Insurance Brokers Ltd, Defendants

[2009] O.J. No. 283

80 M.V.R. (5th) 200

70 C.C.L.I. (4th) 280

[2009] I.L.R. I-4797

2009 CarswellOnt 303

Court File Nos. 41871/06A, 32617/04A, 37539/05

Ontario Superior Court of Justice

J.B. Shaughnessy J.

Heard: January 6, 2009.
Judgment: January 23, 2009.

(37 paras.)

Civil litigation -- Civil procedure -- Trials -- Severance of issues of parties -- Motion by third party insurer for bifurcation of three trials to determine issue of defendant's coverage dismissed -- Actions arose from motor vehicle accident involving four drivers -- Defendant denied liability and third parties insurer and insurance agent -- Insurer claimed coverage cancelled prior to accident for non-payment of premiums -- Defendant sued agent for negligence in not remitting proper information to insurer -- Defendant's credibility at issue and negative finding in bifurcated proceeding could have impact on determination of other substantive issues at trial -- Bifurcation not likely to result in cost or time savings.

Insurance law -- Actions -- By insured against insurer -- Motion by third party insurer for bifurcation of three trials to determine issue of defendant's coverage dismissed -- Actions arose from motor vehicle accident involving four drivers -- Defendant denied liability and third parties insurer and insurance agent -- Insurer claimed coverage cancelled prior to accident for non-payment of premiums -- Defendant sued agent for negligence in not remitting proper information to insurer -- Defendant's credibility at issue and negative finding in bifurcated proceeding could have impact on determination of other substantive issues at trial -- Bifurcation not likely to result in cost or time savings.

Motion by Pilot Insurance for bifurcation of the trials of Mazza's and Grof's action in order to determine whether Smith was insured by Pilot when the motor vehicle accident giving rise to the actions took place. The accident gave rise to a third action commenced by Laird, for which Pilot also sought bifurcation to determine the issue of whether Smith was operating an insured vehicle and whether his claim was statute-barred. The accident took place when Smith's southbound vehicle crossed into the northbound lane of Highway 35, colliding with the northbound vehicles of Grof and Mazza. Smith alleged he was forced into the northbound lane by Laird's northbound vehicle as it entered the southbound lane to pass the Mazza and Grof vehicles. Laird denied he crossed into the southbound lane. Smith sued Laird for his injuries and named Pilot as a party defendant, but his claim against Pilot was dismissed on consent. Smith claimed he was insured under a Pilot policy at the time of the accident, but Pilot claimed the policy was properly cancelled for non-payment of premiums prior to the accident. There were allegations of negligence on the part of Haber Blain, insurance agents for Pilot who acted on Smith's behalf to obtain insurance coverage. Haber Blain opposed bifurcation, submitting this would result in procedural land substantive problems which would prejudice Smith and Haber Blain.

HELD: Motion dismissed. Smith's credibility was at issue with respect to the insurance coverage as well as in relation to liability for the accident and in his third party claim against Haber Blain. With credibility being a focal issue, the potential existed for inconsistent verdicts. IF the insurance coverage issue was bifurcated, any adverse credibility finding against Smith could seriously impact his credibility in the subsequent trials

and would also adversely affect Pilot, if it was obliged to defend Smith. Bifurcation was not likely to significantly reduce costs or time.

Statutes, Regulations and Rules Cited:

Insurance Act, R.S.O. 1990, c. I.8, s. 267.6, s. 276.6(1)

Counsel:

Alan L. Rachlin, for Pilot Insurance Company, the Moving Party.

Chris Stribopoulos, for Haber Blain Insurance Brokers Ltd., the Responding Party.

Andrew Elrick, for the Plaintiffs.

REASONS ON MOTION

1 J.B. SHAUGHNESSY J.:-- The three above noted actions arise out of a motor vehicle accident that occurred on June 28, 2003 on Highway 35 in the Township of Manvers, in the City of Kawartha Lakes. The accident involved vehicles driven by Jeffery Smith, Frank Grof Jr., Antonio Mazza and Gregory Laird.

2 The Third Party Defendant, Pilot Insurance Company seeks an order bifurcating the trial in the Mazza action (action 41871/06A) and the Grof action (action 32617/04A) in order that the issue of whether Jeffery Smith was insured by Pilot at the time the motor vehicle accident occurred. Pilot Insurance Company also seeks an order bifurcating the trial of action 37539/05 in order that the issue of whether Jeffery Smith was operating an uninsured vehicle at the time of the motor vehicle accident and whether Mr. Smith's claim is statute barred by the provisions of S. 267.6 of the Insurance Act. Finally, Pilot seeks an order that the aforementioned bifurcated trials of the insurance coverage issues be tried together, or one after the other, as the trial judge may direct.

BACKGROUND INFORMATION

3 The police report details that the vehicle driven by Jeffery Smith was proceeding southbound on Highway 35, when it crossed into the northbound lane striking the northbound Grof motor vehicle and the Mazza vehicle.

4 Jeffery Smith in his pleadings alleges that he was forced into the northbound lanes as a result of the northbound Laird vehicle which had crossed into the southbound lane to pass one or both of the northbound Mazza and Grof vehicles. Mr. Laird denies having entered the southbound lane prior to the collision. Accordingly, liability as between Jeffery Smith and Gregory Laird is in dispute.

5 As a consequence of the motor vehicle collision, Frank Grof Sr., a passenger in the Grof vehicle was fatally injured. His family commenced the Grof action claiming damages under the Family Law Act.

6 The occupants of the Mazza vehicle commenced their action claiming damages for injuries arising from the collision.

7 Jeffery Smith sustained extensive injuries and he commenced his action against Gregory Laird. He also named Pilot Insurance Company and Haber Blain insurance Brokers Ltd. as party defendants. However the action as against Pilot and Haber Blain was subsequently dismissed on consent.

8 Jeffery Smith alleges that at the time of the motor vehicle accident, he was insured under an automobile policy of insurance issued by Pilot that he obtained on or about June 7, 2002. Mr. Smith states that he agreed to pay the insurance premium by monthly pre-authorized debits from his bank account. It is his discovery evidence that because he had limited funds he requested monthly payments of the premium as he could not pay a lump sum payment.

9 It is the position of Pilot Insurance Company that the OAP1 Owners Automobile Policy was properly cancelled for non-payment of premiums on or about March 1, 2003 by way of a registered letter dated February 11, 2003.

10 Haber Blain Insurance Brokers are the insurance agents who acted on Mr. Smith's behalf to obtain insurance coverage with Pilot on or about June 7, 2002. In the various proceedings there are allegations of negligence on the part of Haber Blain. Haber Blain vigorously opposes the bifurcation of the insurance coverage issue proposed by Pilot.

11 The Defendants Allstate Insurance Company of Canada in the Mazza action and AXA Canada Inc. in the Grof action are parties on the basis that their insurance policies issued to the respective Plaintiffs indemnify those Plaintiffs in respect to all claims against all uninsured and inadequately insured motorists pursuant to the standard automobile policy in force. Accordingly if it is determined that Jeffery Smith caused the motor vehicle collision and Mr. Smith was uninsured or inadequately insured then Allstate and AXA policies would respond.

12 Pursuant to the Order of Justice Glass dated April 5, 2007, all three actions were ordered to be tried together or in such manner as the trial judge may direct.

13 There are Jury Notices filed in all three actions.

THE INSURANCE COVERAGE ISSUE

14 Jeffery Smith commenced third party actions in each of the Grof and Mazza actions against Pilot Insurance Company and his insurance broker, Haber Blain Insurance Brokers Ltd. claiming indemnity for any and all amounts for which he may be found liable to the plaintiffs and he also claims his costs for defending the actions brought by these plaintiffs.

15 Jeffery Smith chose to proceed against Pilot by way of a Third Party Claim. Pilot could have brought a declaratory action to address the coverage issue as between it and Jeffery Smith. Pilot however elected not to do so and accordingly has adhered to the forum and procedural manner in which Jeffery Smith chose to determine the insurance coverage issue.

16 Credibility is a crucial issue in the Third Party Claims against Pilot and Haber Blain in the Mazza and Grof actions. Counsel for Haber Blain submits that if Pilot is permitted to bifurcate the insurance coverage issue and have that issue proceed to trial prior to the Trial of the main action, any adverse credibility findings against Jeffery Smith could seriously impact the credibility of Mr. Smith in the subsequent trials of the main actions. Further, if Pilot is unsuccessful in the bifurcated trial then Pilot would be in the precarious position of defending Mr. Smith in the main action after placing his credibility in issue in the bifurcated trial.

17 The facts, at the present time, relating to the insurance coverage issue are as follows:

(a) Pilot admits that it received from Haber Blain Mr. Smith's signed Application for Automobile Insurance and a signed authorization form permitting Pilot to make monthly withdrawals from Mr. Smith's bank account for payment of the monthly insurance premiums and a copy of Mr. Smith's void cheque in June 2002. However the documentation was lost.

(b) In September 2002 as a result of follow up by Haber Blain, Pilot realized that it had no documentation relating to Mr. Smith's Application for automobile insurance and accordingly they requested further copies from Haber Blain.

(c) In this period of time Pilot did not attempt to withdraw the monthly insurance premiums from Mr. Smith's bank account until November 12, 2002 and then Pilot attempted to withdraw all of the prior outstanding insurance premiums totaling $ 662.14.

(d) It is Jeffery Smith's evidence that he chose to make monthly payments because he could not afford to pay a significant lump sum.

(e) By November 12, 2002 Jeffery Smith had moved and closed his bank account. As a consequence Pilot was unable to secure payment. Pilot nevertheless attempted to secure payment from Mr. Smith's closed bank account of the sum of $752.06 on December 12, 2002 all the while being aware that the bank account was closed.

(f) At discovery it is Pilot's evidence that a Schedule of Payments would be automatically issued by Pilot to its insured setting out the dates upon which Pilot would be attempting to withdraw the monthly premium payments. However there is no evidence that Mr. Smith received any Schedule of Payments. The evidence at discovery reflected that only one Schedule of Payments was prepared and sent to Mr. Smith's address which Pilot was aware had changed.

(g) Pilot ultimately received Jeffery Smith's new banking information and on January 12, 2003 Pilot attempted to withdraw insurance premiums totaling $862.54 from Mr. Smith's bank account. Jeffery Smith gave evidence on his discovery that he had no information as to when Pilot would be attempting to withdraw funds and he could not afford to pay $ 862.45 in one lump sum and that is why he chose to make monthly

payments.

(h) Pilot admits that it did not inform Mr. Smith that it would attempt to withdraw a lump sum of $ 862.45 from his new bank account.

(i) Pilot sent a registered letter February 11, 2003 effectively cancelling the policy March 1, 2003. However the allegation is that this letter had the incorrect street name and the wrong postal code even though Mr. Smith's void cheque that Mr. Smith forwarded to Pilot contained the correct address. However as Mr. Rachlin submits Statutory Condition # 11 of the policy provides that a contract of insurance is terminated effective 15 days after the registered letter notifying the insured of the cancellation is on receipt at the Post Office to which it is addressed. Again Mr. Smith's credibility is in issue as he claims he never received the registered letter notifying him that the policy is cancelled. Jeffery Smith alleges he no longer lived at the address the registered letter was sent and that he advised his broker Haber Blain of the change in address.

(j) Mr. Smith also alleges that the insurance policy with Pilot was issued late; that he never received the actual paper policy as it was sent to the wrong address; that he never received a schedule of monthly premium payments; that by the time the paper policy was issued a substantial number of monthly pre-authorized debits had accrued and that he was not advised that all the accrued debits would be deducted from his bank account at one time.

(k) In addition to the allegations against Pilot, Jeffery Smith claims alternatively that if the policy was properly cancelled, then Haber Blain was negligent in that he states that he advised Haber Blain that he had moved from the address to which the registered cancellation letter was sent. He also alleges that he sent a void cheque for his new bank account but that Haber Blain lost the cheque. He further alleges that a representative of Haber Blain told him the accrued premium debits would not be payable in a lump sum but rather they would be payable in equally monthly payments. He further alleges that a representative of Haber Blain told him that the insurance policy would not be cancelled. Haber Blain denies all these allegations.

18 There are four issues at the trial of these actions:

(1) Liability for the motor vehicle collisions;
(2) Assessment of damages in all 3 actions;
(3) A determination of whether the Pilot insurance policy was properly cancelled;
(4) A determination of whether Haber Blain Insurance Brokers were negligent as alleged by Jeffery Smith.

19 Mr. Rachlin readily concedes that Jeffery Smith's credibility is a thread interwoven into 3 of the

above noted issues for trial. However, he submits that the narrow technical issue for a bifurcated trial is whether Statutory Condition # 11 of the policy has been complied with. Accordingly he submits that the insurance coverage issue is a separate and distinct issue requiring a bifurcated trial.

20 The Defendant Gregory Laird has defended action # 37539/05 (Smith v Laird) on the basis that Jeffery Smith was uninsured as of the date of the motor vehicle collision and consequently Smith is not entitled to recover any loss or damage for bodily injury arising from the use or operation of an automobile by virtue of section 267.6(1) of the Insurance Act.

POSITION OF THE PARTIES

21 It is the position of the Pilot Insurance Company that there is no overlap between the evidence to be adduced at trial with respect to liability and damages and the evidence that will have to be led with respect to the insurance coverage issue. Therefore it is submitted that bifurcation of the issue would not result in any significant duplication of evidence or time and would not raise a real risk of inconsistent findings.

22 The position of Haber Blain Insurance Brokers Ltd. is that there is no viable evidence that there would be any savings of litigation costs or Court time by ordering that the insurance coverage issue be tried prior to the main action. Counsel for Haber Blain submits that if the motion is granted the result will be that Jeffery Smith will be involved in the Third Party insurance coverage trial as well as the main actions relating to liability and damages. Therefore Jeffery Smith will be involved in both trials whether or not he is successful in the trial of the Third Party issue. Accordingly it is argued that the only benefit of bifurcating the insurance coverage issue is if there is a finding that Pilot has no liability.

23 The claims against Haber Blain lie in negligence. Haber Blain has claims for contribution and indemnity as against the Plaintiff Gregory Laird and Pilot as well as a claim for contributory negligence against Jeffery Smith. It is the position of Haber Blain that the 3 actions involve complicated issues of liability and damages that require that evidence be given by all the parties. Finally it is the position of Haber Blain that bifurcating the Third party insurance coverage issue would result in significant prejudice to Jeffery Smith and to Haber Blain.

24 Counsel for the Plaintiffs Grof and Gregory Laird and Counsel for AXA Canada Inc. support the motion brought by Pilot for bifurcation of the insurance coverage issue. Counsel for Allstate Insurance Company of Canada and Counsel for the Plaintiffs Mazza do not oppose the application. Counsel for Jeffery Smith supports bifurcation but on a much different basis than that sought by Pilot. Haber Blain opposes the application.

25 On behalf of Gregory Laird is filed the Affidavit of Robert Sutherland sworn August 10, 2008. Mr. Sutherland's affidavit supports the bifurcation of the insurance coverage issue "and the related issue of whether or not Haber Blain was negligent ..." Therefore the position of Gregory Laird as detailed in the Affidavit of his Counsel is of limited value as Pilot modified the relief sought at the commencement of the hearing of this motion to exclude a determination of the negligence, if any, of Haber Blain.

CASE LAW

26 The case law supports the basic right of a litigant to have all issues resolved in a single trial and that a split trial should be ordered only in the "clearest of cases"(Elcano Acceptance Ltd et al v Richmond, Richmond, Stambler & Mills (1986) 55 O.R. (2d) 56 (C.A.); Sempecos v State Farm Fire & Casualty Co. (2002) 29 CPC (5th) 99 (Div. Ct.) affirmed (2003) 38 CPC (5th) 64 (C.A.). There is also jurisprudence which suggests that the Court will be slow to exercise its jurisdiction and bifurcate issues for trial when one party objects and severance might cause problems. (Elcano supra and Mitchell v Reed Estate (1995) 36 CPC (3rd) 195 (Ont. Gen Div).

27 The onus is on the party seeking bifurcation to demonstrate "an exceptional case" which means that the moving party has to meet a very high burden that the law requires for a bifurcation order. (Kovach v Kovach; [2009] O.J. No. 150, Court file number 228/08, released January 15, 2009 (Ont. Div. Ct).

28 A case that has been generally followed relating to bifurcation of an issue is Bourne v Saunby [1993] O.J. No. 2606 a decision of Justice Peter Tobias. I have considered the applicable criteria in Bourne v Saunby in deciding whether bifurcation of the third party insurance coverage issue is appropriate. While the factors listed in the Bourne case are helpful, the court's discretion to order bifurcation is not confined to a consideration of the list of criteria in that case. The circumstances of the case may require a consideration of other relevant factors.

29 In General Refractories Co. of Canada v Venturedyne Ltd [2001] O.J. No. 746 Justice Himel notes (para 12) that:

> In recent years greater emphasis has been placed on the right and duty of the Court to consider its processes in order to achieve the most just and expeditious determination of disputes.

30 Justice Somers in Shah v Becamon [2007] O.J. No. 1165 (para 2) states that "a third party claim is a derivative action of the main action and draws its life and sustenance from the main action and is wholly dependant on its continuing."

31 There has been case law to the effect that a Court may not sever the issues of liability and damages where a Jury Notice has been filed. (Carreiro (Litigation Guardian of) v Flynn [2005] O.J. No. 877 (Div Ct.) and Duffy v Gillespie (1997) 36 O.R. (3rd) 443.) More recently the Ontario Divisional Court has reviewed the issue of bifurcation of an issue where a Jury Notice has been delivered. In Kovach v Kovach (Court File number 228/08 released January 15 2009) the Court stated that it was not prepared to conclude that under no circumstances may a jury trial be bifurcated. The Court also suggested that: the principles extracted from non-jury cases in support of such a consent proposal should be approached with great caution. Those principles have been enunciated in the knowledge that the same judge will likely hear the issue of liability and damages. What is lacking in those cases is any necessity to appreciate the mischief that might be caused by a matter where one jury hears the liability issue and another hears the damages issue. At the conclusion of the liability issue, there is always the possibility of an appeal by one side or the other. If an appeal is taken, the likelihood of retaining the same jury is remote. With a second jury, there is a danger of inconsistent findings. It is a rare case where there is a clean break between liability and damages. Perforce, findings of liability will ordinarily be inextricably bound with the issue of damages. (para 46).

32 In the Kovach case the Court stated that "a jury trial can never be bifurcated unless all the parties to the action consent." (para 49)

33 The Court in the Kovach case agreed with the reasoning in the Carriero case (supra) and referred to the reasoning of the Court of Appeal in the Elcano decision (supra) that the power to bifurcate is a "narrowly circumscribed power", to be exercised only in the "clearest cases" and that "a court should be slow to exercise the power if one of the parties objects to its exercise." (para. 51). Further the Divisional Court held that the decision to bifurcate a jury trial is more stringent than "a clear benefit of time and expense." (para 54)

ANALYSIS

34 Haber Blain strenuously objects to the bifurcation of the insurance coverage issue on the basis that the bifurcation of the insurance coverage issue raised by Pilot will result in procedural and substantive problems which will prejudice Jeffery Smith and Haber Blain. I agree with this submission .In the material filed, it is proposed by Pilot that the bifurcated issue would be heard May 2009 by a jury. The Plaintiff's actions are not ready for trial and accordingly the trials of the main actions will not likely be ready for trial for approximately another nine to fifteen months. Accordingly, the Jury that would hear the insurance coverage issue would not be the Jury that will hear the main actions. In my opinion if the order was granted and the trials took place as proposed by Counsel for Pilot then the potential for "mischief", as stated in the Kovach case that may be caused by separate juries trying the issues becomes a serious obstacle. The credibility of Jeffery Smith is a very live issue in the insurance coverage issue as well as liability in the main action and in the third party claims against Haber Blain. The Jury will be required to make findings of negligence that will necessarily involve determinations of Jeffery Smith's credibility and the credibility of each of the parties involved in the main actions to assess liability for the motor vehicle accident. Therefore, with credibility being the focal issue, the potential for inconsistent verdicts is obvious.

35 If the third party insurance coverage issue was bifurcated and proceeded to trial prior to the trial of the main actions, any adverse credibility findings against Pilot's alleged insured, Jeffery Smith, will seriously impact his credibility in the subsequent trials of the main actions and will also adversely affect Pilot, if it is then obligated to defend and indemnify Jeffery Smith in the main actions.

36 In the result I am not satisfied that this is an exceptional case nor does it meet the very high burden that the law requires for a bifurcation order. I am also not satisfied, in all the circumstances that bifurcation would likely result in any significant savings in litigation costs or court time. I find there is no clear benefit in terms of time and expense if bifurcation was granted. I find that bifurcation of the third party issue would likely result in prejudice to Jeffery Smith and Haber Blain Insurance Brokers Ltd. Further, in terms of all the issues being litigated, including the issue of the credibility of Jeffery Smith, mandates that the Court not depart from the general rule that "as far as possible, multiplicity of legal proceedings shall be avoided."(S. 138 of the Courts of Justice Act).

37 The application for bifurcation of the third party insurance coverage issue is dismissed. If required, Counsel may contact the Trial Coordinator at Whitby, Ontario to arrange an appointment to speak to the issue of costs.

J.B. SHAUGHNESSY J.

cp/e/qlafr/qlcnt/qlrxg/qlaxw/qlhcs/qlaxr/qlced

Tab 7

Indexed as:

Elcano Acceptance Ltd. et al. v. Richmond, Richmond, Stambler & Mills

[1986] O.J. No. 578

55 O.R. (2d) 56

16 O.A.C. 69

9 C.P.C. (2d) 260

38 A.C.W.S. (2d) 163

Ontario
Court of Appeal

Howland C.J.O., Morden and Thorson JJ.A.

June 4, 1986.

Counsel:

B. O'Brien, Q.C., for appellants.

D.W. Goudie, Q.C., for respondents.

The judgment of the court was delivered orally by

1 MORDEN J.A.:-- We are of the view that the only course open to us in the particular circumstances of this case is to set aside the judgment appealed from and to direct a new trial.

2 The learned trial judge in the course of the trial of this action, which is based upon the alleged professional negligence of the defendant solicitors, decided of his own motion and against the firm objection of counsel for the defendants, that he would deal with the issue of liability only or, more

accurately, an aspect of liability albeit a most important one. He said that he would determine whether or not the standard of care was met by the solicitors.

3 In the circumstances of this case this was not the only issue relating to liability. The defendants alleged that, having regard to the manner in which the plaintiffs sought to recover and in fact recovered on the promissory notes in question, which it was said the defendants had defectively drafted, and other defences raised in the earlier action on the notes unrelated to what the defendants had done, the plaintiffs could not show a causal connection between any alleged loss and the defendants' lapse, if there were one. We will not go into details of these issues or express an opinion on them. It is sufficient to observe that they were issues relating to liability or, at least, liability and damages. The trial judge appeared to recognize this because he noted in the course of his ruling that he was going to concern himself with "the main issue on liability" and that "there are a number of issues raised which of course affect liability indirectly". He intended to dispose of "the issue of liability in the narrow sense in which I have indicated it".

4 He indicated that further evidence might be called after his ruling. In his subsequent reserved reasons for judgment the trial judge, in effect, purported to deal fully with the question of liability. However, at one point in his reasons he said that, apart from "the possible exception of reformation or rectification", the defences raised were still available. With respect to rectification he said that he "was prepared to hold that it would likely not have availed the plaintiffs in the first action". He was confident that "at the end of the entirety of this trial, if negligence is found, some loss will be held to have occurred".

5 At the conclusion of his reasons he stated, for the reasons which he had given, "that the defendant firm of solicitors was negligent" and that "[t]here will be judgment in an amount to be assessed". The formal judgment was signed and entered in the terms just quoted.

6 With respect to the terms of the disposition, the trial judge had earlier in his reasons said: "The question of damages will be the subject of a reference in due course with appropriate directions or will be decided by me once the issue of liability has run its course."

7 It appears from the terms of rule 54.02, which was in force at the time of the judgment (although not at the time of the trial) that the trial judge, without the consent of the parties, was not empowered to direct a reference.

8 Accepting that the power exists, in some circumstances, to split a trial and to render a judgment on one issue in the action only, we are satisfied that it was not exercised properly in this case. As far as the power itself is concerned, we note that it is nowhere expressly conferred, as it is in some other jurisdictions. Provisions which are contained in the rules to enable some issues or matters to be separately dealt with do not bear on this question: see Rule 21 (determination of an issue before trial), Rule 22 (special case), rules 30.04(8) and 31.06(5) (determination of an issue as a prelude to discovery), and rules 37.13(2)(b) and 38.11(1)(b) (directing the trial of an issue in a motion and application respectively).

9 In the argument before us reference was made to the view of the editors of Holmested and Gale on the Judicature Act of Ontario and Rules of Practice (1983), vol. 1, at p. 887ff., that the court has power to direct the separate trial of an issue in an action. To the extent that support for this view is relied upon reference is made to former Rule 73 which, in its concluding clause, provided that where several causes of

action are joined in one action the court "may direct the issues respecting the separate causes of action to be tried separately". It may be thought that this provision merely enabled the court to direct that the causes of action themselves be separately tried. In any event, this wording in Rule 73 has not been carried forward into the new rules: see rule 5.05 which is the closest counterpart to Rule 73.

10 The fact that the power to split a trial is not expressly conferred does not, of course, mean that it may not be part of the inherent jurisdiction of the court and we accept that it exists on this basis, to be exercised in the interest of justice. Resort to it has, in fact, been usefully made: see, e.g., Simpsons Ltd. v. Pigott Construction Co. Ltd. (1973), 1 O.R. (2d) 257, 40 D.L.R. (3d) 47, and Lake Ontario Cement Co. v. Golden Eagle Oil Co. Ltd. (1974), 3 O.R. (2d) 739, 46 D.L.R. (3d) 659. It has been held that the power may not be exercised where one of the parties has served a jury notice: Shepley v. Libby McNeil & Libby of Canada Ltd.; Clifford & McKenzie et al., Third Parties (1979), 23 O.R. (2d) 354, 9 C.P.C. 201.

11 However, since it is a basic right of a litigant to have all issues in dispute resolved in one trial it must be regarded as a narrowly circumscribed power. This approach is supported by the familiar statutory admonition which is continued in s. 148 of the Courts of Justice Act, 1984 (Ont.), c. 11:

> 148. As far as possible, multiplicity of legal proceedings shall be avoided.

There is also the judicial admonition of Meredith C.J.C.P. in Waller v. Independent Order of Foresters (1905), 5 O.W.R. 421 at p. 422: "Experience has shewn that seldom, if ever, is any advantage gained by trying some of the issues before the trial of the others is entered upon ... ". The power should be exercised, in the interest of justice, only in the clearest cases. We would think that a court would give substantial weight to the fact that both parties consent to the splitting of a trial, if this be the case. On the other hand, a court should be slow to exercise the power if one of the parties, particularly, as in this case, the defendant (see Emma Silver Mining Co. v. Grant (1878), 11 Ch. D. 918 at p. 928), objects to its exercise.

12 As we have said, accepting that the power exists, we conclude that it was not exercised properly in this case. Having regard to the course that was followed, in which the trial judge appears to have resolved all issues of liability against the defendant after earlier indicating he would deal with only one of them, we do not think that the issue of liability was properly tried.

13 Since both counsel are agreed that the formal judgment of the trial judge should be regarded as a proper basis for an appeal to this Court to enable it, at least, to determine the correctness of the course of action followed by the trial judge, we are prepared to deal with the matter on this basis.

14 Since we are not satisfied that the record on the issue of liability is complete we think that we should not deal with any aspect of this subject. Accordingly, we express no opinion on the merits, one way or the other, on the substantive correctness of the trial judge's opinion. In all of the circumstances, we think that justice requires a new trial, rather than the continuation of the trial.

15 Accordingly, the appeal is allowed, the judgment below is set aside and a new trial is directed. The appellant shall have the costs of the appeal and one-half the costs of the trial.

Appeal allowed; new trial ordered.

Tab 8

Indexed as:

Garland v. Consumers' Gas Co.

Gordon Garland, appellant;
v.
Enbridge Gas Distribution Inc., previously known as Consumers' Gas Company Limited, respondent, and Attorney General of Canada, Attorney General for Saskatchewan, Toronto Hydro-Electric System Limited, Law Foundation of Ontario and Union Gas Limited, interveners.

[2004] 1 S.C.R. 629

[2004] S.C.J. No. 21

2004 SCC 25

File No.: 29052.

Supreme Court of Canada

Heard: October 9, 2003;
Judgment: April 22, 2004.

Present: Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

(91 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Restitution -- Unjust enrichment -- Late payment penalty -- Customers of regulated gas utility claiming restitution for unjust enrichment arising from late payment penalties levied by utility in

excess of interest limit prescribed by s. 347 of Criminal Code -- Whether customers have claim for unjust enrichment -- Defences that can be mounted by utility to resist claim -- Whether other ancillary orders necessary.

Summary:

The respondent gas utility, whose rates and payment policies are governed by the Ontario Energy Board ("OEB"), bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time. The appellant and his wife paid approximately $75 in LPP charges between 1983 and 1995. The appellant [page630] commenced a class action seeking restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the *Criminal Code*. He also sought a preservation order. In a previous appeal to this Court, it was held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and the matter was remitted back to the trial court for further consideration. As the case raised no factual dispute, the parties brought cross-motions for summary judgment. The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB's orders. The Court of Appeal disagreed, but dismissed the appellant's appeal on the grounds that his unjust enrichment claim could not be made out.

Held: The appeal should be allowed. The respondent is ordered to repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 of the *Code* after the action was commenced in 1994 in an amount to be determined by the trial judge.

The test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment. The proper approach to the juristic reason analysis is in two parts. The plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations. If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case. The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. Courts should have regard at this point to two factors: the reasonable expectations of the parties and public policy considerations.

Here, the appellant has a claim for restitution. The respondent received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The transfer of those funds constitutes a benefit to the respondent. The parties are agreed that the second prong of the test has been satisfied. With respect to the third prong, the only possible juristic reason from an established category that could justify the enrichment [page631] in this case is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are inoperative to the extent of their conflict with s. 347 of the *Criminal Code*. The appellant has thus made out a *prima facie* case for unjust enrichment.

The respondent's reliance on the orders is relevant when determining the reasonable expectations of the parties at the rebuttal stage of the juristic reason analysis even though it would not provide a defence if the

respondent was charged under s. 347 of the *Code*. However, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, criminals should not be permitted to keep the proceeds of their crime. In weighing these considerations, the respondent's reliance on the inoperative OEB orders from 1981-1994, prior to the commencement of this action, provides a juristic reason for the enrichment. After the action was commenced and the respondent was put on notice that there was a serious possibility its LPPs violated the *Criminal Code*, it was no longer reasonable to rely on the OEB rate orders to authorize the LPPs. Given that conclusion, it is only necessary to consider the respondent's defences for the period after 1994.

The respondent cannot avail itself of any defence. The change of position defence is not available to a defendant who is a wrongdoer. Since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. Section 18 (now s. 25) of the *Ontario Energy Board Act* should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and it is not necessary to consider the constitutionality of the section.

This action does not constitute an impermissible collateral attack on the OEB's orders. The OEB does not have exclusive jurisdiction over this dispute, which is a private law matter under the competence of civil courts, nor does it have jurisdiction to order the remedy sought by the appellant. Moreover, the specific object of the action is not to invalidate or render inoperative the OEB's orders, but rather to recover money that was illegally [page632] collected by the respondent as a result of OEB orders. In order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. Section 347 does not contain any such indication.

The *de facto* doctrine does not apply in this case because it only attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation regulated by a government authority is not supported by the case law and does not further the doctrine's underlying purpose.

A preservation order is not appropriate in this case. The respondent has ceased to collect the LPPs at a criminal rate, so there would be no future LPPs to which a preservation order could attach. Even with respect to the LPPs paid between 1994 and the present, a preservation order should not be granted because it would serve no practical purpose, because the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, and because *Amax* can be distinguished from this case. A declaration that the LPPs need not be paid would similarly serve no practical purpose and should not be made.

Cases Cited

Applied: Peter v. Beblow, [1993] 1 S.C.R. 980; explained: Pettkus v. Becker, [1980] 2 S.C.R. 834; Peel (Regional Municipality) v. Canada, [1992] 3 S.C.R. 762; referred to: Garland v. Consumers' Gas Co., [1998] 3 S.C.R. 112; Sprint Canada Inc. v. Bell Canada (1997), 79 C.P.R. (3d) 31; Ontario Hydro v. Kelly (1998), 39 O.R. (3d) 107; Mahar v. Rogers Cablesystems Ltd. (1995), 25 O.R. (3d) 690; Berardinelli v. Ontario Housing Corp., [1979] 1 S.C.R. 275; Sharwood & Co. v. Municipal Financial Corp. (2001), 53 O.R. (3d) 470; Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd., [1976] 2

S.C.R. 147; RBC Dominion Securities Inc. v. Dawson (1994), 111 D.L.R. (4th) 230; Rathwell v. Rathwell, [1978] 2 S.C.R. 436; Reference re Goods and Services Tax, [1992] 2 S.C.R. 445; Mack v. Canada (Attorney General) (2002), 60 O.R. (3d) 737; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961; Transport North American Express Inc. v. New Solutions Financial Corp., [2004] 1 S.C.R. 249, [page633] 2004 SCC 7; Oldfield v. Transamerica Life Insurance Co. of Canada, [2002] 1 S.C.R. 742, 2002 SCC 22; Lipkin Gorman v. Karpnale Ltd., [1992] 4 All E.R. 512; Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63; Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Litchfield, [1993] 4 S.C.R. 333; Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307; R. v. Jorgensen, [1995] 4 S.C.R. 55; Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721; Amax Potash Ltd. v. Government of Saskatchewan, [1977] 2 S.C.R. 576.

Statutes and Regulations Cited

Civil Code of Quebec, S.Q. 1991, c. 64, arts. 1493, 1494.

Constitution Act, 1867, ss. 91(19), (27), 92(13).

Criminal Code, R.S.C. 1985, c. C-46, ss. 15, 347.

Municipal Franchises Act, R.S.O. 1990, c. M.55.

Ontario Energy Board Act, R.S.O. 1990, c. O.13, s. 18.

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 25.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 45.02.

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Smith, Lionel. "The Mystery of 'Juristic Reason'" (2000), 12 S.C.L.R. (2d) 211.

Ziegel, Jacob S. "Criminal Usury, Class Actions and Unjust Enrichment in Canada" (2002), 18 J. Cont. L. 121.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (2001), 57 O.R. (3d) 127, 208 D.L.R. (4th) 494, 152 O.A.C. 244, 19 B.L.R. (3d) 10, [2001] O.J. No. 4651 (QL), affirming a decision of the Superior Court of Justice (2000), 185 D.L.R. (4th) 536, [page634] [2000] O.J. No. 1354 (QL). Appeal allowed.

Counsel:

Michael McGowan, Barbara L. Grossman, Dorothy Fong and Christopher D. Woodbury, for the appellant.

Fred D. Cass, John D. McCamus and John J. Longo, for the respondent.

Christopher M. Rupar, for the intervener the Attorney General of Canada.

Thomson Irvine, for the intervener the Attorney General for Saskatchewan.

Alan H. Mark and Kelly L. Friedman, for the intervener Toronto Hydro-Electric System Limited.

Mark M. Orkin, Q.C., for the intervener the Law Foundation of Ontario.

Patricia D. S. Jackson and M. Paul Michell, for the intervener Union Gas Limited.

The judgment of the Court was delivered by

1 IACOBUCCI J.:-- At issue in this appeal is a claim by customers of a regulated utility for restitution for unjust enrichment arising from late payment penalties levied by the utility in excess of the interest limit prescribed by s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46. More specifically, the issues raised include the necessary ingredients to a claim for unjust enrichment, the defences that can be mounted to resist the claim, and whether other ancillary orders are necessary.

2 For the reasons that follow, I am of the view to uphold the appellant's claim for unjust enrichment and therefore would allow the appeal.

I. Facts

3 The respondent Consumers' Gas Company Limited, now known as Enbridge Gas Distribution [page635] Inc., is a regulated utility which provides natural gas to commercial and residential customers throughout Ontario. Its rates and payment policies are governed by the Ontario Energy Board ("OEB" or

"Board") pursuant to the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13 ("*OEBA*"), and the *Municipal Franchises Act*, R.S.O. 1990, c. M.55. The respondent cannot sell gas or charge for gas-related services except in accordance with rate orders issued by the Board.

4 Consumers' Gas bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time.

5 The LPP was implemented in 1975 following a series of rate hearings conducted by the OEB. In granting Consumers' Gas's application to impose the penalty, the Board noted that the primary purpose of the LPP is to encourage customers to pay their bills promptly, thereby reducing the cost to Consumers' Gas of carrying accounts receivable. The Board also held that such costs, along with any special collection costs arising from late payments, should be borne by the customers who cause them to be incurred, rather than by the customer base as a whole. In approving a flat penalty of five percent, the OEB rejected the alternative course of imposing a daily interest charge on overdue accounts. The Board reasoned that an interest charge would not provide sufficient incentive to pay by a named date, would give little weight to collection costs, and might seem overly complicated. The Board recognized that if a bill is paid very soon after the due date, the penalty would, if calculated as an interest charge, be a very high rate of interest. However, it noted that customers could avoid such a charge by paying their bills on time, and that, in any event, in the case of the average [page636] bill the dollar amount of the penalty would not be very large.

6 The appellant Gordon Garland is a resident of Ontario and has been a Consumers' Gas customer since 1983. He and his wife paid approximately $75 in LPP charges between 1983 and 1995. In a class action on behalf of over 500,000 Consumers' Gas customers, Garland asserted that the LPPs violate s. 347 of the *Criminal Code*. That case also reached the Supreme Court of Canada, which held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and remitted the matter back to the trial court for further consideration (*Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 ("*Garland No. 1*")). Both parties have now brought cross-motions for summary judgment.

7 The appellant now seeks restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the *Code*. He also seeks a preservation order requiring Consumers' Gas to hold LPPs paid during the pendency of the litigation subject to possible repayment.

8 The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB order. He dismissed the application for a preservation order. A majority of the Court of Appeal disagreed with the motions judge's reasons, but dismissed the appeal on the grounds that the appellant's unjust enrichment claim could not be made out.

II. Relevant Statutory Provisions

9 *Ontario Energy Board Act*, R.S.O. 1990, c. O.13

> **18.** An order of the Board is a good and sufficient defence to any proceeding brought or taken against any [page637] person in so far as the act

or omission that is the subject of the proceeding is in accordance with the order.

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B

25. An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

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

15. No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.

347. (1) Notwithstanding any Act of Parliament, every one who

(*a*) enters into an agreement or arrangement to receive interest at a criminal rate, or

(*b*) receives a payment or partial payment of interest at a criminal rate,

is guilty of

(*c*) an indictable offence and is liable to imprisonment for a term not exceeding five years, or

(*d*) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

III. Judicial History

A. *Ontario Superior Court of Justice* (2000), 185 D.L.R. (4th) 536

10 As this case raised no factual disputes, all parties agreed that summary judgment was the proper procedure on the motion. Winkler J. found that the appellant's claim could not succeed in law and that there was no serious issue to be tried. In so finding, he held that the "regulated industries defence" was not a complete defence to the claim. On his reading of the relevant case law, the dominant consideration was whether the express statutory [page638] language afforded a degree of flexibility to provincial regulators. Section 347 affords no such flexibility, so the defence is not available.

11 Nor, in Winkler J.'s view, did s. 15 of the *Criminal Code* act as a defence. Section 15 was a

provision of very limited application, originally enacted to ensure that persons serving the Monarch *de facto* could not be tried for treason for remaining faithful to the unsuccessful claimant to the throne. While it could have a more contemporary application, it was limited on its face to actions or omissions occurring pursuant to the authority of a sovereign power. As the OEB was not a sovereign power, it did not apply.

12 Winkler J. found that the proposed action was a collateral attack on the OEB's orders. The *OEBA* indicated repeatedly that the OEB has exclusive control over matters within its jurisdiction. In addition, interested parties were welcome to participate in OEB hearings, and OEB orders were reviewable. The appellant did not avail himself of any of these opportunities, choosing instead to challenge the validity of the OEB orders in the courts. Winkler J. found that, unless attacked directly, OEB orders are valid and binding upon the respondent and its consumers. The OEB was not a party to the instant proceeding and its orders were not before the court. Winkler J. noted that the setting of rates is a balancing exercise, with LPPs being one factor under consideration. Applying *Sprint Canada Inc. v. Bell Canada* (1997), 79 C.P.R. (3d) 31 (Ont. Ct. (Gen. Div.)), *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107 (Gen. Div.), and *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Gen. Div.), Winkler J. found that the instant action, although framed as a private dispute between two contractual parties, was in reality an impermissible collateral attack on the validity of OEB orders. It would be inappropriate for the court to determine matters that fall squarely within the OEB's jurisdiction. Moreover, this Court's decision in *Garland No. 1* with respect [page639] to s. 347 provided the OEB with ample legal guidance to deal with the matter.

13 In case he was incorrect in that finding, Winkler J. went on to find that s. 18 of the *OEBA* provided a complete defence to the proposed action. He held that s. 18 was constitutionally valid because it did not interfere with Parliament's jurisdiction over interest and the criminal law, or, to the extent that it did, the interference was incidental. Although the respondent did not strictly comply with the OEB order in that it waived LPPs for some customers, this did not preclude the respondent from relying on s. 18.

14 In case that finding was also mistaken, Winkler J. went on to consider whether the appellant's claim for restitution was valid. The parties had conceded that the appellant had suffered a deprivation, and Winkler J. was satisfied that the respondent had received a benefit. However, he found that the OEB's rate order constituted a valid juristic reason for the respondent's enrichment.

15 Having reached those conclusions, Winkler J. declined to make a preservation order, as requested by the appellant, allowed the respondent's motion for summary judgment and dismissed the appellant's action. By endorsement, he ordered costs against the appellant.

B. *Ontario Court of Appeal* (2001), 208 D.L.R. (4th) 494

16 McMurtry C.J.O., for the majority, found that Winkler J. was incorrect in finding that there had been an impermissible collateral attack on a decision of the OEB because the appellant was not challenging the merits or legality of the OEB order or attempting to raise a matter already dealt with by the OEB. Rather, the proposed class action was based on the principles of unjust enrichment and raised issues over which the OEB had no [page640] jurisdiction. As such, the courts had jurisdiction over the proposed class action.

17 McMurtry C.J.O. further found that s. 25 of the 1998 *OEBA* (the equivalent provision to s. 18 of the 1990 *OEBA*) did not provide grounds to dismiss the appellant's action. He did not agree that the respondent's failure to comply strictly with the OEB orders made s. 25 inapplicable. Instead, he found that while s. 25 provides a defence to any proceedings in so far as the act or omission at issue is in accordance with the OEB order, legislative provisions restricting citizen's rights of action attract strict construction (*Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275). The legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, and even wording as broad as that found in s. 25 could not provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. He noted that this decision was based on the principles of statutory interpretation, not on the federal paramountcy doctrine.

18 Section 15 of the *Criminal Code* did not provide the respondent with a defence, either. It was of limited application and is largely irrelevant in modern times. As for the "regulated industries defence", it did not apply because the case law did not indicate that a company operating in a regulatory industry could act directly contrary to the *Criminal Code*.

19 Nonetheless, McMurtry C.J.O. held that the appellant's unjust enrichment claim could not be made out. It had been conceded that the appellant suffered a deprivation, but McMurtry C.J.O. held that the appellant failed to establish the other two elements of the claim for unjust enrichment. While payment of money will normally be a benefit, McMurtry C.J.O. found that the payment of the late penalties in this case did not confer a benefit on the [page641] respondent. Taking the "straightforward economic approach" to the first two elements of unjust enrichment, as recommended in *Peter v. Beblow*, [1993] 1 S.C.R. 980, McMurtry C.J.O. noted that the OEB sets rates with a view to meeting the respondent's overall revenue requirements. If the revenue available from LPPs had been set lower, the other rates would have been set higher. Therefore, the receipt of the LPPs was not an enrichment capable of giving rise to a restitutionary claim.

20 In case that conclusion was wrong, McMurtry C.J.O. went on to find that there was a juristic reason for any presumed enrichment. Under this aspect of the test, moral and policy questions were open for consideration, and it was necessary to consider what was fair to both the plaintiff and the defendant. It was therefore necessary to consider the statutory regime within which the respondent operated. McMurtry C.J.O. noted that the respondent was required by statute to apply the LPPs; it had been ordered to collect them and they were taken into account when the OEB made its rate orders. He found that it would be contrary to the equities in this case to require the respondent to repay all the LPP charges collected since 1981. Such an order would affect all of the respondent's customers, including the vast majority who consistently pay on time.

21 The appellant argued that a preservation order was required even if his arguments on restitution were not successful because he could still be successful in arguing that the respondent could not enforce payment of the late penalties. As he had found no basis for ordering restitution, McMurtry C.J.O. saw no reason to make a preservation order. Moreover, the order requested would serve no practical purpose because it gave the respondent the right to spend the monies at stake. He dismissed the appeal and the appellant's action. In so doing, he agreed with the motions judge that the appellant's [page642] claims for declaratory and injunctive relief should not be granted.

22 As to costs, McMurtry C.J.O. found that there were several considerations that warranted overturning the order that the appellant pay the respondent's costs. First, the order required him to pay the costs of his successful appeal to the Supreme Court of Canada. Second, even though the respondent was ultimately successful, it failed on two of the defences it raised at the motions stage and three of the defences it raised at the Court of Appeal. Third, the proceedings raised novel issues. McMurtry C.J.O. found that each party should bear its own costs.

23 Borins J.A., writing in dissent, was of the opinion that the appeal should be allowed. He agreed with most of McMurtry C.J.O.'s reasons, but found that the plaintiff class was entitled to restitution. In his opinion, the motions judge's finding that the LPPs had enriched the respondent by causing it to have more money than it had before was supported by the evidence and the authorities. Absent material error, he held, it was not properly reviewable.

24 However, Borins J.A. found that the motions judge had erred in law in finding that there was a juristic reason for the enrichment. The motions judge had failed to consider the effect of the Supreme Court of Canada decision that the charges amount to interests at a criminal rate and that s. 347 of the *Criminal Code* prohibits the receipt of such interest. As a result of this decision, Borins J.A. felt that the rate orders ceased to have any legal effect and could not provide a juristic reason for the enrichment. A finding that the rate orders constituted a juristic reason for contravening s. 347 also allowed orders of a provincial regulatory authority to override federal criminal law and removed a substantial reason for compliance with s. 347. Thus, he held that allowing the respondent [page643] to retain the LPPs was contrary to the federal paramountcy doctrine.

25 According to Borins J.A., finding the OEB orders to constitute a juristic reason would also be contrary to the authorities which have applied s. 347 in the context of commercial obligations. This line of cases required consideration of when restitution should have been ordered and for what portion of the amount paid. Finally, it would allow the respondent to profit from its own wrongdoing.

26 Borins J.A. was not sympathetic to the respondent's claims that its change of position should allow it to keep the money it had collected in contravention of s. 347, even if it could have recovered the same amount of money on an altered rate structure. He also noted that, in his opinion, the issue of recoverability should have been considered in the context of the class action, not on the basis of the representative plaintiff's claim for $75. Borins J.A. would have allowed the appeal, set aside the judgment dismissing the appellant's claim, granted partial summary judgment, and dismissed the respondent's motion for summary judgment. The appellant would have been required to proceed to trial with respect to damages. He would also have declared that the charging and receipt of LPPs by the respondent violates s. 347(1)(*b*) of the *Criminal Code* and that the LPPs need not be paid by the appellant, and would have ordered that the respondent repay the LPPs received from the appellant, as determined by the trial judge. He would also have ordered costs against the respondent.

27 It should be noted that on January 9, 2003, McLachlin C.J. stated the following constitutional question:

> Are s. 18 of the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13, and s. 25 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B,

constitutionally inoperative [page644] by reason of the paramountcy of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46?

As will be clear from the reasons below, I have found it unnecessary to answer the constitutional question.

IV. Issues

28 1. Does the appellant have a claim for restitution?

(a) Was the respondent enriched?
(b) Is there a juristic reason for the enrichment?

2. Can the respondent avail itself of any defence?

(a) Does the change of position defence apply?
(b) Does s. 18 (now s. 25) of the *OEBA* ("s. 18/25") shield the respondent from liability?
(c) Is the appellant engaging in a collateral attack on the orders of the Board?
(d) Does the "regulated industries" defence exonerate the respondent?
(e) Does the *de facto* doctrine exonerate the respondent?

3. Other orders sought by the appellant

(a) Should this Court make a preservation order?
(b) Should this Court make a declaration that the LPPs need not be paid?
(c) What order should this Court make as to costs?

[page645]

V. Analysis

29 My analysis will proceed as follows. First, I will assess the appellant's claim in unjust enrichment. Second, I will determine whether the respondent can avail itself of any defences to the appellant's claim. Finally, I will address the other orders sought by the appellant.

A. *Unjust Enrichment*

30 As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 784). In this case, the parties are

agreed that the second prong of the test has been satisfied. I will thus address the first and third prongs of the test in turn.

(a) Enrichment of the Defendant

31 In *Peel, supra*, at p. 790, McLachlin J. (as she then was) noted that the word "enrichment" connotes a tangible benefit which has been conferred on the defendant. This benefit, she writes, can be either a positive benefit, such as the payment of money, or a negative benefit, for example, sparing the defendant an expense which he or she would otherwise have incurred. In general, moral and policy arguments have not been considered under this head of the test. Rather, as McLachlin J. wrote in *Peter, supra*, at p. 990, " [t]his Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment". Other considerations, she held, belong more appropriately under the third element -- absence of juristic reason.

32 In this case, the transactions at issue are payments of money by late payers to the respondent. It seems to me that, as such, under the "straightforward [page646] economic approach" to the benefit analysis, this element is satisfied. Winkler J. followed this approach and was satisfied that the respondent had received a benefit. "Simply stated", he wrote at para. 95, "as a result of each LPP received by Consumers' Gas, the company has more money than it had previously and accordingly is enriched."

33 The majority of the Court of Appeal for Ontario disagreed. McMurtry C.J.O. found that while payment of money would normally be a benefit, it was not in this case. He claimed to be applying the "straightforward economic approach" as recommended in *Peter, supra*, but accepted the respondent's argument that because of the rate structure of the OEB, the respondent had not actually been enriched. Because LPPs were part of a scheme designed to recover the respondent's overall revenue, any increase in LPPs was off-set by a corresponding decrease in regular rates. Thus McMurtry C.J.O. concluded, " [t]he enrichment that follows from the receipt of LPPs is passed on to all [Consumers' Gas] customers in the form of lower gas delivery rates" (para. 65). As a result, the real beneficiary of the scheme is not the respondent but is rather all of the respondent's customers.

34 In his dissent, Borins J.A. disagreed with this analysis. He would have held that where there is payment of money, there is little controversy over whether or not a benefit was received and since a payment of money was received in this case, a benefit was conferred on the respondent.

35 The respondent submits that it is not enough that the plaintiff has made a payment; rather, it must also be shown that the defendant is "in possession of a benefit". It argues that McMurtry C.J.O. had correctly held that the benefit had effectively been passed on to the respondent's customers, so the respondent could not be said to have retained the benefit. The appellant, on the other hand, maintains [page647] that the "straightforward economic approach" from *Peter, supra*, should be applied and any other moral or policy considerations should be considered at the juristic reason stage of the analysis.

36 I agree with the analysis of Borins J.A. on this point. The law on this question is relatively clear. Where money is transferred from plaintiff to defendant, there is an enrichment. Transfer of money so clearly confers a benefit that it is the main example used in the case law and by commentators of a transaction that meets the threshold for a benefit (see *Peel, supra*, at p. 790; *Sharwood & Co. v.*

Municipal Financial Corp. (2001), 53 O.R. (3d) 470 (C.A.), at p. 478; P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (1990), at p. 38; Lord Goff and G. Jones, *The Law of Restitution* (6th ed. 2002), at p. 18). There simply is no doubt that Consumers' Gas received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The availability of those funds constitutes a benefit to Consumers' Gas. We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme.

37 While the respondent rightly points out that the language of "received and retained" has been used with respect to the benefit requirement (see, for example, *Peel, supra*, at p. 788), it does not make sense that it is a requirement that the benefit be retained permanently. The case law does, in fact, recognize that it might be unfair to award restitution in cases where the benefit was not retained, but it does so after the three steps for a claim in unjust enrichment have been made out by recognizing a "change of position" defence (see, for example, *Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd.*, [1976] 2 S.C.R. 147; *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230 (Nfld. C.A.)). Professor J. S. Ziegel, in his comment on the Ontario Court of Appeal decision in this case, "Criminal Usury, Class Actions and Unjust Enrichment in Canada" (2002), 18 *J. Cont. L.* 121, at p. 126, suggests that McMurtry C.J.O.'s reliance on the regulatory framework of the LPP [page648] in finding that a benefit was not conferred "was really a change of position defence". I agree with this assessment. Whether recovery should be barred because the benefit was passed on to the respondent's other customers ought to be considered under the change of position defence.

(b) Absence of Juristic Reason

(i) *General Principles*

38 In his original formulation of the test for unjust enrichment in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at p. 455 (adopted in *Pettkus, supra*, at p. 844), Dickson J. (as he then was) held in his minority reasons that for an action in unjust enrichment to succeed:

> ... the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason -- such as a contract or disposition of law -- for the enrichment.

39 Later formulations of the test by this Court have broadened the types of factors that can be considered in the context of the juristic reason analysis. In *Peter, supra*, at p. 990, McLachlin J. held that:

> It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".
>
> ... The test is flexible, and the factors to be considered may vary with the situation before the court.

40 The "juristic reason" aspect of the test for unjust enrichment has been the subject of much academic commentary and criticism. Much of the discussion arises out of the difference between the ways in which the cause of action of unjust enrichment is conceptualized in Canada and in England. While both Canadian

and English causes of action require an enrichment of the defendant and a [page649] corresponding deprivation of the plaintiff, the Canadian cause of action requires that there be "an absence of juristic reason for the enrichment", while English courts require "that the enrichment be unjust" (see discussion in L. Smith, "The Mystery of 'Juristic Reason'" (2000), 12 S.C.L.R. (2d) 211, at pp. 212-13). It is not of great use to speculate on why Dickson J. in *Rathwell, supra*, expressed the third condition as absence of juristic reason but I believe that he may have wanted to ensure that the test for unjust enrichment was not purely subjective in order to be responsive to Martland J.'s criticism in his reasons that application of the doctrine of unjust enrichment contemplated by Dickson J. would require "immeasurable judicial discretion" (p. 473). The importance of avoiding a purely subjective standard was also stressed by McLachlin J. in her reasons in *Peel, supra*, at p. 802, in which she wrote that the application of the test for unjust enrichment should not be "case by case 'palm tree' justice".

41 Perhaps as a result of these two formulations of this aspect of the test, Canadian courts and commentators are divided in their approach to juristic reason. As Borins J.A. notes in his dissent (at para. 105), while "some judges have taken the *Pettkus* formulation literally and have attempted to decide cases by finding a 'juristic reason' for a defendant's enrichment, other judges have decided cases by asking whether the plaintiff has a positive reason for demanding restitution". In his article, "The Mystery of 'Juristic Reason'", *supra*, which was cited at length by Borins J.A., Professor Smith suggests that it is not clear whether the requirement of "absence of juristic reason" should be interpreted literally to require that plaintiffs show the absence of a reason for the defendant to keep the enrichment or, as in the English model, the plaintiff must show a reason for reversing the transfer of wealth. Other commentators have argued that in fact there is no difference beyond semantics between the Canadian and English tests (see, for example, M. McInnes, "Unjust [page650] Enrichment -- Restitution -- Absence of Juristic Reason: *Campbell* v. *Campbell*" (2000), 79 *Can. Bar Rev.* 459).

42 Professor Smith argues that, if there is in fact a distinct Canadian approach to juristic reason, it is problematic because it requires the plaintiff to prove a negative, namely the absence of a juristic reason. Because it is nearly impossible to do this, he suggests that Canada would be better off adopting the British model where the plaintiff must show a positive reason that it would be unjust for the defendant to retain the enrichment. In my view, however, there is a distinctive Canadian approach to juristic reason which should be retained but can be construed in a manner that is responsive to Smith's criticism.

43 It should be recalled that the test for unjust enrichment is relatively new to Canadian jurisprudence. It requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable. As McLachlin J. wrote in *Peel, supra*, at p. 788, the Court's approach to unjust enrichment, while informed by traditional categories of recovery, "is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice". But at the same time there must also be guidelines that offer trial judges and others some indication of what the boundaries of the cause of action are. The goal is to avoid guidelines that are so general and subjective that uniformity becomes unattainable.

44 The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in [page651] my

view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus, supra*), a disposition of law (*Pettkus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

45 The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

46 As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and [page652] that further cases will add additional refinements and developments.

47 In my view, this approach to the juristic reason analysis is consistent with the general approach to unjust enrichment endorsed by McLachlin J. in *Peel, supra*, where she stated that courts must effect a balance between the traditional "category" approach according to which a claim for restitution will succeed only if it falls within an established head of recovery, and the modern "principled" approach according to which relief is determined with reference to broad principles. It is also, as discussed by Professor Smith, *supra*, generally consistent with the approach to unjust enrichment found in the civil law of Quebec (see, for example, arts. 1493 and 1494 of the *Civil Code of Quebec*, S.Q. 1991, c. 64).

(ii) *Application*

48 In this case, the only possible juristic reason from an established category that could be used to justify the enrichment is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are rendered inoperative to the extent of their conflict with s. 347 of the *Criminal Code*. The plaintiff has thus made out a *prima facie* case for unjust enrichment.

49 Disposition of law is well established as a category of juristic reason. In *Rathwell, supra*, Dickson J. gave as examples of juristic reasons "a contract or disposition of law" (p. 455). In *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 ("*GST Reference*"), Lamer C.J. held that a valid statute is a

juristic reason barring recovery in unjust enrichment. This was affirmed in *Peter, supra*, at p. 1018. Most recently, in *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737, the Ontario Court of Appeal held that the legislation which created the Chinese head tax provided a juristic reason which prevented recovery of the head tax in unjust [page653] enrichment. In the leading Canadian text, *The Law of Restitution, supra*, McCamus and Maddaugh discuss the phrase "disposition of law" from *Rathwell, supra*, stating, at p. 46:

> ... it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law.

It seems clear, then, that valid legislation can provide a juristic reason which bars recovery in restitution.

50 Consumers' Gas submits that the LPPs were authorized by the Board's rate orders which qualify as a disposition of law. It seems to me that this submission is predicated on the validity and operability of this scheme. The scheme has been challenged by the appellant on the basis that it conflicts with s. 347 of the *Criminal Code* and, as a result of the doctrine of paramountcy, is consequently inoperative. In the *GST Reference, supra*, Lamer C.J. held that legislation provides a juristic reason "unless the statute itself is *ultra vires*" (p. 477). Given that legislation that would have been *ultra vires* the province cannot provide a juristic reason, the same principle should apply if the provincial legislation is inoperative by virtue of the paramountcy doctrine. This position is contemplated by Borins J.A. in his dissent when he wrote, at para. 149:

> In my view, it would be wrong to say that the rate orders do not provide [Consumers' Gas] with a defence under s. 18 of the *OEBA* because they have been rendered inoperative by the doctrine of federal paramountcy, and then to breathe life into them for the purpose of finding that they constitute a juristic reason for [Consumers' Gas's] enrichment.

51 As a result, the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative. If the [page654] OEB orders are constitutionally valid and operative, they provide a juristic reason which bars recovery. Conversely, if the scheme is inoperative by virtue of a conflict with s. 347 of the *Criminal Code*, then a juristic reason is not present. In my view, the OEB rate orders are constitutionally inoperative to the extent of their conflict with s. 347 of the *Criminal Code*.

52 The OEB rate orders require the receipt of LPPs at what is often a criminal rate of interest. Such receipt is prohibited by s. 347 of the *Criminal Code*. Both the OEB rate orders and s. 347 of the *Criminal Code* are *intra vires* the level of government that enacted them. The rate orders are *intra vires* the province by virtue of s. 92(13) (property and civil rights) of the *Constitution Act, 1867*. Section 347 of the *Criminal Code* is *intra vires* the federal government by virtue of s. 91(19) (interest) and s. 91(27) (criminal law power).

53 It should be noted that the Board orders at issue did not require Consumers' Gas to collect the LPPs within a period of 38 days. One could then make the argument that this was not an express operational

conflict. But to my mind this is somewhat artificial. I say this because at bottom it is a necessary implication of the OEB orders to require payment within this period. In that respect it should be treated as an express order for purposes of the paramountcy analysis. Consequently, there is an express operational conflict between the rate orders and s. 347 of the *Criminal Code* in that it is impossible for Consumers' Gas to comply with both provisions. Where there is an actual operational conflict, it is well settled that the provincial law is inoperative to the extent of the conflict (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961). As a result, the Board orders are constitutionally inoperative. Because the Board orders are constitutionally inoperative, they do not provide a juristic reason. It therefore falls to Consumers' Gas to show that there was a juristic reason for the enrichment [page655] outside the established categories in order to rebut the *prima facie* case made out by the appellant.

54 The second stage of juristic reason analysis requires a consideration of reasonable expectations of the parties and public policy considerations.

55 When the reasonable expectations of the parties are considered, Consumers' Gas's submissions are at first blush compelling. Consumers' Gas submits, on the one hand, that late payers cannot have reasonably expected that there would be no penalty for failing to pay their bills on time and, on the other hand, that Consumers' Gas could reasonably have expected that the OEB would not authorize an LPP scheme that violated the *Criminal Code*. Because Consumers' Gas is operating in a regulated environment, its reliance on OEB orders should be given some weight. An inability to rely on such orders would make it very difficult, if not impossible, to operate in this environment. At this point, it should be pointed out that the reasonable expectation of the parties regarding LPPs is achieved by restricting the LPPs to the limit prescribed by s. 347 of the *Criminal Code* and also would be consistent with this Court's decision in *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, 2004 SCC 7.

56 Consumers' Gas's reliance on the orders would not provide a defence if it was charged under s. 347 of the *Criminal Code* because the orders are inoperative to the extent of their conflict with s. 347. However, its reliance on the orders is relevant in the context of determining the reasonable expectations of the parties in this second stage of the juristic reason analysis.

57 Finally, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, a criminal should not be permitted to keep the proceeds of his crime (*Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22, at para. 11; [page656] *New Solutions, supra*). Borins J.A. focussed on this public policy consideration in his dissent. He held that, in light of this Court's decision in *Garland No. 1*, allowing Consumers' Gas to retain the LPPs collected in violation of s. 347 would let Consumers' Gas profit from a crime and benefit from its own wrongdoing.

58 In weighing these considerations, from 1981-1994, Consumers' Gas's reliance on the inoperative OEB orders provides a juristic reason for the enrichment. As the parties have argued, there are three possible dates from which to measure the unjust enrichment: 1981, when s. 347 of the *Criminal Code* was enacted, 1994, when this action was commenced, and 1998, when this Court held in *Garland No. 1* that the LPPs were limited by s. 347 of the *Criminal Code*. For the period between 1981 and 1994,

when the current action was commenced, there is no suggestion that Consumers' Gas was aware that the LPPs violated s. 347 of the *Criminal Code*. This mitigates in favour of Consumers' Gas during this period. The reliance of Consumers' Gas on the OEB orders, in the absence of actual or constructive notice that the orders were inoperative, is sufficient to provide a juristic reason for Consumers' Gas's enrichment during this first period.

59 However, in 1994, when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in charging the LPPs. This possibility became a reality when this Court held that the LPPs were in excess of the s. 347 limit. Consumers' Gas could have requested that the OEB alter its rate structure until the matter was adjudicated in order to ensure that it was not in violation of the *Criminal Code* or asked for contingency arrangements to be made. Its decision not to do this, as counsel for the appellant pointed out in oral submissions, was a "gamble". After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer [page657] reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs.

60 Moreover, once this Court held that LPPs were offside, for purposes of unjust enrichment, it is logical and fair to choose the date on which the action for redress commenced. Awarding restitution from 1981 would be unfair to the respondent since it was entitled to reasonably rely on the OEB orders until the commencement of this action in 1994. Awarding restitution from 1998 would be unfair to the appellant. This is because it would permit the respondent to retain LPPs collected in violation of s. 347 after 1994 when it was no longer reasonable for the respondent to have relied on the OEB orders and the respondent should be presumed to have known the LPPs violated the *Criminal Code*. Further, awarding restitution from 1998 would deviate from the general rule that monetary remedies like damages and interest are awarded as of the date of occurrence of the breach or as of the date of action rather than the date of judgment.

61 Awarding restitution from 1994 appropriately balances the respondent's reliance on the OEB orders from 1981-1994 with the appellant's expectation of recovery of monies that were charged in violation of the *Criminal Code* once the serious possibility that the OEB orders were inoperative had been raised. As a result, as of the date this action was commenced in 1994, it was no longer reasonable for Consumers' Gas to rely on the OEB orders to insulate them from liability in a civil action of this type for collecting LPPs in contravention of the *Criminal Code*. Thus, after the action was commenced in 1994, there was no longer a juristic reason for the enrichment of the respondent, so the appellant is entitled to restitution of the portion of monies paid to satisfy LPPs that exceeded an interest rate of 60 percent, as defined in s. 347 of the *Criminal Code*.

[page658]

B. *Defences*

62 Having held that the appellant's claim for unjust enrichment is made out for LPPs paid after 1994, it

remains to be determined whether the respondent can avail itself of any defences raised. It is only necessary to consider the defences for the period after 1994, when the elements of unjust enrichment are made out, and thus I will not consider whether the defences would have applied if there had been unjust enrichment before 1994. I will address each defence in turn.

(a) Change of Position Defence

63 Even where the elements of unjust enrichment are made out, the remedy of restitution will be denied where an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned (*Storthoaks, supra*). In this case, the respondent says that any "benefit" it received from the unlawful charges was passed on to other customers in the form of lower gas delivery rates. Having "passed on" the benefit, it says, it should not be required to disgorge the amount of the benefit (a second time) to overcharged customers such as the appellant. The issue here, however, is not the ultimate destination within the regulatory system of an amount of money equivalent to the unlawful overcharges, nor is this case concerned with the net impact of these overcharges on the respondent's financial position. The issue is whether, as between the overcharging respondent and the overcharged appellant, the passing of the benefit on to other customers excuses the respondent of having overcharged the appellant.

64 The appellant submits that the defence of change of position is not available to a defendant who is a wrongdoer and that, since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. I agree. The rationale for the change of position [page659] defence appears to flow from considerations of equity. G. H. L. Fridman writes that "[o]ne situation which would appear to render it inequitable for the defendant to be required to disgorge a benefit received from the plaintiff in the absence of any wrongdoing on the part of the defendant would be if he has changed his position for the worse as a result of the receipt of the money in question" (*Restitution* (2nd ed. 1992), at p. 458). In the leading British case on the defence, *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 512 (H.L.), Lord Goff stated (at p. 533):

> [I]t is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these [where the defendant has changed his or her position]? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.

65 If the change of position defence is intended to prevent injustice from occurring, the whole of the plaintiff's and defendant's conduct during the course of the transaction should be open to scrutiny in order to determine which party has a better claim. Where a defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff. In this case, the respondent cannot avail itself of this defence because the LPPs were obtained in contravention of the *Criminal Code* and, as a result, it cannot be unjust for the respondent to have to return them.

66 Thus, the change of position defence does not help the respondent in this case. Even assuming that the respondent would have met the other requirements set out in *Storthoaks, supra*, the respondent cannot avail itself of the defence because it is not an "innocent" defendant given that the benefit was received as a result of a *Criminal Code* violation. It is not necessary, as a result, to discuss change of position in a comprehensive manner and I leave a [page660] fuller development of the other elements of this defence to future cases.

(b) Section 18/25 of the *Ontario Energy Board Act*

67 The respondent raises a statutory defence found formerly in s. 18 and presently in s. 25 of the 1998 *OEBA*. The former and the present sections are identical, and read:

> An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

I agree with McMurtry C.J.O. that this defence should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and we do not have to consider the constitutionality of the section.

68 McMurtry C.J.O. was correct in his holding that legislative provisions purporting to restrict a citizen's rights of action should attract strict construction (*Berardinelli, supra*). In this case, I again agree with McMurtry C.J.O. that the legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, despite the broad wording of the section. Section 18/25, thus, cannot provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. As a consequence, like McMurtry C.J.O., I find the argument on s. 18/25 to be unpersuasive.

69 Because I find that it could not have been the intention of the legislature to bar civil claims stemming from acts that offend the *Criminal Code*, on a strict construction, s. 18/25 cannot protect Consumers' Gas from these types of claims. If the [page661] provincial legislature had wanted to eliminate the possibility of such actions, it should have done so explicitly in the provision. In the absence of such explicit provision, s. 18/25 must be read so as to exclude from its protection civil actions arising from violations of the *Criminal Code* and thus does not provide a defence for the respondent in this case.

(c) Exclusive Jurisdiction and Collateral Attack

70 McMurtry C.J.O. was also correct in his holding that the OEB does not have exclusive jurisdiction over this dispute. While the dispute does involve rate orders, at its heart it is a private law matter under the competence of civil courts and consequently the Board does not have jurisdiction to order the remedy sought by the appellant.

71 In addition, McMurtry C.J.O. is correct in holding that this action does not constitute an impermissible collateral attack on the OEB's order. The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E.,*

Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked [page662] collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.

72 Moreover, the appellant's case lacks other hallmarks of collateral attack. As McMurtry C.J.O. points out at para. 30 of his reasons, the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum. In this case, the appellant is not bound by the Board's orders, therefore the rationale behind the rule is not invoked. The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.

73 In this case, the appellant is not the object of the orders and thus there can be no concern that he is seeking to avoid the orders by bringing this action. As a result, a threat to the integrity of the system does not exist because the appellant is not legally bound to follow the orders. Thus, this action does not appear, in fact, to be a collateral attack on the Board's orders.

[page663]

(d) The Regulated Industries Defence

74 The respondent submits that it can avail itself of the "regulated industries defence" to bar recovery in restitution because an act authorized by a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state and, as a result, the collection of LPPs pursuant to orders

issued by the OEB cannot be considered to be contrary to the public interest and thus cannot be contrary to s. 347 of the *Criminal Code*.

75 Winkler J. held that the underlying purpose of the defence, regulation of monopolistic industries in order to ensure "just and reasonable" rates for consumers, would be served in the circumstances and as a result the defence would normally apply. However, because of the statutory language of s. 347, Winkler J. determined that the defence was not permitted in this case. He wrote, at para. 34, "[t]he defendant can point to no case which allows the defence unless the federal statute in question uses the word 'unduly' or the phrase 'in the public interest'". Absent such recognition in the statute of "public interest", he held, no leeway for provincial exceptions exist.

76 I agree with the approach of Winkler J. The principle underlying the application of the defence is delineated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356:

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

Estey J. reached this conclusion after canvassing the cases in which the regulated industries defence had been applied. Those cases all involved conflict between federal competition law and a provincial regulatory scheme, but the application of the [page664] defence in those cases had to do with the particular wording of the statutes in question. While I cannot see a principled reason why the defence should not be broadened to apply to cases outside the area of competition law, its application should flow from the above enunciated principle.

77 Winkler J. was correct in concluding that, in order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. But s. 347 does not contain the required indication for exempting a provincial scheme.

78 This view is further supported by this Court's decision in *R. v. Jorgensen*, [1995] 4 S.C.R. 55. In that case, the accused was charged with "'knowingly' selling obscene material 'without lawful justification or excuse'" (para. 44). The accused argued that the Ontario Film Review Board had approved the videotapes, therefore it had a lawful justification or excuse. This Court considered whether approval by a provincial body could displace a criminal charge. Sopinka J., for the majority, held that in order to exempt acts taken pursuant to a provincial regulatory body from the reach of the criminal law, Parliament must unequivocally express this intention in the legislative provision in issue (at para. 118):

> While Parliament has the authority to introduce dispensation or exemption from criminal law in determining what is and what is not criminal, and may do so by authorizing a provincial body or official acting under provincial legislation to

issue licences and the like, an intent to do so must be made plain.

[page665]

79 The question of whether the regulated industries defence can apply to the respondent is actually a question of whether s. 347 of the *Criminal Code* can support the notion that a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state. In the previous cases involving the regulated industries defence, the language of "the public interest" and "unduly" limiting competition has always been present. The absence of such language from s. 347 of the *Criminal Code* precludes the application of this defence in this case.

(e) *De Facto* Doctrine

80 Consumers' Gas submits that because it was acting pursuant to a disposition of law that was valid at the time -- the Board orders -- they should be exempt from liability by virtue of the *de facto* doctrine. This argument cannot succeed. Consumers' Gas is not a government official acting under colour of authority. While the respondent points to the Board orders as justification for its actions, this does not bring the respondent into the purview of the *de facto* doctrine because the case law does not support extending the doctrine's application beyond the acts of government officials. The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. As a result, Consumers' Gas cannot rely on the *de facto* doctrine to resist the plaintiff's claim.

81 Furthermore, the *de facto* doctrine attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation that is simply regulated by a government authority is not supported by the case law and in my view does not further the underlying purpose of the doctrine. In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court held, at p. 756, that:

[page666]

> There is only one true condition precedent to the application of the doctrine: the *de facto* officer must occupy his or her office under colour of authority.

It cannot be said that Consumers' Gas was a *de facto* officer acting under colour of authority when it charged LPPs to customers. Consumers' Gas is a private corporation acting in a regulatory context, not an officer vested with some sort of authority. When charging LPPs, Consumers' Gas is engaging in commerce, not issuing a permit or passing a by-law.

82 In rejecting the application of the *de facto* doctrine here, I am cognizant of the passage in *Reference re Manitoba Language Rights*, at p. 757, cited by the intervener Toronto Hydro and which, at first

glance, appears to imply that the *de facto* doctrine might apply to private corporations:

> ... the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. [Emphasis added.]

83 While this passage appears to indicate that "private bodies corporate" are protected by the doctrine, it must be read in the context of the entire judgment. Earlier, at p. 755, the Court referred to the writings of Judge A. Constantineau in *The De Facto Doctrine* (1910), at pp. 3-4. The following excerpt from that passage is relevant:

> The de facto doctrine is a rule or principle of law which ... recognizes the existence of, and protects from collateral attack, public or private bodies corporate, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies ... . [Emphasis added.]

In this passage, I think it is clear that the Court's reference to "private bodies corporate" is limited to issues affecting the creation of the corporation, for example where a corporation was incorporated under an invalid statute. It does not suggest that the acts [page667] of the corporation are shielded from liability by virtue of the *de facto* doctrine.

84 This view finds further support in the following passage from the judgment (at p. 755) :

> That the foundation of the principle is the more fundamental principle of the rule of law is clearly stated by Constantineau in the following passage (at pp. 5-6):
>
> > Again, the doctrine is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large, since any other rule would lead to such uncertainty and confusion, as to break up the order and quiet of all civil administration. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to challenge the authority of and refuse obedience to the government of the state and the numerous functionaries through whom it exercises its various powers, or refuse to recognize municipal bodies and their officers, on the ground of irregular existence or defective titles, insubordination and disorder of the worst kind would be encouraged, which might at any time culminate in anarchy.

The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. In sum, I find no merit in Consumers' Gas's argument that the *de facto* doctrine shields it from liability and as a result this doctrine should not be a bar to the appellant's recovery.

C. *Other Orders Requested*

(a) Preservation Order

85 The appellant, Garland, requests an "*Amax*-type" preservation order on the basis that the LPPs continue to be collected at a criminal rate during the pendency of this action, and these payments would never have been made but for the delays inherent in litigation (*Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576). In my view, however, a preservation order is not appropriate in this case. Consumers' Gas has now ceased to collect the LPPs at a criminal rate. As a result, if a preservation order were made, there would be no future [page668] LPPs to which it could attach. Even with respect to the LPPs paid between 1994 and the present, to which such an order could attach, a preservation order should not be granted for three further reasons: (1) such an order would serve no practical purpose, (2) the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and (3) *Amax* can be distinguished from this case.

86 First, the appellant has not alleged that Consumers' Gas is an impecunious defendant or that there is any other reason to believe that Consumers' Gas would not satisfy a judgment against it. Even if there were some reason to believe that Consumers' Gas would not satisfy such a judgment, an *Amax*-type order allows the defendant to spend the monies being held in the ordinary course of business -- no actual fund would be created. So the only thing that a preservation order would achieve would be to prevent Consumers' Gas from spending the money earned from the LPPs in a non-ordinary manner (for example, such as moving it off-shore) which the appellant has not alleged is likely to occur absent the order.

87 Second, the respondent submits that by seeking a preservation order the appellant is attempting to avoid Rule 45.02 of the Ontario *Rules of Civil Procedure*, the only source of jurisdiction in Ontario to make a preservation order. The *Rules of Civil Procedure* apply to class proceedings and do not permit such an order in these circumstances. Rule 45.02 provides that, "[w]here the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just" (emphasis added). The respondent submits that the appellant is not in fact claiming a specific fund here. In the absence of submissions by the appellant on this issue, I am of the view that the appellant has not satisfied the criteria set out in the Ontario *Rules of Civil Procedure* and that this Court could refuse to grant the order requested on this basis.

[page669]

88 Finally, the appellant's use of *Amax, supra*, as authority for the type of order sought is without merit. The appellant has cited the judgment very selectively. The portion of the judgment the appellant cites in his written submissions reads in full (at p. 598) :

> Apart from the Rules this Court has the discretion to make an order as requested by appellants directing the Province of Saskatchewan to hold, as stakeholder, such sums as are paid by the appellants pursuant to the impugned

> legislation but with the right to use such sums in the interim for Provincial purposes, and with the obligation to repay them with interest in the event the legislation is ultimately held to be *ultra vires*. Such an order, however, would be novel, in giving the stakeholder the right to spend the moneys at stake, and I cannot see that it would serve any practical purpose. [Emphasis added.]

The Court in *Amax* went on to refuse to make the order. So while the appellant is right that the Court in *Amax* failed to reject the hypothetical possibility of making such an order in the future, it seems to me that in this case, as in *Amax*, such an order would serve no practical purpose. For these reasons, I find there is no basis for making a preservation order in this case.

(b) Declaration That the LPPs Need Not Be Paid

89 The appellant also seeks a declaration that the LPPs need not be paid. Given that the respondent asserts that the LPP is no longer charged at a criminal rate, issuing such a declaration would serve no practical purpose and as a result such a declaration should not be made.

(c) Costs

90 The appellant is entitled to his costs throughout. This should be understood to mean that, regardless of the outcome of any future litigation, the appellant is entitled to his costs in the proceedings leading up to and including *Garland No. 1* and this appeal. In addition, in oral submissions counsel for the Law Foundation of Ontario made the point that in order to reduce costs in future class actions, "litigation by installments", as occurred in this case, should be [page670] avoided. I agree. On this issue, I endorse the comments of McMurtry C.J.O., at para. 76 of his reasons:

> In this context, I note that the protracted history of these proceedings cast some doubt on the wisdom of hearing a case in instalments, as was done here. Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

VI. Disposition

91 For the foregoing reasons, I would allow the appeal with costs throughout, set aside the judgment of the Ontario Court of Appeal, and substitute therefor an order that Consumers' Gas repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 after the action was commenced in 1994 in an amount to be determined by the trial judge.

Solicitors:

Solicitors for the appellant: McGowan Elliott & Kim, Toronto.

Solicitors for the respondent: Aird & Berlis, Toronto.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitors for the intervener Toronto Hydro-Electric System Limited: Ogilvy Renault, Toronto.

Solicitor for the intervener the Law Foundation of Ontario: Mark M. Orkin, Toronto.

[page671]

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

cp/e/qw/qlls

Tab 9

Case Name:

Degregorio v. Brick and Allied Craft Union of Canada, Local 29

Between
Marcello Degregorio, Plaintiff (Appellant), and
Brick and Allied Craft Union of Canada, Local 29,
Defendant (Respondent)

[2012] O.J. No. 5066

2012 ONCA 724

Docket: C55335

Ontario Court of Appeal
Toronto, Ontario

M. Rosenberg, E.E. Gillese and M.H. Tulloch JJ.A.

Heard: October 24, 2012.
Judgment: October 26, 2012.

(4 paras.)

Labour arbitration -- Trade unions -- Representation of employees -- Appeal by plaintiff worker from dismissal of action against union dismissed -- Appellate court agreed with motion judge that essential character of dispute involved union's duties of fair representation and fair referral under Labour Relations Act -- Issue of termination could not be bifurcated from facts underlying essential nature of dispute.

Labour law -- Unions -- Civil liability of unions -- Duties -- Referrals -- Representation of members -- Appeal by plaintiff worker from dismissal of action against union dismissed -- Appellate court agreed with motion judge that essential character of dispute involved union's duties of fair representation and fair referral under Labour Relations Act -- Issue of termination could not be bifurcated from facts underlying essential nature of dispute.

Labour law -- Labour relations boards -- Jurisdiction -- Appeal by plaintiff worker from dismissal of action against union dismissed -- Appellate court agreed with motion judge that essential

character of dispute involved union's duties of fair representation and fair referral under Labour Relations Act -- Issue of termination could not be bifurcated from facts underlying essential nature of dispute.

Statutes, Regulations and Rules Cited:

Labour Relations Act, 1995, S.O. 1995, c. 1, Schedule A

Appeal From:

On appeal from the order of Justice Stevenson of the Superior Court of Justice, dated March 9, 2012.

Counsel:

S. Grillone, for the appellant.

C. Sinclair, for the respondent.

APPEAL BOOK ENDORSEMENT

The following judgment was delivered by

1 THE COURT:-- The motion judge found that the essential character of the dispute between the appellant and the respondent union concerned the respondent's duties of fair representation and fair referral under the *Labour Relations Act, 1995*. We agree.

2 While the appellant wishes to hive off the issue of termination and be permitted to pursue that through the courts, the factual matrix makes it clear that the termination was part and parcel of the ongoing dispute with the result that the essential nature of the dispute does indeed relate to the duties of fair representation and fair refusal. A full and generous reading of the Reply does nothing to alter this conclusion.

3 Moreover, this court has previously indicated that the unnecessary bifurcation of proceedings flowing out of the same factual matrix is to be avoided: see *A.C. Concrete Forming Ltd. v. The Residential Low Rise Forming Contractors Association of Metropolitan Toronto and Vicinity*, 2008 ONCA 864 (CanLII), at para. 26.

4 Accordingly, the appeal is dismissed with costs to the respondent fixed in the sum of $5500, all inclusive.

cp/e/qljel/qlpmg/qlmll

Tab 10

Case Name:

The Plan Group v. Bell Canada

Between
Bell Canada, Respondent (Appellant), and
The Plan Group, 1248163 Ontario Limited, 1248164 Ontario Limited and 1248165 Ontario Limited, Applicants (Respondents)

[2009] O.J. No. 2829

2009 ONCA 548

252 O.A.C. 71

96 O.R. (3d) 81

81 C.L.R. (3d) 9

62 B.L.R. (4th) 157

2009 CarswellOnt 3807

179 A.C.W.S. (3d) 40

Docket: C48892

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, E.E. Gillese and R.A. Blair JJ.A.

Heard: December 18, 2008.
Judgment: July 7, 2009.

(215 paras.)

Alternative dispute resolution -- Binding arbitration -- Voluntary binding arbitration -- Agreement to arbitrate -- Interpretation -- Appeal by Bell Canada from application judge's interpretation of an

arbitration clause allowed -- Application judge erred in his failure to give meaning to important term of arbitration clause specifying that arbitration was to be conducted "under the then-current rules" of Institute -- He further erred in interpretation of phrase "to file" in waiver provision of arbitration clause as "to deliver" or "to serve" the notice upon Bell, which could not be sustained.

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Correctness -- Appeal by Bell Canada from application judge's interpretation of an arbitration clause allowed -- Application judge erred in his failure to give meaning to important term of arbitration clause specifying that arbitration was to be conducted "under the then-current rules" of Institute -- He further erred in interpretation of phrase "to file" in waiver provision of arbitration clause as "to deliver" or "to serve" the notice upon Bell, which could not be sustained.

Contracts -- Interpretation -- General principles -- Ordinary meaning -- Consider the entire contract -- Appeal by Bell Canada from application judge's interpretation of an arbitration clause allowed -- Application judge erred in his failure to give meaning to important term of arbitration clause specifying that arbitration was to be conducted "under the then-current rules" of Institute -- He further erred in interpretation of phrase "to file" in waiver provision of arbitration clause as "to deliver" or "to serve" the notice upon Bell, which could not be sustained.

Appeal by Bell Canada from an application judge's interpretation of an arbitration agreement. Bell and The Plan Group entered into an Alliance Agreement in February 1999 concerning joint projects for the delivery of services to customers on cabling projects. The Agreement contained a two-step dispute resolution process. The parties were first to engage in good faith discussions using their commercially-reasonable efforts to settle the dispute. Thereafter, if those discussions failed, the parties were to resort to arbitration. The arbitration clause stipulated that it was to be conducted under the Arbitration Act "and the then-current rules" of the Institute. In this regard there were two sets of rules that were considered by the application judge - those that were in effect at the time the Agreement was negotiated (the 1999 Rules), and those that were in effect at the time the dispute arose between the parties (the Current Rules). In 2005, a dispute arose between Bell and The Plan Group in relation to work performed under the Agreement for the Greater Toronto Airport Authority. The differences could not be resolved, and in August 2005 The Plan Group delivered to Bell a draft notice demanding arbitration. In December 2005, it delivered a final notice demanding arbitration. However, no notice to arbitrate the dispute was ever filed with the Institute. The arbitration clause's waiver provision specified that a failure to file a notice of arbitration in time would constitute an irrevocable waiver of the claim. The application judge held that the arbitration clause did not mandate delivery and filing of a Notice of Arbitration. The arbitration clause contemplated that after commencement of the arbitration and the appointment of the arbitrator, the arbitrator would apply the 1999 ADR Rules during the proceedings. The arbitration clause did not express the intention of the parties that any dispute or any arbitration under the Agreement was to be arbitrated and resolved in accordance with the rules of the Institute. On a plain reading, the arbitration clause limited the reach of the 1999 Rules to the conduct of the arbitration rather than requiring compliance with all such Rules. The arbitration clause expressly stipulated the procedure for the appointment of the arbitrator, thus contemplating a procedure for the appointment of an arbitrator outside the Rules of the Institute. The parties agreed that the arbitrator was to apply the procedural rules of the Institute in effect from time to time in the conduct of the arbitration and

did not agree that either the remaining rules of the Institute were also to be applied in respect of any arbitration under the Agreement or that the Institute was to administer any such arbitration. By the reference to the then-current rules of the Institute in the second sentence of the arbitration clause, the parties did not agree to accept the possibility that their agreement could be overridden by a substitution of the Current Rules for the 1999 Rules by the Institute.

HELD: Appeal allowed, order set aside, and arbitration under the Alliance Agreement directed to be commenced by filing a Notice of Request to Arbitrate with the Institute. The application judge's interpretation of the arbitration clause was to be reviewed on a standard of correctness. The application judge erred in his failure to give meaning and effect to an important term of the arbitration clause specifying that the arbitration was to be conducted "under the then-current rules" of the Institute. He further erred in his interpretation of the phrase "to file" in the waiver provision of the clause as "to deliver" or "to serve" the notice upon Bell, which could not be sustained. The application judge erred by misapplying, or failing to apply, the principle that a contract was to be interpreted in a manner that gave meaning to all of its terms and avoided an interpretation that rendered one or more of its terms ineffective. The error stemmed in large part from his undue focus on the parties' "conceptual approaches" to the arbitration rather than on the wording of the arbitration clause itself. His approach led him to ground his interpretation on a set of Institute rules (the 1999 Rules) that had no direct application and, even to the extent they provided "context" to the interpretive exercise, did not support the interpretation he adopted. That error reinforced the narrow interpretation of the arbitration clause he embraced, premised on his erroneous conclusion as to the nature of the arbitration the parties had agreed to. This led to his refusal to give effect to the set of Institute rules that were applicable (the Current Rules) because - in his view - they represented a "fundamental change" from that flawed view of the nature of the arbitration process agreed to. In refusing to apply the Current Rules, the application judge ignored, and failed to give effect to, the clear and unequivocal language of the arbitration clause stipulating that the arbitration was to be conducted under "the then-current rules" of the Institute. The application judge equated the word "filing" in the waiver clause with "delivering" the notice to, or "serving" it upon, the other side. In the context of a legal document relating to the resolution of disputes, "filing" could not be properly or reasonably interpreted to bear such a meaning. "Filing" was a well-understood concept in the dispute resolution milieu. It meant placing or depositing a document with the institutional overseer of the proceeding. It did not mean delivering the document to, or leaving it with, or serving it upon, the other party. The application judge's erroneous interpretation of the waiver provision served to bolster his conclusion that the type of arbitration agreed to was not one that was to be administered by the Institute and that the clause was to be interpreted largely in light of the application of the 1999 Rules.

Statutes, Regulations and Rules Cited:

Arbitration Act, 1991, S.O. 1991, c. 17, s. 2(1), s. 6, s. 23

Appeal From:

On appeal from the judgment of Justice Herman J. Wilton-Siegel of the Superior Court of Justice dated April 29, 2008 and reported at (2008), 71 C.L.R. (3d) 205, [2008] O.J. No. 1633.

Counsel:

Matthew P. Gottlieb and James D. Bunting, for the appellant.

Neal J. Smitheman and Antonio Di Domenico, for the respondents.

Reasons for judgment were delivered by R.A. Blair J.A., concurred in by S.T. Goudge J.A. Separate dissenting reasons were delivered by E.E. Gillese J.A.

R.A. BLAIR J.A.:--

I. BACKGROUND

1 Bell and The Plan Group entered into an Alliance Agreement on February 1, 1999, concerning joint projects for the delivery of services to customers on cabling projects in the Greater Toronto Region. The Agreement contained a two-step dispute resolution process, found in section 22. The parties were first to engage in good faith discussions using "their commercially reasonable efforts to settle the dispute" (s. 22.1). Thereafter, if those discussions failed, the parties were to resort to arbitration (s. 22.2).

2 Section 22.2, the arbitration clause - the interpretation of which is at the heart of this appeal - reads as follows:

> Bell and [The Plan Group] will settle by arbitration any dispute arising out of or related to this Agreement or any Sub-contract that is not finally resolved pursuant to Section 21.1 hereof.[1] *A single arbitrator will conduct the arbitration under the Arbitration Act, 1991 (Ontario) and the then-current rules of the Arbitration and Mediation Institute of Ontario Inc.* Bell and [The Plan Group] will select the arbitrator from a panel of persons knowledgeable in business information and the construction industry. The decision and award of the arbitrator will be final and binding and the award so rendered may be entered into any court having jurisdiction thereof. The arbitration will be held in Toronto, Ontario. The arbitrator will not be empowered to award punitive damages to either Party. *Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim.* [Emphasis added.][2]

3 The second sentence of the arbitration clause (which I shall refer to as "the conduct of arbitration provision") stipulates that the arbitration will be conducted under the *Arbitration Act, 1991*, S.O. 1991, c. 17, "and the then-current rules" of the Institute. In this regard there are two sets of rules that were considered by the application judge - those that were in effect at the time the Agreement was negotiated (the "1999 Rules"), and those that were in effect at the time the dispute arose between the parties (the "Current Rules").

4 In 2005, a dispute arose between Bell and The Plan Group in relation to certain work performed under the Agreement for the Greater Toronto Airport Authority. Invoices exceeding $40 million in value were at the heart of the dispute. The differences could not be resolved through "commercially reasonable efforts to settle." Accordingly, on August 26, 2005, The Plan Group delivered to Bell a draft notice demanding arbitration. On December 14, 2005 it delivered a final notice demanding arbitration. No notice to arbitrate the dispute was - nor has one ever been - filed with the Institute, however. The last sentence of the arbitration clause (which I will refer to as the "waiver provision") specifies that a failure to file a notice of arbitration in time will constitute an irrevocable waiver of the claim.

II. THE POSITIONS OF THE PARTIES

5 Bell has repeatedly taken the position that, in order to commence the arbitration, The Plan Group must deliver to Bell and file with the Institute, a written notice of request to arbitrate. This position is based upon section 22.2 of the Agreement, and the requirements of Articles 11 and 13 of the Current Rules. Article 11 provides for the submission of disputes under agreements to arbitration "by delivering a written Notice of Request to Arbitrate to the respondent". Article 13 specifies that, "The arbitration *is deemed to have commenced* when a Notice of Request to Arbitrate ... *has been filed with the Institute* and the initial filing fee has been paid" (emphasis added). Bell also relies on Article 5, which says that, "By agreeing to the Rules, the parties agree that the arbitration shall be administered by the Institute", and the stipulation in Article 3 that, "To the extent that the Rules conflict with the Act, the provisions of the Rules shall apply".

6 The Plan Group contends, on the other hand, that no notice of arbitration need be filed with the Institute for the arbitration to be commenced. It submits that none of the Rules of the Institute apply to govern the initiation or commencement of the arbitration and that the Rules are only engaged after the arbitrator has been chosen and only to the extent that the Institute's rules pertain to the procedural conduct of the arbitration. The arbitration may be commenced in any way permissible under the Act, The Plan Group argues, and it has complied with section 23(1)3 of the Act by delivering provisional and final notices demanding arbitration upon Bell.

7 Underlying all of these arguments is the real issue between the parties. It is Bell's position that as a result of The Plan Group's failure to file a notice of arbitration with the Institute, its complaints are time barred by virtue of the closing sentence of Section 22.2 cited above. For reasons that are not entirely clear on the record, this issue has not been addressed directly. Instead, it has been equated by the parties - and by the application judge - with the issue of how the arbitration is to be commenced.

III. LAW AND ANALYSIS

Interlocutory/Final Order

8 The Plan Group argues that the judgment below is interlocutory in nature and, therefore, that Bell requires leave to appeal, which it has not sought. I disagree. The decision is a final order because it finally determined the only issue raised in the application before the application judge.

9 The Plan Group's theory is that the practical and legal result of the decision is to confirm that an arbitration proceeding has already been commenced, given the declaration that the filing of a notice of

arbitration was not necessary to commence the arbitration. The decision was therefore an intervention by the court to assist in the conduct of the arbitration in order to ensure that the arbitration was being conducted in accordance with the arbitration clause in the Agreement, as contemplated by s. 6 of the *Arbitration Act, 1991*. So far as is relevant, s. 6 provides:

> **Court intervention limited**
>
> 6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:
>
> 1. To assist the conducting of arbitrations.
> 2. To ensure that arbitrations are conducted in accordance with arbitration agreements.

10 The Plan Group accordingly submits that the decision below was simply interlocutory in nature, within the context of an ongoing arbitration proceeding; it did not finally determine any substantive matter in the arbitration.

11 There is no merit in this argument. It misconceives the nature and purpose of the interlocutory/final order dichotomy, which is to act as a gatekeeper for appeals to a higher court in the particular proceeding before the courts. An application, like an action, is a free-standing proceeding.

12 The classic explanation of whether an order is final or interlocutory is that of Middleton J.A. in *Hendrickson v. Kallio*, [1932] O.R. 675 (C.A.), at p. 678:

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties - the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application,[3] but it is interlocutory if the merits *of the case* remain to be determined. [Emphasis added.]

13 Here, the merits *of the case* - i.e., of the application proceeding before the court - have been determined.

14 In my view, the decision of this Court in *Buck Bros. Ltd. v. Frontenac Builders Ltd.* (1994), 19 O.R. (3d) 97 (C.A.), is determinative of this issue. There, Morden A.C.J.O. made it quite clear that ancillary proceedings are not relevant in determining whether an order of a judge is final or interlocutory.

15 In *Buck Bros.*, the application judge, [1994] O.J. No. 37, ordered that whether a condition precedent for arbitration had been met should be determined, not by the court, but by a panel of arbitrators appointed in accordance with the arbitration agreement. An appeal was launched, but the responding party moved to have the appeal quashed. The argument was that the order under appeal was interlocutory, because the real subject-matter of the litigation between the parties was still to be determined

on the merits in the arbitration, and therefore the appeal was not properly before the court.

16 Morden A.C.J.O rejected this argument. At p. 100, after citing the passage from *Hendrickson v. Kallio* set out above, he said:

> In one sense, it can be said that the order in question does not determine "the real matter in dispute between the parties" (which is the right of the moving parties to be paid fair and equitable consideration by the responding parties and, if so, its amount, or, something less than this, whether the condition precedent to commencing an arbitration proceeding has been met). I do not think, however, that, in the circumstances, the order is interlocutory. I read the passage from *Hendrickson v. Kallio* as referring to "the real matter in dispute between the parties" *in the proceeding which is before the court* and not in some other proceeding which may, or may not, then be in existence. In accordance with this interpretation, I read "the litigation" in "the very subject matter of the litigation" as referring to the proceeding in which the order in question is made. Similarly, I read "the case" in "if the merits of the case remain to be determined" as also referring to the proceeding in which the order is made. [Emphasis in original.]

17 Contrary to the submission of The Plan Group, the decision of the British Columbia Court of Appeal in *Tamarack Capital Advisors Inc. v. SEM Holdings Ltd.* (2006), 54 B.C.L.R. (4th) 80 (C.A.), does not conflict with *Buck Bros.* In *Tamarack*, the proposed appeal was from an order dismissing a motion for a stay of the action. It was a not a final order because it did not determine a substantive matter in the litigation; it had merely refused to stay the proceeding.

18 I conclude that the judgment of Wilton-Siegel J. here is a final order. Leave to appeal from it is not necessary.

Standard of Review

19 The parties disagree on the standard of review applicable to the application judge's interpretation of the Agreement. Bell submits that the interpretation of the Agreement is a question of law, and therefore is reviewable on a standard of correctness. The Plan Group argues that the interpretation of the Agreement involves questions of mixed fact and law, and that this court cannot intervene absent palpable and overriding error.

20 The historical view is that the interpretation of a contract is a question of law, and reviewable on the standard of correctness. However, the standard of appellate review in matters of contractual interpretation is not as straightforward as it once appeared to be, and there has been considerable debate about it in the jurisprudence since the decision of the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

21 *Housen* is considered to be the leading authority on the standard of appellate review, directing that the applicable standard of review will depend upon the nature of the question - whether the alleged error is one of law, mixed fact and law, or fact. But, it is fair to say that appellate courts across the country have

sent mixed signals about the standard of review in contract interpretation cases in the post-*Housen* era. In British Columbia, the general approach seems to be to treat contractual interpretation as a matter of mixed fact and law attracting review on a deferential basis.[4] In Alberta, on the other hand, the opposite appears to be the case. The interpretation of contracts is considered to be a question of law, giving rise to a standard of correctness.[5] New Brunswick and Nova Scotia appear to hold to the traditional view that the standard of review in contractual interpretation is correctness, while recognizing that a trial judge's findings of fact and drawing of factual inferences should be accorded deference.[6]

22 Steel J.A. addressed the current status of this dialogue in *Prairie Petroleum Products Ltd. v. Husky Oil Ltd.* (2008), 295 D.L.R. (4th) 146 (Man. C.A.), at paras. 34-36, where she said:

> Until recently, interpretation of a contract was considered a question of law reviewable by an appellate court on a standard of correctness.
>
> At present, however, the standard of appellate review will depend on the nature of the question, whether it is a question of law, a question of fact or a question of mixed fact and law. *A question of law attracts the correctness standard, while a palpable and overriding error must be found with respect to a question of fact or mixed fact and law.* See *Housen.*
>
> The proper interpretation and application of the principles of contractual interpretation is a question of law. A trial judge's determination of the factual matrix, consideration of extrinsic evidence and consideration of the evidence as a whole is a question of fact. Finally, the application of the legal principles to the language of the contract in the context of the relevant facts, or a question involving an intertwining of fact and law, is a question of mixed fact and law. [Citations omitted; emphasis added.]

23 I generally agree with Steel J.A.'s summary, except for her categorical statement - purportedly reflecting *Housen* - suggesting that questions of mixed fact and law always attract the palpable and overriding error standard. In my view, *Housen* does not stand for such a definitive statement, nor does the jurisprudence in this Court.

24 It must be remembered, particularly when considering the appropriate standard of review for questions of mixed fact and law, that the Court in *Housen* did not tackle that subject in the context of contractual interpretation. It did so *clearly and explicitly* in the context of a negligence action, an entirely different brand of case.

25 The distinction between these two types of cases is meaningful for these purposes, it seems to me. Whereas the application of legal principles to the facts in a negligence action is very much a fact-driven exercise, the interpretation of a contract - leaving aside the factual issues that may underlie the task - is not; it is very much a legal exercise. In my view, Lang J.A. of this Court accurately summarized the effect of *Housen* in *MacDougall v. MacDougall* (2006), 262 D.L.R. (4th) 120, at para. 25, when she said:

> The leading authority on standard of review is *Housen v. Nikolaisen*. *Housen* does not address directly the standard of review for the interpretation of a contract. Rather, it canvasses the standard of review in a case involving the application of the law of negligence to findings of fact. *In that context*, it distinguishes among questions of fact, questions of law, and questions of mixed fact and law concluding that questions of fact are reviewed on the standard of palpable and overriding error and questions of law on the standard of correctness. Where the question of fact and of law are inextricably intertwined so that the question is one of mixed fact and law, the trial judge's finding is entitled to deference. [Citations omitted; emphasis added.]

26 In determining the proper standard of review, however, it is important to keep in mind the distinction between the nature of the question addressed by the trial court (i.e. a question of fact, a question of law, or a question of mixed fact and law) and the standard of appellant review of the trial court's disposition of that question. The distinction does not matter if the trial court was answering a question of fact (where the standard of appellant review is palpable and overriding error) or a question of law (where it is correctness). But the distinction *is* important where the question addressed was one of mixed fact and law. To say that a matter raises a question of mixed fact and law, by itself, does not mean that the standard of appellate review is necessarily one of palpable and overriding error. As *Housen* tells us, at para. 36, "matters of mixed fact and law lie along a spectrum." Thus, where the question at issue is determined to be one of mixed fact and law, the appellate court must take a further step and go on to locate the precise question at the proper point on the *Housen* spectrum in order to determine the applicable standard of appellate review.

27 Where the matter referred to is more a matter of legal principle and sits towards the error of law end of the spectrum, the standard is correctness. Where the matter is one in which the legal principle and the facts are inextricably intertwined - where the facts dominate, as it were - it falls more towards the factual end of the spectrum, and significant deference must be accorded. Contractual interpretation, in my opinion, is generally the type of case that falls within the former category, negligence one that generally falls into the latter.

28 In my view, this distinction between the nature of the question to be determined and the standard of appellate review to be applied to that determination can help in clarifying a number of cases that might otherwise be misunderstood. For example, in *Casurina Limited Partnership et al. v. Rio Algom Ltd. et al.* (2004), 181 O.A.C. 19 (C.A.), at para. 34, Feldman J.A. concluded that, "The construction of a written instrument is a question of mixed fact and law". She did not say, however - nor should she be understood to have said, I think - that a deferential standard of appellate review must *always* be applied to the interpretation of a contract. Indeed, in *Palumbo v. Research Capital Corp.* (2005), 72 O.R. (3d) 241 (C.A.), Laskin J.A. observed at para. 32 that, "The standard of review of the interpretation of a contract provision ordinarily is correctness."

29 The palpable and overriding error standard of review, it seems to me, is designed to afford deference to trial judges in their essential fact-finding functions, including the drawing of inferences from the facts and the determination of issues where law and facts are inextricably intermixed. We leave it to trial judges to

sort these matters out with good reason. They have seen and heard the witnesses and are attuned to the dynamics of the trial. In *Waxman et al. v. Waxman et al.* (2004), 186 O.A.C. 201, at para. 292, this Court articulated the policy reasons for giving such deference to trial judges:

> The "palpable and overriding" standard demands strong appellate deference to findings of fact made at trial. Some regard the standard as neutering the appellate process and precluding the careful second hard look at the facts that justice sometimes demands. This viewpoint is tenable only if facts found on appeal are more likely to be accurate than those determinations made at trial. If findings of fact were to be made on appeal they might be different from those made at trial. Most cases that go through trial and onto appeal will involve evidence open to more than one interpretation. Merely because an appellate court might view the evidence differently from the trial judge and make different findings is not, however, any basis for concluding that the appellate court's findings will be more accurate and its result more consistent with the justice of the particular case than the result achieved at trial.

30 The exercise of interpreting a contract is not essentially a fact-finding exercise, however. As the authorities cited above have noted, there may be questions involving the determination of the factual context in which the contract was negotiated, or considerations of extrinsic evidence, that evoke the fact-finding functions. Those decisions are to be addressed from the palpable and overriding error perspective. In substance, though, the exercise of interpreting a contract is a legal exercise, calling upon the learning and training that judges and lawyers acquire over years of experience. Apart from the truly factual aspects that may underlie the task, trial judges have no particular advantage over appellate judges in the art of contractual interpretation.

31 In my view, certainty in contract is an important policy value underlying the construction of contracts. This factor alone is sufficient to push the standard of review in such cases towards correctness and away from deference. At the very least, contractual interpretation is an exercise that generally falls much more towards the error of law end of the *Housen* spectrum, once the factual issues referred to above have been resolved or if - as is the case here - they are not in dispute. The Supreme Court of Canada has yet to consider the standard of review in contractual interpretation cases post-*Housen*. I am not entirely persuaded that it makes sense to take one type of analysis (the *Housen* analysis) that is designed to discourage appellate courts from re-trying *the factual issues* in cases, and apply its analytical paradigm (the facts/mixed fact and law/law spectrum) to what is essentially *a legal exercise*.

32 In any case, I am satisfied that the decision of the application judge must be set aside in this case whether the standard of review is properly one of correctness, or palpable and overriding error.

33 In my view, the issues raised on appeal tend toward questions of law, attracting review by this court on a standard of correctness. There were no underlying evidentiary or factual issues of a contested nature that the application judge was required to resolve. The arbitration clause was to be interpreted in light of its own wording in the context of the Agreement as a whole and having regard to the 1999 Rules and the Current Rules. There was no dispute as to what these Rules were. The application judge was in no better

position than we are to ascertain the meaning of the arbitration clause in those circumstances.

34 Even if it can be said that the standard is palpable and overriding error, the decision cannot stand. In *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, at para. 110, the Supreme Court of Canada observed that "clearly wrong" and "unreasonable" are the "functional equivalents" of palpable and overriding error. Respectfully, in my view, the arbitration clause cannot reasonably bear the interpretation endorsed by the application judge.

35 The errors in the application judge's reasoning manifest themselves particularly in two areas: (i) in his failure to give meaning and effect to an important term of the arbitration clause, namely the requirement in the conduct of arbitration provision that the arbitration was to be conducted "under ... the then-current rules [of the Institute]"; and (ii) in his interpretation of the phrase "to file" in the waiver provision as "to deliver" or "to serve" the notice upon Bell, which cannot be sustained.

36 I turn briefly now to a review of the relevant principles of contractual interpretation before resuming the analysis of the errors in the application judge's reasons, and the interpretation of the arbitration clause itself.

Principles of Contractual Interpretation

37 Little, if anything is to be found in the application judge's reasons about the principles of interpretation he invoked. Broadly speaking, however - as this Court noted in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254, at para. 24 - a commercial contract is to be interpreted,

> (a) 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;
>
> (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;
>
> (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract),
>
> (d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity. [Footnotes omitted.]

38 In addition, as Doherty J.A. observed in *Glimmer Resources Inc. v. Exall Resources Ltd.* (1999), 119 O.A.C. 78 (C.A.), at para. 17, each word in an agreement is not to be "placed under the interpretative microscope in isolation and given a meaning without regard to the entire document and the nature of the relationship created by the agreement." Courts should not strain to dissect a written agreement into isolated components and then interpret them in a way that - while apparently logical at one level - does not make sense given the overall wording of the document and the relationship of the parties.

Yet that is precisely the effect of accepting The Plan Group's interpretation of the word "conduct" in the arbitration clause and of minimizing or eliminating the import of the words "the then-current rules [of the Institute]."

Interpreting the Arbitration Clause

39 For ease of reference, I set out the text of section 22.2 of the Agreement - the arbitration clause - again here:

> Bell and [The Plan Group] will settle by arbitration any dispute arising out of or related to this Agreement or any Sub-contract that is not finally resolved pursuant to Section 21.1 hereof.[7] *A single arbitrator will conduct the arbitration under the Arbitration Act, 1991 (Ontario) and the then-current rules of the Arbitration and Mediation Institute of Ontario Inc.* Bell and [The Plan Group] will select the arbitrator from a panel of persons knowledgeable in business information and the construction industry. The decision and award of the arbitrator will be final and binding and the award so rendered may be entered into any court having jurisdiction thereof. The arbitration will be held in Toronto, Ontario. The arbitrator will not be empowered to award punitive damages to either Party. *Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim.* [Emphasis added.]

40 I understand The Plan Group's argument to be the following. Arbitrations are governed by the provisions of the *Arbitration Act, 1991*, except to the extent that the parties have contracted out of those provisions, expressly or by implication. With that proposition, I do not quarrel. The Plan Group goes on to submit, however, that they and Bell have not contracted out of the provisions of the Act with respect to the commencement of arbitration proceedings; instead, they agreed only that the arbitrator, once appointed by the parties, would "conduct" the arbitration by applying only the Institute's procedural rules, that is, that portion of the Institute rules dealing with the procedural "conduct" of the arbitration by the arbitrator. The parts of the Institute's rules relating to commencement of the arbitration, the administration of the arbitration generally, and anything other than procedural conduct, have no application. Accordingly, The Plan Group properly commenced the arbitration, they say, by delivering a preliminary and final Notice of Request to Arbitrate to Bell in accordance with s. 23(1)3 of the Act which permits arbitration to be commenced in that fashion.

41 The application judge accepted this argument. Respectfully, I do not think it is tenable. As I have mentioned, his interpretation fails to give meaning to an important term in the arbitration clause specifying that the arbitration would be conducted under the "then-current rules" of the Institute, and further, assigned an unsustainable interpretation to the word "file" in the waiver portion of the clause.

Failure to Give Effect to the Phrase "The Then-Current Rules [of the Institute]"

42 The application judge did not apply the Current Rules. His interpretation failed to give meaning and effect to a critical term of the parties' agreement calling for conduct of the arbitration under "the then-

current rules [of the Institute]." Early in his reasons, at para. 19, the application judge recognized that " [v]iewed on its own, the second sentence in the Arbitration Clause constitutes a straight-forward agreement to comply with the provisions of both the Act and *the rules of the Institute from time to time*" (emphasis added). He added that he "[saw] no reason not to give effect to the express wording of this provision." That is not what he did, however. In this respect, he erred in law by misapplying, or failing to apply, the principle that a contract is to be interpreted in a manner that gives meaning to all of its terms and avoids an interpretation that renders one or more of its terms ineffective.

(i) The Application Judge's Focus on "Conceptual Approaches"

43 Some background is necessary to understand how the application judge arrived at this result. The error stems in large part, in my view, from his undue focus on the parties' "conceptual approaches" to the arbitration rather than on the wording of the arbitration clause itself. Indeed, he was persuaded that, "*The issue on this application [turned] on* which of such conceptual approaches is applicable" (para. 15; emphasis added). Instead of asking himself what the clear wording of the conduct of arbitration provision meant - viewed in the context of the arbitration clause and the Agreement as a whole, and the Institute rules - he embarked upon a search for the proper "conceptual approach" to the type of arbitration agreed to by the parties.

44 The application judge's approach led him to ground his interpretation on a set of Institute rules (the 1999 Rules) that had no direct application and, even to the extent they provide "context" to the interpretive exercise, they did not support the interpretation he adopted. That error reinforced the narrow interpretation of the arbitration clause he embraced, premised on his erroneous conclusion as to the nature of the arbitration the parties had agreed to. This, in turn, led to his refusal to give effect to the set of Institute rules that were applicable (the Current Rules) because - in his view - they represented a "fundamental change" from that flawed view of the nature of the arbitration process agreed to.

45 An understanding of the two concepts put forward is therefore important to provide insight into his reasoning process. The two different conceptual approaches were summarized by the application judge at paras. 16 and 17 of his reasons:

> Plan says that the parties did not agree that the Institute would administer any arbitration under the Agreement. It submits that the parties agreed only to be bound by the procedural rules of the Institute (whether the 1999 Rules or the Current Rules) that apply in the conduct of an arbitration after the appointment of an arbitrator, and only to the extent that the arbitrator chooses to apply them. Accordingly, Plan submits that the rules of the Institute do not apply to determine the method of initiating arbitration. It also argues that the Arbitration Clause permits an arbitration to be commenced by any means recognized under law, including delivery of a notice demanding arbitration, using the language of paragraph 23(1)3 of the Act.
>
> Bell argues that the parties agreed that (1) the Institute is to administer any arbitration under the Agreement; and (2) any such arbitration must be

commenced by filing a Notice to Arbitrate with the Institute. Bell relies on the reference in the second sentence of the Arbitration Clause to the "then-current rules" of the Institute, and the substitution of the Current Rules for the 1999 Rules including, in particular, section 5 of the Current Rules. Bell says that, collectively, these provisions have the result that the parties are bound by the Current Rules of the Institute in their entirety including, in particular, the provisions respecting commencement of an arbitration.

46 The application judge adopted The Plan Group's conceptual approach.

47 I do not mean to suggest that the different conceptual approaches to the arbitration clause are meaningless. They shaped a good part of the debate between the parties. However, the meaning of a document is not determined by the conceptual approaches taken by the parties to it; it is the meaning of their written document that sheds light on their chosen conceptual approach. Here, the application judge tackled the interpretative exercise in the reverse. He ascertained what he believed to be the proper "conceptual approach" to the arbitration clause by relying on a set of Institute rules that had no application (the 1999 Rules). He then used that conceptual approach to interpret the arbitration clause in a way that would justify his refusal to give effect to the set of Institute rules that did apply (the Current Rules).

48 But, as outlined below, the structure of the arbitration clause read as a whole, and in the context of the 1999 Rules and the Current Rules, simply does not support the conceptual approach and interpretation advanced by The Plan Group and adopted by the application judge, in my opinion.

(ii) The Structure of the Arbitration Clause

49 The structure of the arbitration clause and the sequence in which it evolves are themselves of some significance. In fact, the parties outline their concept of the arbitration at the very outset of the clause. They do not agree that they will arbitrate their disputes by first appointing their arbitrator and then leaving it to the arbitrator to "conduct" the procedural aspects of the arbitration and the hearing in accordance with the procedural portion of the rules of the Institute. Rather, in the first two sentences of the arbitration clause, they agree (a) to resolve their disputes by arbitration, (b) to resort to a single arbitrator to do so, and (c) to have the arbitration conducted by the single arbitrator "under the Arbitration Act, 1991 (Ontario) and *the then-current rules* [of the Institute]." That is their "conceptual approach" to their dispute-resolution mechanism: a single-decision-maker arbitration held under the Act and the rules of the Institute in effect at the time the dispute arises.

50 The parties *then* turn their attention to a number of specifics about the arbitration process. They will themselves select the arbitrator from a panel of knowledgeable persons (contrary to the application judge's reasoning, this does "carve out" a right that would otherwise be governed by the rules of the Institute). The arbitrator's decision will be final and binding, and enforceable. The arbitration will take place in Toronto. The arbitrator will not be empowered to award punitive damages. Finally, the parties create what is in effect a limitation period for the bringing of claims which is tied to the filing of a notice of arbitration.

51 I see nothing in the structure or development of the arbitration clause itself to suggest that the applicable rules of the Institute are to be limited to procedural rules to be applied by the arbitrator. Indeed,

had the parties intended that to be the case they would have said "under the then-current rules [of the Institute] *pertaining to the procedural conduct of the arbitration and the hearing by the arbitrator*". They did not do so.

(iii) The Arbitration Clause in Context: The Agreement, the 1999 Rules, and the Current Rules

52 This view is buttressed by the language of the arbitration clause in the context of the Agreement and the rules of the Institute in effect at the time the Agreement was negotiated (the 1999 Rules).

53 A major flaw in The Plan Group's reasoning is to assume - as the application judge appears to have concluded - that the parties agreed to be bound (i) by a particular bundle of rules that could conveniently be amputated from the 1999 Rules (Part IV - Conduct of the Arbitration) and (ii) by any future changes to that specific bundle of rules only. That is not the case, however. The 1999 Rules may be of some assistance as an interpretive aid - they provide part of the context or factual matrix existing at the time the Agreement was negotiated - but they do not apply to this arbitration directly, nor did the parties ever agree that they would apply to any arbitration other than one that happened to be commenced during the period when they were in force. The parties did not agree in the arbitration clause to be bound by any particular set of rules. They agreed only that that the arbitration would be conducted under whatever set of Institute rules were operative at the time the arbitration in question took place.

54 The Agreement itself was for a five-year term which was renewable.[8] The parties had therefore agreed to a long-term contractual relationship. They clearly contemplated that disputes arising during that relationship would be resolved through arbitration conducted under the rules of the Institute and that those rules could change from time to time during the term of the Agreement.

55 Moreover - to the extent they may provide some guidance - the 1999 Rules do not support the amputation approach to the "conduct" of the arbitration or the lack of involvement of the Institute. The application judge drew comfort from the fact that the 1999 Rules are conveniently divided in four Parts: Part I - General; Part II - Commencing the Arbitration; Part III - The Arbitrators; and Part IV - Conduct of the Arbitration. He found reinforcement for The Plan Group's conceptual approach to the arbitration in these separate divisions of those Rules and, in particular, Part IV - Conduct of the Arbitration. The logic does not work, however.

56 First, it would be purely fortuitous if successor Institute rules continued to be similarly structured and divided. While it happened that the 1999 Rules were conveniently divided into Parts and that Part IV was conveniently entitled "Conduct of the Arbitration", the Current Rules are not divided in that fashion and there is no obvious successor to Part IV. The Current Rules consist of 49 individual rules and two Schedules. How the application judge understood the parties would determine what were revisions to or changes in the procedural rules in Part IV in such circumstances is unknown.

57 Second, the view that rules relating to the conduct of the arbitration can be separated into those that are "procedural" and those that are not, makes no sense. Rules relating to the conduct of arbitrations are in essence procedural in nature. They are not "substantive". They provide for the process or procedure to be followed by the parties in having the substantive nature of their dispute resolved by the arbitrator. Indeed,

the set up of the 1999 Rules themselves is incompatible with the notion that only Part IV relates to "the conduct of arbitrations" (in spite of the title to that Part). The 1999 Rules are entitled: "Rules of Procedure for the Conduct of Arbitrations". In Article 1(d), they define themselves - taken in their entirety - as meaning "these *Rules for the conduct of arbitrations of the Institute*" (emphasis added). Thus, when the parties agreed that the arbitration would be conducted "under ... the then-current rules [of the Institute]", they were agreeing - so long as the 1999 Rules remained in effect, in any event - that it would be conducted under "these Rules for the conduct of arbitrations of the Institute", which, as worded, necessarily refers to the Rules as a whole.

58 Third, both the 1999 Rules and the Current Rules provide for the arbitration to be administered by the Institute. Rule 5 of the Current Rules expressly states that by agreeing to arbitration under the Rules, the parties agree that the arbitration shall be administered by the Institute. Article 3.1 of the 1999 Rules likewise stipulates that where parties have provided for arbitration under the auspices of the Institute, the arbitration is to take place in accordance with the rules in affect at the date of commencement of the arbitration. In both instances, then, once the parties agree to conduct the arbitration under the rules of the Institute, they accept that the arbitration will be administered by the Institute. This is consistent with the jurisprudence indicating that where parties agree to use the rules of an institutional arbitration body, they cannot cherry pick the rules they wish to apply and ignore the rest; they are bound to follow all of the rules: see e.g. *Spectra Innovations Inc. v. Mitel Corp.*, [1999] O.J. No. 1870 (S.C.).

59 In short, neither the 1999 Rules nor the Current Rules are amenable to be adopted by parties intending to administer their arbitration privately. Had the parties wished to adopt an arbitration mechanism that borrowed already existing arbitration rules but maintained a privately administered arbitration, they could easily have done so, for example, by resorting to the UNCITRAL Arbitration Rules or the CPR Institute for Conflict Prevention & Resolution - Non-Administered Arbitration Rules. Both those regimes permit such an opt-in or opt-out. The rules of the Institute do not.

60 Fourth, even the opening provision in Part IV of the 1999 Rules envisages the conduct of the arbitration "in all respects" - that is, not just what is touched on in Part IV - to be governed by the Act, the Rules, and the parties' agreements. Article 10.1 states:

> Subject to Article 2.1, the arbitration shall be *conducted in all respects* in accordance with the provision of the *Arbitration Act*, these Rules, the Arbitration Agreements and any other agreement of the parties applicable to the conduct of the proceedings. [Emphasis added.]

61 Finally, the provisions of Part IV clearly contemplate the involvement of the Institute in overseeing the arbitration - again, refuting the notion that the arbitration was to be a "non-administered" arbitration with the parties borrowing only the procedural-conduct related rules of the Institute for the purposes of their own arbitration. Notices, statements and written communications may be sent to the other parties "at the address set out on the records of the Institute" (Article 11.1). The parties are jointly and severally liable for costs and expenses of the arbitration, "including the administrative fees of the Institute" (12.1). The arbitrator or the Institute "may request supplementary deposits for the costs and expenses" (12.2). After the completion of the arbitration and delivery of the award, "the Institute shall provide an accounting"

(12.3). Significantly, "the Institute", as well as the arbitrator, "may extend or abridge any time prescribed by these Rules" (14.2). Finally, the Institute's Schedule of Fees completes Part IV.

62 With respect, I am at a loss to understand how the framework of the 1999 Rules - even if Part IV of those Rules alone is to be considered - can be said to support the non-administrated arbitration interpretation adopted by the application judge. But that is the interpretation that led to his failure to apply the Current Rules.

63 After a lengthy analysis of the arbitration clause in light of the 1999 Rules, the application judge then went on to consider whether the legal result would be any different with regard to the Current Rules. He answered that question in the negative because he concluded that the application of the Current Rules would result in a fundamental change from Plan Group's "conceptual approach," which he had accepted as applicable following his analysis of the impact of the 1999 Rules. At paras. 21, 56 and 59 of his reasons, he said:

> For the reasons set out below, I find that the Arbitration Clause did not mandate delivery and filing of a Notice of Arbitration in compliance with sections 4.1 and 4.3 of the 1999 Rules in order to initiate an arbitration. Instead, I find that the Arbitration Clause contemplated that after commencement of the arbitration and the appointment of the arbitrator, the arbitrator would apply the 1999 Rules during the proceedings.
>
> ...
>
> Moreover, even if they had agreed to the possibility of a change of some nature to the fundamental conceptual approach in the Arbitration Clause by means of a revision of the 1999 Rules, there is no basis for concluding that the parties agreed to the involvement of the Institute in the administration of any arbitration under the Agreement, which is implied by Bell's position.
>
> ...
>
> In summary, I do not think that the Court can find that the parties agreed to be bound by any revisions to, or replacement of, the 1999 Rules beyond revisions to, or changes in, the procedural rules in Part IV of the 1999 Rules in the absence of either (1) wording in the Arbitration Clause that is more extensive than the phrase relied upon by Bell or (2) other contextual evidence, both of which are lacking in this proceeding.

64 For the reasons I have articulated, these conclusions are unsustainable.

(iv) The Effect of the Term "The Then-Current Rules" of the Institute

65 In the end, the application judge refused to apply the Current Rules. In doing so, he ignored, and failed to give effect to, the clear and unequivocal language of the arbitration clause stipulating that the

arbitration was to be conducted under "the then-current rules" of the Institute. The "then-current rules" cannot mean anything other that the Current Rules in the context of this arbitration. The Current Rules call for an arbitration administered by the Institute and commenced by the filing of a notice of arbitration with the Institute.

66 Four provisions of the Current Rules, in particular, are important for determining whether commencement of arbitration under the Agreement requires a party to file a request to arbitrate with the Institute. They are:

> 3. (a) The Rules shall apply where the parties have agreed that the National Arbitration Rules of the ADR Institute of Canada apply. ... *To the extent that the Rules conflict with the Act, the provisions of the Rules shall apply* except to the extent that the parties may not lawfully contract out of the provision of the Act...[9]
>
> 5. By agreeing to the Rules, the parties agree that the arbitration shall be administered by the Institute. ...
>
> 11. Where a dispute falls under an arbitration clause or agreement, a party, as claimant, *may submit that dispute to arbitration by delivering* a written Notice of Request to Arbitrate to the respondent...
>
> 13. The arbitration is *deemed to have commenced* when a Notice of Request to Arbitrate ... has been *filed with the Institute and the initial filing fee has been paid*. The Institute shall notify the parties when an arbitration has been commenced and shall deliver to them a Notice of Commencement of Arbitration.

[Emphasis added.]

67 Clearly, where the Current Rules govern the arbitration - as in my view they do here - a dispute under an agreement is submitted to arbitration by delivering a Notice of Request to Arbitrate to the other party, but the arbitration is not deemed to have been "commenced" for purposes of its administration until that Notice is filed with the Institute and the initial filing fee paid. The Plan Group has not taken that step.

68 Were the arbitration governed by the 1999 Rules, The Plan Group would be in a different position. While sections 4.1 and 4.4 of those Rules call for the filing of a notice of arbitration with the Institute, the 1999 Rules also provided that in the event of a conflict between them and the Arbitration Act, the Act prevailed. Section 23(1)3 of the Act stipulates that an arbitration may be commenced in any way recognized by law, including where "[a] party serves on the other parties a notice demanding arbitration under the agreement." That is what the Plan Group did here.

69 But this arbitration is not to be conducted under the 1999 Rules. It is to be conducted under the Current Rules, which provide that *they* trump the Act (s. 3(a)), and which require a Notice of Request to Arbitrate to be filed with the Institute before the arbitration is deemed to have been commenced (s. 13).

The Waiver Provision

70 The second major error of the application judge is found in his treatment of the words "failure *to file* a notice of arbitration" (emphasis added) in the waiver provision of the arbitration clause, which states:

> Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim.

71 The concept of "filing" the notice of arbitration signals that it is to be deposited or placed with an organization or institution overseeing the proceeding. The application judge equated it, however, with "delivering" the notice to, or "serving" it upon, the other side. In the context of a legal document relating to the resolution of disputes, "filing" cannot be properly or reasonably interpreted to bear such a meaning.

72 The application judge addressed the meaning of the phrase "failure to file a notice of arbitration" only incidentally. He did so in the course of his lengthy examination of what he calls the "Operation of the Arbitration Clause in 1999." In the result, he rejected Bell's interpretation of the arbitration clause as providing for arbitration administered by the Institute and commenced by filing a notice to arbitrate with the Institute. This rejection - or, at least, his conclusion that the last sentence of the arbitration clause "is at best equivocal with respect to the agreement of the parties" - rests, as he saw it, on the failure of the parties to make reference to three things in that sentence, namely:

(i) the failure to specify filing with the Institute in accordance with Article 4.1 of the 1999 Rules and to identify the "notice of arbitration" as the notice of arbitration provided for in Article 4 of those Rules;

(ii) the failure to insert the words "with the Institute" after the words "failure to file a notice of arbitration" (leaving open The Plan Group's suggested interpretation equating "filing" with "delivery" to the other party, he concludes); and

(iii) the failure to clarify, for limitation purposes, which of the filing requirements under Article 4.2 or Article 4.4 - one requires the filing of a single notice; the other of three copies - applied.

73 There are a number of reasons why this rationale for the rejection of Bell's position is not sustainable under the language of the arbitration clause, even as interpreted through the lens of the 1999 Rules.

74 In the first place, the language of the arbitration clause makes it clear that the arbitration is to be conducted, not in accordance with the 1999 Rules (unless the arbitration happens to be commenced when they are in force), but in accordance with the Rules of the Institute in place from time to time - the "then-current rules." Consequently, there was no reason for the parties to refer specifically to any particular provisions in the 1999 Rules. Indeed, to have done so might well have created problems of interpretation in the future because references to specific rules might set up a conflict with different rules in effect at a later time.

75 Secondly, the notion that "filing" may be equated with "delivery" - or with "service", or with "giving

notice" - in the context of a legal-related proceeding is seriously flawed. "Filing" is a well-understood concept in the dispute resolution milieu. It means placing or depositing a document with the institutional overseer of the proceeding. It does not mean delivering the document to, or leaving it with, or serving it upon the other party.

76 A cursory review of any number of dictionary resources confirms the distinction between these concepts. For example, *The Shorter Oxford English Dictionary*, 3d ed., defines the verb "file" to mean "to place in due manner among the records of a court or public office," and the verb "deliver" to mean "to hand over to another's possession or keeping."[10] Service involves the formal delivery of a document to someone: *Black's Law Dictionary*, 8th ed., *s.v.* "service".

77 Both the 1999 Rules and the Current Rules of the Institute use the terms "file", "deliver" and "serve" in distinct contexts. "Filing," is used in the context of depositing a document with the Institute - for example, a notice of arbitration or a pleading. Often, filing is what triggers the requirement for an administrative fee payment. Article 4.4 of the 1999 Rules requires the claimant to "*file at the office of the Institute* three copies of the Notice of Arbitration together with the administrative fee". Articles 4.6 - 4.8 provide that the pleadings are to be *served* on the opposite party *and filed* with the Institute. Rule 13 of the Current Rules deems the arbitration to have been commenced "when a Notice of Request to Arbitrate ... *has been filed with the Institute* and the initial filing fee has been paid." Under the Current Rules, pleadings are "delivered" to the parties and to the Institute, but they are not "filed" with the other party.

78 Finally, it was not necessary for the parties to the arbitration clause to have added the words "with the Institute" after the words "failure to file a notice of arbitration" in the final sentence of the arbitration clause. The fact that the notice was to be filed with the Institute is self-evident from a reading of the arbitration clause as a whole. The arbitration was to be conducted in accordance with the Rules of the Institute.

79 The application judge's treatment of the waiver provision in the last sentence of the arbitration clause had several unfortunate consequences. It caused him to lose sight of the simple, straight-forward meaning of that stipulation in the arbitration clause: a notice of arbitration must be filed with the Institute within 12 months of the occurrence upon which the claim is based; otherwise the claim is irrevocably waived. Of equal importance, however, it skewed his interpretation of the balance of the arbitration clause. Instead of leading him to conclude - as it should have done - that the parties had agreed to an arbitration procedure to be administered by the Institute, his erroneous interpretation served to bolster his conclusion that type of arbitration agreed to was not one that was to be administered by the Institute and that the clause was to be interpreted largely in light of the application of the 1999 Rules.

The Dissent

80 I have had the opportunity to review the dissenting reasons of my colleague, Justice Gillese. Respectfully, I do no share her view of the proper disposition of the appeal for the reasons I have given.

81 In completion I should address an issue she has raised as a preliminary matter, namely, the question whether the matters in the application should have been referred to the arbitrator for determination, based on the principles set out in *Dell Computer Corp. v. Union des Consommateurs*, [2007] 2 S.C.R. 801.

The parties to this appeal are sophisticated commercial parties represented by sophisticated commercial counsel. They did not argue or ask us to deal with this issue, presumably for their own practical reasons. I would be reluctant to determine the appeal on that basis.

82 In any event, I do not see the application (and the appeal) as raising a question regarding the jurisdiction of the arbitrator, but rather a question of whether there *is* an arbitration within which the arbitrator may or may not exercise a jurisdiction.

IV. DISPOSITION

83 Accordingly, for the foregoing reasons, I would allow the appeal, set aside the order of the application judge, and in its place direct that arbitration under the Alliance Agreement must be commenced by filing a Notice of Request to Arbitrate with the Institute.

84 Bell is entitled to its costs of the appeal and of the application. Counsel have agreed on amounts. In accordance with that agreement, the costs of the appeal are fixed at $20,000 and the costs of the application at $30,000. Both amounts are inclusive of fees, disbursements and GST.

R.A. BLAIR J.A.
S.T. GOUDGE J.A.:-- I agree.

85 E.E. GILLESE J.A. (dissenting):-- I have read the draft reasons of my colleague, Blair J.A. With respect, I do not agree that the application judge's interpretation of the arbitration clause is to be reviewed on a standard of correctness. In any event, however, in my view, the application judge's interpretation is not only reasonable, it is correct. Accordingly, I would dismiss the appeal.

86 As will become apparent, the factual context plays a significant role in the disposition of this appeal. Thus, I begin there.

BACKGROUND[11]

The Alliance Agreement

87 Going into the 1990s, Bell Gateways (a division of the appellant, Bell Canada ("Bell")) was dominant in the structured cabling market. Its competitors were principally small, unsophisticated cabling installation contractors. This changed in the early 1990s when electrical contractors entered the structured cabling market and larger contractors began providing the same value-added services as Bell. Electrical contractors brought sophisticated project-management skills to the cabling market and developed relationships with general contractors, project managers, electrical engineers and Bell's clients. Over time, customers gave their electrical and cabling work to electrical contractors.

88 These developments posed a problem for Bell Gateways because it found it difficult to penetrate the longstanding relationships that electrical contractors had with project managers and general contractors. Bell Gateways increasingly lost market share to electrical contractors, including the Plan Group, a premier structured cabling contractor.

89 In early 1998, Bell and the Plan Group joined forces and began to jointly pursue cabling projects. Success in those projects led Bell and the respondents ("Plan") to enter into an agreement dated February 1, 1999 (the "Alliance Agreement").

90 The Alliance Agreement contemplated that Plan would perform electrical and cabling services contracted in Bell's name and Bell would provide marketing, bonding and project financing services for Plan. It reflected the parties' expectation that a number of projects would be started during the term of the agreement. The initial term of the Alliance Agreement was for five years, ending on January 31, 2004.

91 Article 22 of the Alliance Agreement establishes a two-step process for resolving disputes that might arise between the parties. The first step in the process is set out in art. 22.1. It requires the party that considers a dispute to exist to provide written notice to the other. The parties must then make good faith efforts to resolve the dispute through a structured discussion process.

92 If the good faith efforts fail to resolve the dispute, the parties move to the second step of the dispute resolution process. The second step, contained in art. 22.2 (the "Arbitration Clause"), requires the dispute to be settled by arbitration. The last sentence in the Arbitration Clause provides that a failure to file a notice of arbitration within twelve months of the occurrences supporting a claim constitutes an irrevocable waiver of that claim (the "Waiver").

93 The full text of art. 22 is set out below.[12] The critical portions of the Arbitration Clause read as follows:

> 22.2 Bell and [Plan] will settle by arbitration any dispute arising out of or related to this Agreement or any Sub-contract that is not finally resolved pursuant to Section 22.1 hereof. A single arbitrator will conduct the arbitration under the Arbitration Act, 1991 (Ontario) and the then-current rules of the Arbitration and Mediation Institute of Ontario Inc. ... Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim.

The Dispute

94 The parties contracted to provide the Greater Toronto Airport Authority ("GTAA") with electrical systems in its new airport terminal. Plan continued to work on the GTAA project after January 31, 2004, the end date of the initial five-year term of the Alliance Agreement.

95 By October 2004, Bell had not paid Plan for invoices it had rendered in relation to the GTAA project. The invoices claimed for amounts in excess of $40 million. Without collecting a significant amount of the invoiced amounts, Plan would have gone bankrupt.

96 On December 16, 2004, Plan accepted $23 million as settlement for the invoiced amounts (the "Settlement"). Plan says that it was compelled to accept the significantly reduced amount because it was in a vulnerable financial state. It further alleges that its compromised financial state was brought about by Bell's capital investment demands of Plan that were made as part of the Alliance Agreement, coupled with

Bell's subsequent breach of cash flow obligations.

97 Plan wished to dispute the Settlement in accordance with art. 22.

98 On August 26, 2005, Plan took the first step in the dispute resolution process to which the parties are bound by virtue of art. 22 of the Alliance Agreement. It delivered written notice to Bell that a dispute existed between the parties. In addition, Plan alerted Bell to the possibility that the dispute might proceed to arbitration by attaching to the notice of dispute a 20-page draft "Notice Demanding Arbitration" (the "Draft Notice"), which set out particulars of its claim. Among other things, the Draft Notice asserted Plan's claim to compensation in respect of the Settlement.

99 What happened thereafter is most easily understood by means of a timeline.

A Chronology of the Events that Followed

September 8, 2005

- Fall and winter 2005 Bell responds to Plan's notice of dispute and Draft Notice. It asserts that Plan's claim was waived, pursuant to art. 22.2, as it was in respect of occurrences that took place over 12 months previously. It says nothing about the need to file a notice of arbitration with the Arbitration and Mediation Institute of Ontario Inc. (the "Institute") or in accordance with the Institute's rules. Bell also agrees to meet with Plan pursuant to art. 22.1.

Fall and winter 2005

- Bell asks for extensive particulars of Plan's claim. Plan provides them.

December 12, 2005

- Although discussions between the parties continue, Plan delivers a final notice demanding arbitration (the "Notice") to counsel for Bell. In the cover letter that accompanies the Notice, Plan states that it wishes to preserve its rights under the Alliance Agreement, reiterates its willingness to continue with settlement discussions and asks counsel for Bell to confirm that it can accept service of the Notice. The Notice complies with the requirements for commencement of arbitration in s. 23(1)3 of the *Arbitration Act, 1991*, S.O. 1991, c. 17.

January 17, 2006

- As Plan has received no response to the Notice, it contacts Bell by email, asking when it might hear back.

January 20, 2006

- Bell responds by email, saying that it is continuing to review Plan's claim and asks for further particulars. It raises no issue about the adequacy of the Notice or the need for it to be filed with the Institute. It says that it has not ruled out the possibility of further meetings and discussions.

March 2, 2006

- Plan provides Bell with further particulars.

April 11, 2006

- Plan concludes that Bell is not making good-faith efforts to settle the dispute. It sends Bell a letter to that effect and advises that it will proceed in accordance with the Arbitration Clause. It asks Bell to contact it by April 18 to discuss the selection of a suitable arbitrator.

April 19, 2006

- Bell responds saying it will make an application to the court to seek relief consistent with its position that Plan's claims are not arbitrable because they have been waived and, in some cases, released. It says it will serve a notice of application shortly. Counsel for Bell asks counsel for Plan not to commence arbitration proceedings until it serves its notice of application.

Spring and summer 2006

- Plan makes a number of inquiries of Bell about the status of the notice of application and is assured repeatedly that the notice will be sent.

August 11, 2006

- Bell serves Plan with the notice of application. The relief sought includes a declaration that Plan had waived its claim and that Plan is barred from commencing arbitration by virtue of its failure to file a notice of arbitration in accordance with the Arbitration Clause.

September 20, 2006

- Bell serves Plan with the supporting affidavit material.

December 7, 2006

- Plan brings a motion seeking to stay Bell's application and refer the dispute to arbitration on the basis that Bell's application required the determination of arbitrable issues.

Spring or summer of 2007

- Settlement discussions take place in respect of Bell's application and Plan's motion. The parties agree to withdraw their respective court proceedings (*i.e.* the application and stay motion), without prejudice to their ability to advance their positions at arbitration.

Summer or fall of 2007

- Plan and Bell agree on the Honourable Coulter Osborne as arbitrator of the dispute.

September 2007

- The application and stay motion are withdrawn.

Fall 2007

- Bell refuses to appoint the Honourable Coulter Osborne or schedule a hearing of the arbitration until Plan files a notice of request to arbitrate in accordance with s. 11 of the Institute's rules.

The Proceedings Below

100 Plan found itself in a "catch 22" position. It could not get the matter before the arbitrator because Bell refused to accept that Plan had commenced arbitration and would not appear before the arbitrator unless Plan filed a notice of request to arbitrate with the Institute. If Plan took that step however, it was concerned that it would jeopardize its position in respect of the Waiver.

101 On November 8, 2007, in an attempt to get the court's help to break the deadlock, Plan brought a notice of application to the Superior Court of Justice. The relief sought was an order appointing the Honourable Coulter Osborne as arbitrator of the dispute, pursuant to art. 22.2 of the Alliance Agreement.

102 On January 23, 2008, the parties agreed that they would advise the application judge that the only issue for determination was whether commencement of arbitration under the Alliance Agreement required a party to file a written request to arbitrate with the Institute. They also agreed not to rely on disputed evidence.

103 Plan maintains that it asked the court, alternatively, to resolve the impasse by appointing an arbitrator to interpret the Arbitration Clause regarding commencement of arbitration. It says that the agreement between counsel concerning the scope of the application pertained only to the relevance of disputed evidence and the suitability for summary determination by way of application. It says it did not abandon its alternative position that if the court declined to determine the matter summarily in accordance with the principles in *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, then the matter should be decided by an arbitrator appointed by the court, without prejudice to either party's position concerning the proper procedure for commencing arbitration.

104 On February 28, 2008, Wilton-Siegel J. heard the application.

105 By order dated April 29, 2008 (the "Order"), the court declared that as of December 14, 2005, the Arbitration Clause did not require a party commencing arbitration under the Alliance Agreement to file a Notice of Request to Arbitrate with the Institute.

106 Bell appeals.

ARTICLE 22 OF THE ALLIANCE AGREEMENT

107 For ease of reference, art. 22 is set out in full, below:

> 22. DISPUTE RESOLUTION
>
> 22.1 The Parties seek to avoid disputes whenever possible. In the event of a dispute between the Parties concerning any matter arising from or connected with this Agreement, the Parties shall use their commercially reasonable efforts to settle the dispute in accordance with the following procedures:
>
> (a) A Party which considers that a dispute exists shall provide written notice (in this paragraph 22.1(a), a "Notice of Dispute") to the other Party to the attention of the other Party's representative. For this purpose the nominated representative of Bell shall be its Assistant Vice-President Internetworking and the nominated representative for [Plan] shall be either of Bill Kurtin or Marshel Cohen. (Either Party may change its representative(s) on written notice to the other Party.) Following the provision of a Notice of Dispute to a Party's representative, the representatives of the Parties will forthwith make commercially reasonable efforts to, in good faith, resolve all disputes which are the subject of such notice in no more than 10 days from the date of the notice.
>
> (b) Should the dispute between the Parties not be resolved pursuant to the settlement process set out in Paragraph 22.1(a) hereof during the 10 day

period referred to therein, the dispute shall be referred for resolution to Bell's Vice-President Gateways and to either of Bill Kurtin or Marshel Cohen. Following such referral, such persons will forthwith make commercially reasonable efforts, in good faith, to resolve all disputes which are the subject of such referral within 10 days from the date of such referral.

22.2 *Bell and [Plan] will settle by arbitration any dispute arising out of or related to this Agreement or any Sub-contract that is not finally resolved pursuant to Section 22.1 hereof. A single arbitrator will conduct the arbitration under the Arbitration Act, 1991 (Ontario) and the then-current rules of the Arbitration and Mediation Institute of Ontario Inc.* Bell and [Plan] will select the arbitrator from a panel of persons knowledgeable in business information and the construction industry. The decision and award of the arbitrator will be final and binding and the award so rendered may be entered in any court having jurisdiction thereof. The arbitration will be held in Toronto, Ontario. The arbitrator will not be empowered to award punitive damages to either Party. *Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim.* [Emphasis added.]

THE REASONS OF THE APPLICATION JUDGE

108 The application judge understood the application to have raised a single issue: did the Arbitration Clause require a party to file a "Notice of Request to Arbitrate" with the Institute in order to commence arbitration? He noted that the parties had very different conceptions of how the Arbitration Clause operated and that the issue turned on which conceptual approach applied. At paras. 16 and 17 of the reasons, the application judge set out the parties' conceptual approaches:

> Plan says that the parties did not agree that the Institute would administer any arbitration under the Agreement. It submits that the parties agreed only to be bound by the procedural rules of the Institute (whether the 1999 Rules or the Current Rules) that apply in the conduct of an arbitration after the appointment of an arbitrator, and only to the extent that the arbitrator chooses to apply them. Accordingly, Plan submits that the rules of the Institute do not apply to determine the method of initiating arbitration. It also argues that the Arbitration Clause permits an arbitration to be commenced by any means recognized under law, including delivery of a notice demanding arbitration, using the language of paragraph 23(1)3 of the Act.
>
> Bell argues that the parties agreed that (1) the Institute is to administer any arbitration under the Agreement; and (2) any such arbitration must be

commenced by filing a Notice to Arbitrate with the Institute. Bell relies on the reference in the second sentence of the Arbitration Clause to the "then-current rules" of the Institute, and the substitution of the Current Rules for the 1999 Rules including, in particular, section 5 of the Current Rules. Bell says that, collectively, these provisions have the result that the parties are bound by the Current Rules of the Institute in their entirety including, in particular, the provisions respecting commencement of an arbitration.

109 The application judge summarized the two relevant sets of Institute rules at paras. 5-14 of the reasons:

> ***The 1999 Rules***
>
> The Rules of the Institute that applied at the time of execution of the Agreement (the "1999 Rules") were divided into four parts under the following headings: "General", "Commencing the Arbitration", "The Arbitrators" and "Conduct of the Arbitration". The following provisions have relevance to the issue herein.
>
> First, in Part I, section 2.1 provided that the provisions of the *Arbitration Act, 1991*, S.O. 1991, c.17 (the "Act") would govern in the event of any conflict between the Act and the 1999 Rules.
>
> Second, in Part II (entitled "Commencing the Arbitration"), section 4.1 required that written notice of a proposed arbitration be given by a party initiating arbitration to the Institute and all other necessary parties. Section 4.2 provided that the arbitration would be deemed to commence on the date on which the Institute received a Notice of Arbitration from the claimant (presumably, but not expressly, the written notice contemplated by section 4.1).
>
> Third, in Part IV (entitled "Conduct of the Arbitration"), section 10.1 provided that the arbitration was to be conducted in accordance with the Act, the 1999 Rules and any applicable agreement between the parties including the arbitration agreement.
>
> ***The Current Rules***
>
> Since at least 2003, the Institute has applied the ADR Institute of Canada, Inc. National Arbitration Rules (the "Current Rules"). The Current Rules are not divided into discrete sections in the manner of the 1999 Rules.
>
> Section 3 of the Current Rules provides that the Current Rules, rather than the Act, govern in the event of any conflict, except to the extent that the parties may not lawfully contract out of the provisions in the Act.

The first sentence of section 5, upon which Bell places considerable reliance, provides that "[b]y agreeing to the Rules, the parties agree that the arbitration shall be administered by the Institute".

Section 11 of the Current Rules requires the delivery of a "Notice of Request to Arbitrate" to the respondent and to the Institute to commence an arbitration. Section 11 also specifies in detail the required content of a Notice of Request to Arbitrate.

Section 13 provides that an arbitration is deemed to have commenced when a Notice of Request to Arbitrate has been filed with the Institute and the initial filing fee has been paid.

More generally, in addition to the matters addressed by the 1999 Rules, the Current Rules address a number of procedural and substantive issues that are also addressed in the Act. The Current Rules essentially constitute a complete code for the commencement and conduct of an arbitration.

110 The application judge considered the operation of the Arbitration Clause at the time the Alliance Agreement was executed in 1999 and then considered whether the legal result was different under the Current Rules. He found that the Arbitration Clause did not mandate delivery and filing of a Notice of Arbitration in compliance with ss. 4.1 and 4.3 of the 1999 Rules in order to initiate arbitration.

111 Instead, the application judge interpreted the Arbitration Clause as providing that after commencement of arbitration and the appointment of the arbitrator, the arbitrator would apply the Institute rules to the conduct of the arbitration. He reached this conclusion because, on its face, he found the Arbitration Clause favoured Plan's interpretation. He gave several reasons for this conclusion, the most significant of which may be summarized as follows:

1. The wording and order of the second and third sentences in the Arbitration Clause. The Arbitration Clause does not say that any dispute or arbitration under the Alliance Agreement is to be resolved in accordance with the Institute rules. Instead, it refers specifically to the "conduct" of the arbitration being subject to the Act and the then-current Institute rules. Thus, "on a plain reading", the Arbitration Clause limits the reach of the 1999 Rules to the conduct of the arbitration rather than compliance with all of the Institute rules. Part IV of the 1999 Rules is entitled "Conduct of the Arbitration". It is separate and distinct from Part II of the 1999 Rules which is entitled "Commencing the Arbitration."
2. The Arbitration Clause contemplates a procedure for appointment of an arbitrator outside the Rules. Had the parties intended the reference in the second sentence of the Arbitration Clause to constitute an agreement to comply with all of the 1999 rules, the third sentence should have carved the appointment process out of the rules. The fact that it doesn't suggests the parties did not intend all of the Institute rules to apply.

3. Plan's interpretation is more consistent with the context in which the Arbitration Clause was negotiated. The application judge gave a detailed explanation for this view, based on the 1999 Rules and the wording of the Arbitration Clause. For example, Bell's interpretation was based on its position that the Institute would administer the arbitration. However, this position was based on s. 5 of the Current Rules, for which there was no counterpart in the 1999 Rules. Moreover, there is nothing in the Arbitration Clause to say that the Institute would administer the arbitration. Further, Plan's interpretation is consistent with the 1999 Rules which are divided into parts, making it feasible that only the parts governing conduct of the arbitration would apply.

112 After concluding that the Arbitration Clause did not mandate compliance with the 1999 Rules for commencement of arbitration, the application judge considered whether the Current Rules had that effect. This question arose because the Arbitration Clause provides that the arbitration will be conducted in accordance with the "then-current" Institute rules. Bell argued that if the Arbitration Clause did not mandate filing of a Notice to Arbitrate under the 1999 Rules, the result is different because of ss. 3 and 5 of the Current Rules. The effect of those sections, read together with the Arbitration Clause, Bell argued, was that any arbitration must be commenced in accordance with the Current Rules, *i.e.* by filing a Notice of Request to Arbitrate with the Institute under s. 11.

113 After outlining Plan's response to this argument, the application judge explained that the difference between the parties turned on fundamentally different views of the nature of the agreement between the parties in 1999 with respect to (1) the scope of the rules to which the parties agreed to be bound, and (2) the involvement of the Institute in the administration of an arbitration. He concluded that the parties agreed that the arbitrator was to apply the procedural rules of the Institute in effect from time to time in the conduct of the arbitration. He did not agree that either (1) the remaining rules of the Institute were also to be applied in respect of any arbitration under the Agreement; or (2) the Institute was to administer any such arbitration.

114 Thus, the issue was whether, by the reference to the then-current rules of the Institute in the second sentence of the Arbitration Clause, the parties agreed to accept the possibility that their agreement could be overridden by a substitution of the Current Rules for the 1999 Rules by the Institute.

115 He gave two reasons for rejecting the notion that by referring to the "then-current" Institute rules, the parties intended that they would be bound by anything more than changes to procedural rules. First, he found it unlikely that the parties turned their minds to the possibility that by virtue of a change to the Institute rules, the fundamental approach to arbitration embodied in the Arbitration Clause could be changed without their involvement. There was nothing in the limited scope of the 1999 Rules or the Act to suggest the possibility of such a fundamental change. He saw it as far more likely that the parties envisaged that possible changes to the Institute rules would relate to the conduct of arbitration.

116 The second reason, given at paras. 55-58 of the reasons, is a contextual consideration:

Most important, the Agreement was the product of a negotiation between two

sophisticated commercial parties represented by legal counsel. In the absence of wording suggesting otherwise, the Court should proceed on the basis that the conceptual approach to arbitration set out in the Arbitration Clause was meaningful to the parties. In the absence of express wording suggesting otherwise, I do not think the Court should interpret the acknowledgment in the Arbitration Clause of possible revisions to the 1999 Rules to constitute an agreement to be bound by rules that change the fundamental conceptual approach in the Arbitration Clause without the consent of the parties.

Moreover, even if they had agreed to the possibility of a change of some nature to the fundamental conceptual approach in the Arbitration Clause by means of a revision of the 1999 Rules, there is no basis for concluding that the parties agreed to the involvement of the Institute in the administration of any arbitration under the Agreement, which is implied by Bell's position.

If the parties were agreeable to Institute administration of any such arbitration, they could have selected this approach from the outset. Despite the more limited set of provisions in the 1999 Rules, they could have agreed that the arbitration was to be governed in all respects by the 1999 Rules. Alternatively, they could have addressed the possibility of future Institute involvement in the Arbitration Clause. They did neither. The failure to do either reinforces the conclusion that the parties did not agree to accept Institute administration of any arbitration.

In addition, the position of Bell implies that the parties agreed to accept all revised rules of the Institute, sight unseen and without any opportunity to consider the consequences thereof for any arbitration under the Agreement. While I think it is reasonable to contemplate an agreement of this nature extending to revisions of procedural rules designed to facilitate the conduct of an arbitration, it is unreasonable to expect that the parties in this proceeding would have agreed to be bound by a revision that broadened the scope of the operation of the rules of the Institute. For example, I do not think it is reasonable to conclude that the parties agreed to comply with any revision to the rules that imposed additional costs of arbitration upon the parties without their consent by imposing Institute involvement in respect of any arbitration.

117 Accordingly, the application judge could not find that the parties agreed to be bound by any revisions to, or replacement of, the 1999 Rules beyond changes to procedural rules in the absence of either wording to that effect in the Arbitration Clause or other contextual evidence.

118 In the result, he concluded that as of December 14, 2005, the Arbitration Clause did not require that in order to commence arbitration, a party had to file a "Notice of Request to Arbitrate" with the Institute.

THE ISSUE

119 The Order declared that as of December 14, 2005, the Arbitration Clause did not require a party commencing arbitration under the Alliance Agreement to file a Notice of Request to Arbitrate with the Institute. Thus, the issue on appeal is whether the application judge erred in making that declaration.

120 The application judge was required to interpret the Arbitration Clause in order to reach the conclusion that such notice was not required. Accordingly, the first step in the analysis is to determine what standard of review applies to the application judge's interpretation of art. 22.2.

121 Before turning to the standard of review, however, a preliminary matter needs to be addressed.

A PRELIMINARY MATTER

122 In *Dell* at paras. 84-86, the Supreme Court laid down "a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator." The court should "depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law" or a question of mixed law and fact where "the questions of fact require only superficial consideration of the documentary evidence in the record." Further, "[b]efore departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding." Thus, "even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process."

123 This court has endorsed a similarly deferential approach that mandates referral to arbitration where it is arguable that a dispute falls within the scope of an arbitration clause: see *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.); *Greenfield Ethanol Inc. v. Suncor Energy Products Inc.*, 2007 ONCA 823 (C.A.), aff'g [2007] O.J. No. 3104 (S.C.); *Dancap Productions Inc. v. Key Brand Entertainment, Inc.* (2009), 246 O.A.C. 226 (C.A.). Moerover, although the court has concurrent jurisdiction to decide the arbitrability of a dispute under the *Arbitration Act, 1991*, it will construe broadly drafted arbitration clauses generously, "consistent with the legislative policy... which favours arbitration over litigation where the parties so provide by agreement": see *Woolcock v. Bushert* (2004), 246 D.L.R. (4th) 139 (Ont. C.A.), at paras. 23, 25; *Greenfield* at para. 11.

124 In my view, it may well have been preferable had the application judge been asked to refer the whole matter to arbitration, including the dispute regarding the validity of commencement. Such an approach would have been consistent with the parties' agreement in art. 22.2 to have all disputes "arising out of or related to" the Alliance Agreement resolved by arbitration. Further, Bell's stance appears to be a delaying tactic, and, as the decision of my colleague may permanently prevent the arbitration from taking place, it cannot be said that the court proceedings have been "best for the arbitration process". However, the application judge did not refer the issue of commencement to the arbitrator and neither party asked this court to approach the appeal on this basis.

125 Having said that, it is significant that the Order is consonant with the *Dell* principles, set out above, and the jurisprudence of this court. The Order does not state that Plan has commenced arbitration. It simply says that as of the relevant date, it was not necessary to file a notice with the Institute to commence arbitration pursuant to art. 22.2 of the Alliance Agreement. That is, the Order leaves the question of

whether Plan commenced arbitration with the arbitrator, just as the jurisprudence urges.

126 I do not see the form of the Order as some kind of happenstance. The Order takes its form from the conscious decision of counsel for both parties to ask the application judge to perform a single task and decide a single question: interpret the Arbitration Clause and determine whether, on December 14, 2005, a party had to file a notice with the Institute to commence arbitration. The parties did not ask the application judge to decide if Plan had commenced the arbitration nor did he decide that question. Consequently, it is open to Bell to raise that matter as an issue once the parties are before the arbitrator.

127 I raise this preliminary matter for a single purpose - it provides an additional reason for dismissing the appeal. If the Order stands, the parties can appear before the arbitrator and have him decide whether Plan commenced the arbitration. That is, the arbitration will be conducted in a way that conforms with the guidance of this court and that of the Supreme Court.

THE STANDARD OF REVIEW IN CONTRACTUAL INTERPRETATION

128 I agree with much of what my colleague has said generally in respect of appellate review on matters of contractual interpretation. However, I disagree with the view that the question of contractual interpretation in this appeal attracts a standard of review of correctness. To explain my position, I must recap some of the discussion on the guiding legal principles.

The Guiding Legal Principles

129 As my colleague noted, historically, interpretation of a contract was treated as a question of law, reviewable on a standard of correctness. However, *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 dictates that a more nuanced approach be taken by reviewing courts. The standard of review in contractual interpretation - as in other types of civil proceedings - depends on the nature of the question that the trial judge decided: was it one of law, fact, or mixed law and fact? Questions of law are reviewable on a standard of correctness. Questions of fact are reviewable on a standard of palpable and overriding error, or the "functional equivalents" of "clearly wrong", "unreasonable" or "not reasonably supported by the evidence": *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, at para. 110. Questions of mixed law and fact, however, lie along a spectrum, with some questions being more akin to questions of law and others being more akin to questions of fact.

130 At para. 36, *Housen* explains the approach that appellate courts are to take when determining the standard of review to apply to a question of mixed law and fact. Such matters

> lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal

> principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule... is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

131 While *Housen* is a negligence case, this court recognized in *MacDougall v. MacDougall* (2005), 262 D.L.R. (4th) 120, that the *Housen* principles inform the standard of review to be applied by appellate courts when reviewing decisions based on the interpretation of contracts.

132 Writing for the court, Lang J.A. explained in *MacDougall* at para. 30, that the trial judge must apply the proper principles of contract interpretation and that a failure to follow such principles is an error of law attracting review on a correctness standard. At para. 31, Lang J.A. states that when the task of interpretation includes consideration of extrinsic evidence or a determination of the factual matrix, the trial judge is making findings of fact or drawing factual inferences. Such findings are not to be overturned except in the case of palpable and overriding error. At para. 32, she states that where the trial judge applies legal principles to the language of the contract in the context of the relevant facts and inferences, he or she is applying law to fact, which is a question of mixed law and fact. Similarly, if the question is an "inextricable intertwining" of law and fact, it is a question of mixed law and fact. Questions of mixed law and fact are to be reviewed in accordance with the principles from *Housen*, quoted above: *MacDougall* at para. 33.

133 Based on *Housen* and in accordance with *MacDougall*, I understand that an appellate court should determine the standard of review in matters of contractual interpretation in the following way. Begin by identifying the nature of the question that the trial judge decided. This first step is extremely important as a mischaracterization of the question can obscure the true issues and alter the applicable standard of review.

134 If the question is either one of law or fact, the standard of review is straight forward - the former is to be reviewed on a standard of correctness; the latter on a standard of palpable and overriding error or its "functional equivalents".

135 If, however, the question is one of mixed law and fact, the standard of review may be either correctness or palpable and overriding error. To decide which of those standards applies, the appellate court must determine whether the trial judge made an "extricable" error in legal principle in arriving at his or her interpretation. In the area of contractual interpretation, errors in principle include the failure to apply proper principles of contractual interpretation,[13] the application of an incorrect standard,[14] or the failure to consider a required element of a legal test.[15] Such errors constitute errors of law.

136 If an error of law can be identified (*i.e.* extricated), the trial judge's interpretation is subject to review on a standard of correctness. Where, however, the alleged error cannot be extricated from the factual findings, the trial judge's interpretation is to be subjected to a more deferential standard of review. In such cases, appellate courts should review the decision on a standard of palpable and overriding error or its "functional equivalents".

Determining the Standard of Review in Matters of Contractual Interpretation

137 Before determining the standard of review in accordance with these principles, it is useful to recognize that three matters complicate the application of the *Housen* principles to matters of contractual interpretation.

138 First, it can be difficult to determine the nature of the question. For example, in the present case Bell asserts that the contractual interpretation question decided by the application judge is one of law whereas Plan says it is a question of mixed law and fact.

139 Second, if the question is one of mixed law and fact, it is difficult to establish where it lies on the spectrum. A spectrum is not an "either-or" proposition. I do not think it is possible to place a question at a precise point on the spectrum. At most, it appears to me that a question of mixed law and fact can be seen to lie more closely toward one end of the spectrum, rather than the other.

140 In my view, however, *Housen* resolves this second difficulty as it provides that if the trial judge has not made an extricable error of law, the question is to be reviewed on the standard of palpable and overriding error.

141 The third challenge arises from the nature of the task that the trial judge performs when interpreting a contract. When interpreting contracts, trial judges are engaged in the application of settled legal principles - which are designed to give effect to the mutual intentions of the parties - to the contractual provisions. However, the "proper" interpretation often depends, to a greater or lesser extent, on a consideration of the factual matrix and the weighing of evidence. Thus, the very nature of the task performed by the trial judge can make it difficult to determine whether an "extricable" error in law has been committed.

A Deferential Standard of Review is Owed in the Present Case

142 In my view, the application judge's interpretation of art. 22.2 of the Alliance Agreement is reviewable on a standard of palpable and overriding error or its functional equivalents of clearly wrong, unreasonable or not reasonably supported by the evidence.

143 I reach this conclusion for three reasons. First, the question in this case is one of mixed law and fact. Second, the application judge committed no extricable error of law. Third, there are sound policy reasons for a deferential standard of review in this case.

1. The question is one of mixed law and fact

144 As I have mentioned, the first step in determining the standard of review is to identify the nature of the question that the application judge decided. My colleague treats the question as one of law or, if mixed law and fact, as falling at the correctness end of the spectrum. I do not agree.

145 The reasons of the application judge make it clear that his interpretation of the Arbitration Clause depends on the application of legal principles to the language used by the parties with due consideration for the factual matrix, particularly the facts as he found them to be in 1999 when the Alliance Agreement was entered into. As I explain more fully below, it is not possible to interpret the Arbitration Clause without regard to such factual determinations. Accordingly, the application judge was deciding a question of mixed

law and fact.

146 My colleague gives three reasons for viewing the question as one of law or strongly akin to a question of law. The first is that the application judge heard the matter in writing, without oral evidence, and the same written materials are available to this court. However, the law is clear that a first instance judge's findings are to be accorded deference by an appellate court, even when he or she heard no oral evidence: *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (C.A.), at pp. 334-35. There are numerous reasons for giving deference to factual findings of trial judges apart from those that arise when the trial judge has heard testimony firsthand and observed witnesses: *Housen* at para. 24.

147 The second reason given by my colleague for holding that a correctness standard applies is that there are no underlying evidentiary or factual issues of a contested nature. This, however, does not necessarily make the question one of law alone. To reiterate, a question of mixed law and fact is one in which the trial judge "applies the legal principles to the language of the contract in the context of the relevant facts and inferences": *MacDougall* at para. 32.

148 In the recent decision of *Dumbrell v. The Regional Group of Companies Inc.* (2007), 85 O.R. (3d) 616 (C.A.), at para. 52, Doherty J.A. explained that contractual interpretation involves the interplay between the words of a contract and the context in which those words were chosen:

> No doubt, the dictionary and grammatical meaning of the words (sometimes called the "plain meaning") used by the parties will be important and often decisive in determining the meaning of the document. However, the former cannot be equated with the latter. The meaning of a document is derived not just from the words used, but from the context or the circumstances in which the words were used. Professor John Swan puts it well in *Canadian Contract Law* (Markham, Ont.: Butterworths, 2006) at 493:
>
> > There are a number of inherent features of language that need to be noted. Few, if any words, can be understood apart from their context and no contractual language can be understood without some knowledge of its context and the purpose of the contract. Words, taken individually, have an inherent vagueness that will often require courts to determine their meaning by looking at their context and the expectations that the parties may have had.

149 In the present case, the application judge was called on to interpret the Arbitration Clause within the Alliance Agreement as a whole and in the context of these parties, in the particular circumstances at the time the Alliance Agreement was created, with regard to the expectations the parties had at that time. That is, the application judge was called on to decide a question of mixed law and fact, not one of law alone.

150 The third reason given by my colleague for a correctness standard of review is that the interpretation of a contract is "very much a legal exercise". I agree that interpreting the language of a contract is a legal exercise. That, however, does not change the fact that the application judge was

required to interpret art. 22.2 within its unique factual matrix. The application judge did not decide a question of wide or general application nor did he answer a broad jurisdictional question. In fact, he answered a very narrow, discrete question - as of December 2005, did art. 22.2 of the Alliance Agreement require a party to commence arbitration by means of filing a notice with the Institute? Identifying the precise question that the application judge was called on to decide reinforces my view that the true nature of the question is one of mixed law and fact. The question builds into it the factual context, namely, the situation of the parties and their expectations at the time the agreement was entered into.

2. The application judge committed no extricable error of law

151 In interpreting a particular clause of an agreement, the trial judge is engaged in drawing a legal inference as to what the parties intended from the objective standpoint of the law of contract. Such an inference, although a conclusion of law, may be dependent on findings of fact regarding the words of the document and the surrounding circumstances. In such situations, the meaning of the words in the contract cannot be divorced from their context and the factual circumstances in which the agreement was made. That is, it may be inherently difficult to "extricate the legal questions from the factual" in matters of contractual interpretation, just as in negligence: *Housen* at para. 36.

152 This is just such a case. The application judge held that the Arbitration Clause did not require the delivery and filing of a notice of arbitration with the Institute in order to commence the arbitration. In his view, the Arbitration Clause contemplated that after the commencement of arbitration and the appointment of the arbitrator, the arbitrator would apply the Institute's procedural rules, as amended from time to time. The application judge held that the subsequent replacement of the 1999 Rules with the Current Rules could not retroactively change the intention of the parties as of 1999 when the Alliance Agreement was executed.

153 In drawing a legal conclusion as to what the parties mutually intended from the words of the contract and the surrounding circumstances, the application judge was involved in a context-driven inquiry that depended on the weighing of documentary and other evidence, findings of fact and factual inferences. The end result is a legal conclusion that cannot be neatly or easily separated from its factual underpinnings.

154 Although the application judge did not recite the principles of contractual interpretation when interpreting the Arbitration Clause, he carefully and thoughtfully applied them. He thoroughly dealt with the arguments of both parties and gave cogent reasons for choosing the interpretation advanced by Plan. In so doing, he indicated the principles of contractual interpretation that guided him.

155 On my reading of his reasons, the application judge interpreted art. 22.2 in the context of the whole agreement and the factual matrix. Unlike my colleague, as I explain below, I view the application judge as having given meaning and effect to the requirement in the second sentence of art. 22.2 that the arbitration be conducted under the then-current Institute rules and to the meaning of "file" in the Waiver. In my view, his reasons demonstrate no extricable error of law.

3. Policy reasons favour a deferential approach in this case

156 Since the nature of the question is one of mixed law and fact, in the absence of an extricable error of law, this court should accord deference to the trial judge's interpretation. This conclusion flows from

Housen and is based on sound judicial policy.

157 Although it may be difficult to identify the nature of the question and the standard of review - particularly where questions of mixed law and fact are involved - *Housen* provides guidance in two ways. First, it grounds the issue of the standard of review in the different roles that trial and appellate courts play. The "primary role of trial courts is to resolve individual disputes based on the facts before them and settled law". The primary role of appellate courts, by contrast, "is to delineate and refine legal rules and ensure their universal application": *Housen* at para. 9.

158 Because of the different roles of trial and appellate courts, the precedential value of the question can be of some relevance in determining its nature and the standard of review. If the question is "apt... to be of much interest to judges and lawyers in the future", or if the dispute is over a "general proposition that might qualify as a principle of law", it is more likely to be a question of law reviewable for correctness: *Housen* at para. 28, citing *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 37. Conversely, where "the matrices of facts at issue... are so particular, indeed so unique" that the decision would not have precedential value, it "draws nigh to being an unqualified question of mixed law and fact" that is generally subject to a more stringent standard, unless the error is traceable to an error in principle that would engage the law-making function of an appellate court: *Housen* at paras. 28, 36-37; *Southam* at para. 37.

159 In the present case, the interpretation of the Arbitration Clause is of little or no precedential value. The dispute regarding art. 22.2 depends on a unique matrix of facts that is particular to two parties to a specific negotiated agreement. Further, there is no identifiable error in legal principle at issue that would engage the law-making function of the appellate court.

160 The second way in which *Housen* provides guidance is that it directs appellate courts to be cautious in finding that a trial judge erred in law in his or her determination of negligence because it is "often difficult to extricate the legal questions from the factual": *Housen* at para. 36. In my view, and for the same reason, this court should be reluctant to find the application judge's interpretation to be attributable to an error of law. As I have explained, the application judge was engaged in the application of settled legal principles to the evidence and the facts of the case. His legal conclusion regarding the parties' intentions is an "inextricable intertwining of fact and law": *MacDougall* at para. 33.

161 Furthermore, a deferential approach reflects sound judicial policy. In *Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board* (1999), 42 O.R. (3d) 723 (C.A.), Laskin J.A. deferred to a trial judge's interpretation of a contractual provision that was reasonable (and therefore not "unreasonable"), noting that the appellant had not alleged any error in the application of the relevant legal principles. In my view, this approach is consistent with *Housen*. As discussed above, where the question is one of mixed law and fact and no extricable error in principle has been made, deference should be paid to the trial judge's interpretation of a contractual provision in the absence of palpable and overriding error or an interpretation that is clearly wrong, unreasonable or not reasonably supported by the evidence.

162 In *Bradscot*, Laskin J.A. referred to his earlier decision in *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (Ont. C.A.). In *Gottardo*, he stated at para. 48:

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

163 This passage was quoted with approval by the majority in *Housen* at para. 12 in relation to findings of fact and the drawing of factual inferences. In relation to questions of mixed law and fact, the majority held that "in the absence of a legal error or a palpable and overriding error, a finding of negligence by a trial judge should not be interfered with": *Housen* at para. 31. As the majority explained at para. 32, since both legal and factual inferences

> are intertwined with the weight assigned to the evidence, the numerous policy reasons which support a deferential stance to the trial judge's inferences of fact, also, to a certain extent, support showing deference to the trial judge's inferences of mixed fact and law.

164 In contractual interpretation, as in negligence, it can be inherently difficult to extricate the legal questions from the factual. Owing to the fact-sensitive nature of the inquiry - ascertaining the parties mutual and objective intentions - courts frequently make conclusions regarding the "proper interpretation" of a contractual provision without directly applying the interpretive principles or canons of construction. Conclusions as to the "proper interpretation" of a contractual clause summarily express conclusions of law as to what the parties are objectively taken to have intended based on a set of facts. In these situations, as I have said, the interpretation of a contract is a question of mixed law and fact.

165 While courts express opinions on the "proper interpretation" of a contract, there may be more than one reasonable interpretation. It is not uncommon, for instance, for various guidelines or canons of construction to point in different directions on a set of facts and for different courts to reach different conclusions regarding the interpretation of a particular clause.

166 Accordingly, a deferential approach to the application judge's interpretation of a contract, given the absence of an identifiable error of law, is grounded in sound judicial policy and consistent with the guidelines laid down by the Supreme Court in *Housen*.

INTERPRETING THE ARBITRATION CLAUSE

167 The application judge's interpretation of the Arbitration Clause underlies the Order. If his interpretation is reviewed on a palpable and overriding error standard, I see no basis on which to interfere with it. He made no extricable error in legal principle and his interpretation is not "plainly unreasonable". While one might reasonably interpret the Arbitration Clause other than as the application judge did, that is a function of its wording and does not make the application judge's interpretation unreasonable.

168 In any event, however, as I have said, in my view, the application judge was correct in finding that a party did not have to file a notice with the Institute in order to commence arbitration. I reach that

conclusion based on the following chain of reasoning:

1. The Arbitration Clause does not specify how arbitration is to be commenced;
2. The Arbitration Clause does specify that the arbitration will be conducted in accordance with the *Arbitration Act, 1991* and the then-current Institute rules;
3. Article 24.6 of the Alliance Agreement says that Ontario law governs;
4. In 1999, when the Alliance Agreement was executed and at the time of the dispute in 2005, the *Arbitration Act, 1991* was the Ontario law that applied to the Alliance Agreement;
5. Section 23(1) of the *Arbitration Act, 1991* reads as follows:

> An arbitration may be commenced in any way recognized by law, including the following:
>
> 1. A party to an arbitration agreement serves on the other parties notice to appoint or to participate in the appointment of an arbitrator under the agreement.
> 2. If the arbitration agreement gives a person who is not a party power to appoint an arbitrator, one party serves notice to exercise that power on the person and serves a copy of the notice on the other parties.
> 3. *A party serves on the other parties a notice demanding arbitration under the agreement.* [Emphasis added.]

6. Thus, as the application judge held, in 2005, the Arbitration Clause did not require a party commencing arbitration in respect of a dispute under the Alliance Agreement to file a notice of request to arbitrate with the Institute. It appears from s. 23 of the Act that filing such a notice would have been an acceptable way of commencing arbitration, just as was the method chosen by Plan (*i.e.* service on Bell of a notice demanding arbitration under the agreement);
7. The Waiver does not detract from this reasoning;
8. This reasoning promotes a result that is reasonable, fair and sensible.

169 Below, I explain how I arrive at the foregoing reasoning. Before doing so, I make the following observations about the principles that guide the courts when interpreting contracts.

The Principles that Guide Contractual Interpretation

170 The primary goal when interpreting a contract is to give effect to the intention of the parties. There is no need to repeat the general principles of contractual interpretation which assist in achieving that goal as they are well set out in the reasons of the majority. However, the following quotation from *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance*, [1980] 1 S.C.R. 888, at p. 901

provides useful guidance:

> *[T]he 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 intention 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. [Emphasis added.]

171 What, then, was the true intent of the parties in February 1999 when they entered into the Alliance Agreement? Did they intend that if a dispute arose between them that could not be resolved through good faith discussions, the party with the claim could commence arbitration in only one way, namely, by complying with the Institute's rules for commencement of arbitration? I turn now to the analysis which leads me to conclude that the answer to that question is "no".

Article 22

172 The Arbitration Clause does not stand alone - it is but one part of art. 22. Article 22 establishes a two-step process for dispute resolution. Given that art. 22.2 governs the second step in a two-step dispute resolution process, the first of which is contained in art. 22.1, both logic and the guiding principles of contractual interpretation dictate that article 22 be considered as a whole.

173 Article 22 reflects the parties' shared intention to resolve disputes quickly, co-operatively and without recourse to the courts. The first step in the dispute resolution process is laid out in art. 22.1. Pursuant to art. 22.1(a), a party who considers a dispute to exist must provide a designated representative of the other party with written notice to that effect. Within 10 days of the date of the notice, designated representatives of both parties must make commercially reasonable efforts, in good faith, to resolve the dispute. If the dispute is not resolved within 10 days, pursuant to art. 22.1(b) the dispute "shall" be referred to other designated persons in the two organizations (the "second tier"). Within a further 10 days, the second tier must again make commercially reasonable efforts, in good faith, to resolve the dispute.

174 It is worthy of note that while art. 22.1(a) makes it clear how the dispute resolution process is to be commenced (*i.e.* by written notice delivered by the party alleging the dispute to a designated representative of the other party), art. 22.1(b) does not indicate how the dispute is to be referred to the second tier should the initial good faith discussions fail to resolve the dispute. That is, it says nothing about how to commence the second tier discussions.

175 If the dispute is unresolved through the good faith efforts required by art. 22.1, the parties move to

the second step of the dispute resolution process. Art. 22.2 governs the second step; it states that the parties "will settle by arbitration" any disputes unresolved through the first step. It goes on to stipulate that a single arbitrator, selected by the parties from a panel of persons knowledgeable in business information and the construction industry, will conduct the arbitration in Toronto in accordance with the *Arbitration Act, 1991* and the then-current rules of the Institute. Failure to file a notice of arbitration within 12 months "after the occurrences supporting a claim" constitutes an irrevocable waiver of that claim.

176 Three things are immediately apparent on reading art. 22.2. First, it says nothing expressly about how arbitration is to be commenced. In that regard, it stands in sharp contrast with art. 22.1(a) which, as has been noted, spells out the requirements for commencing the dispute resolution process.

177 Second, while art. 22.2 is silent on how the arbitration is to be commenced, as already indicated, a number of other aspects of the arbitration process are specified.

178 Third, the Waiver is in the last sentence of art. 22.2 and it says nothing expressly about commencement of arbitration. That makes sense. The Waiver, on which more is said below, is an important provision which affects substantive rights. How a party commences arbitration is a procedural matter.

How is arbitration to be commenced under art. 22.2?

179 I return to the question which lies at the heart of this appeal. In February 1999, when the parties entered into the Alliance Agreement, did they intend that arbitration could be commenced by only one method, namely, in accordance with the then-current Institute rules?

180 Art. 22.2 does not say that and, with respect, there is no basis on which to imply such an intention. What is clear is this: the parties intended that if the good faith efforts called for by art. 22.1 failed to resolve the dispute, the matter would go to arbitration. How was the arbitration to be commenced? In the absence of any specified manner, I see no reason why the Arbitration Clause must be interpreted so as to permit a party to commence arbitration by one method only, namely, compliance with the Institute rules. The parties to the Alliance Agreement are sophisticated, experienced businesses. Legal counsel assisted in the drafting of the agreement. Had they intended to stipulate a single method by which to commence the arbitration process, that matter would have been specified, just as the method for commencement of the first step in the process in art. 22.1 is specified and just as so many other aspects of the arbitration process are specified.

181 Moreover, art. 24.6 of the Alliance Agreement provides that it is to be governed and construed in accordance with Ontario law.[16] Accordingly, in 1999, when the parties entered into the Alliance Agreement, the *Arbitration Act, 1991* applied to the agreement. Section 2(1) of the *Arbitration Act, 1991* provides that, subject to exceptions that do not apply in this case, the Act applies to arbitrations conducted under an arbitration agreement. "[A]rbitration agreement" is defined as "an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them". Clearly, art. 22.2 is such an agreement. Thus, as I have said, the *Arbitration Act, 1991* applied to art. 22.2.

182 Consequently, I see the true intention of the parties - as expressed in the Arbitration Clause - to be that arbitration could be commenced "in any way recognized by [Ontario] law". Thereafter, the parties would select an arbitrator with the specified background who would conduct the arbitration in accordance with the Act and the Institute rules, as amended.

183 This interpretation is consistent with the flow and structure of art. 22. As has been noted, the method for commencing the dispute resolution process itself is spelt out in art. 22.1(a) but, thereafter, nothing is specified in terms of how notice should be given to move the dispute resolution forward. Art. 22.1(b) says nothing as to how the dispute is to be placed before the second tier, should the initial good faith discussions fail. Similarly, art. 22.2 says nothing as to how to commence arbitration should both tiers of the good faith discussions fail. This suggests that the parties' intention was that once the dispute resolution process was commenced, they would co-operate in seeing it through to settlement.

184 It is also consistent with the Alliance Agreement as a whole. Under the terms of the Alliance Agreement, Bell and Plan agreed to work collaboratively and cooperatively. The Alliance Agreement is not a standard form contract, nor is it a contract in which one party provides goods or services and the other pays for them. It is not a detailed agreement. Rather, it sets out the parties respective rights and obligations in broad terms to create a unique arrangement in which the parties agree to work together to deliver expensive, complicated, technical electrical cabling projects.

185 The parties' agreement to extensive levels of co-operation in all aspects of the joint venture is evident throughout the Alliance Agreement, beginning with the preambles in which the parties recognize that each has unique capabilities and express the desire to cooperate in providing their services on cabling projects. In art. 2, the parties agree to co-ordinate their marketing efforts in respect of existing and new customers and to collaborate in pursuing business opportunities. In art. 3, Plan agrees to refer to Bell all of its cabling project customers in the region and Bell agrees to use Plan to provide customer services to all of its customers in the region. In arts. 8 and 9, the parties agree to provide one another with all training necessary to support customer inquiries in respect of deliverables. The parties also agree to forego any other similar types of alliance agreements in the region and to work together on all new cabling projects.

186 In short, within the structure created by the Alliance Agreement, co-operation between the parties is the hallmark. Similarly, the interpretation I offer for how arbitration is to be commenced relies on the parties' co-operation, within the agreed-on structure provided by art. 22.

187 Furthermore, the factual matrix supports this interpretation. The parties had been working together in a co-operative fashion. As has been mentioned, they were sophisticated, experienced business people working with legal counsel. Their whole approach - both from a legal and a business perspective - was to set out, in broad strokes, that which they wished to accomplish and then co-operate in seeing the matter through to fruition.

188 The interpretation given by my colleague is restrictive and technical - arbitration can be commenced in only one way, by filing a notice with the Institute. In my view, for the reasons already given, such an interpretation is not consistent with the flow and structure of the overall dispute resolution process in art. 22, with the Alliance Agreement as a whole or the factual matrix.

189 Furthermore, the interpretation adopted by my colleague relies heavily on the statement in art. 22.2 that the arbitration is to be conducted under the Institute's rules. There are two responses to this. First, recall that the sole reference to the Institute in art. 22.2 is in the second sentence, which provides that the arbitrator "will conduct the arbitration under the Arbitration Act, 1991 (Ontario) and the then-current rules of the... Institute". One cannot conduct an arbitration unless it has been commenced. Thus, on a plain reading, art. 22.2 says that the Institute rules are to apply to the conduct of the arbitration, not to its commencement.

190 Second, and in any event, even if "conduct" of the arbitration is taken to include its commencement, I see no reason to constrain it to include commencement only by compliance with the Institute rules. That is not what art. 22.2 says. Art. 22.2 says that the arbitrator is to conduct the arbitration under both the *Arbitration Act, 1991* and the Institute rules. Both contain rules for the commencement of arbitration. There is nothing in the wording of art. 22.2 to suggest that the Institute's rules are to govern commencement. Indeed, there is force to the argument that as art. 22.2 refers to the *Arbitration Act, 1991* before the Institute rules, the parties' evinced an intention that the rules set out in the *Arbitration Act, 1991* are to govern commencement of arbitration.

191 Nor do I see *Spectra Innovations Inc. v. Mitel Corp.*, [1999] O.J. No. 1870 (S.C.) as supportive of the interpretation advanced by my colleague. The wording of the clause in *Spectra* is materially different than the Arbitration Clause. The clause in *Spectra* provided that the arbitration tribunal should determine the matter "*acting in accordance with the Rules [of the ICC]*" (emphasis added). However, the Arbitration Clause stipulates that the arbitrator "will *conduct* the arbitration *under the Arbitration Act, 1991* (Ontario) and the then-current [Institute rules]" (emphasis added).

192 Moreover, as the application judge noted at para. 41 of his reasons:

> While the arbitration clause in *Spectra* also addresses the appointment of the arbitrator by the parties (in this case, an arbitration board), it does not refer to compliance with the applicable rules in the context of the conduct of the arbitration by the arbitrator so appointed. This difference points to a specific intention in the Arbitration Clause that the arbitrator, once appointed, would be required to apply the procedural rules in the Act and in the rules of the Institute, as in effect from time to time, rather than to a more general intention that the Institute was to administer all aspects of the arbitration, as was held to be the case in *Spectra*. Accordingly, rather than supporting the interpretation of the Arbitration Agreement proposed by Bell, I think that the decision in *Spectra* actually supports the interpretation of Plan by identifying the unique feature of the Arbitration Clause that distinguishes it from clauses that would contemplate the administrative involvement of the Institute.

193 Further, in *Spectra*, the court relied on the factual matrix in interpreting the clause. After observing that the applicant was based in Singapore, the respondent was based in Ontario and the agreement concerned the supply of product in India, the court in *Spectra* concluded at para. 17:

> ...The I.C.C. court which was founded in Paris in 1923, has a long-standing reputation as one of the leading institutions for arbitration of international commercial disputes. *In this context*, it would be altogether logical that the parties would want to resolve any dispute by setting up an arbitration board acting in accordance with the Rules of conciliation and arbitration of the I.C.C. [Emphasis added.]

194 No such inter-jurisdictional commercial considerations operate in the case at bar, in which all aspects of the business arrangement take place in Ontario and the parties have expressly chosen to have their agreement governed by Ontario law.

195 Finally, the Waiver is an exclusionary provision which warrants strict interpretation as its operation affects substantive rights. In contrast, the clause in *Spectra* dealt with matters of mere procedure.

The Waiver

196 The Waiver is the mechanism chosen by the parties to ensure that claims under the Alliance Agreement are dealt with in a timely fashion - file a notice of arbitration within 12 months of the occurrences which support a claim or the claim is to be treated as irrevocably waived.

197 Bell contends that the Waiver dictates that arbitration could have been commenced in only one way - by filing a notice with the Institute. It says that the word "file" in the Waiver must mean to file with the Institute and, as the Notice was not filed and issued through the Institute, Plan's claim is extinguished. In large measure, my colleague accepts that contention by interpreting the word "file" in the Waiver as a crucial indicator of the parties' intention that the Institute rules were to govern the commencement of arbitration.

198 With respect, I see the Waiver to be of little significance in determining whether the arbitration has been commenced.

199 "Waiver" of a claim and "commencement" of arbitration are not synonymous. The Waiver may be a defence to be raised in the arbitration but it does not dictate whether and how the arbitration is to be commenced.

200 Similarly, I see no reason to adopt an unnecessarily restrictive meaning of "file". "File" is not a defined term in the Alliance Agreement. As the parties intended that disputes would be resolved without recourse to the courts, it does not make sense to ascribe to that word a narrow, strictly legal meaning. Where the parties wanted to closely circumscribe some aspect of the dispute resolution process they did so - good faith discussions were to be conducted within 10 days of the date of the notice of dispute, the arbitration was to be in Toronto, the arbitrator was to be selected from a panel of persons with a particular background and so on.

201 Further, the broader dictionary meaning of "file" includes delivery and receipt and to do that which is necessary to commence a legal proceeding. The common meaning of "file" includes "actual delivery" to the recipient (as opposed to simply mailing) or to initiate proceedings by proper formal procedure. For

example, *The Canadian Dictionary of Law*, 3d ed. defines "file" as follows:

> **File**. v. 1. To leave with the appropriate office for keeping. 2. Register. 3. Requires actual delivery. A mailed document is not filed until received by the other party.

202 These broad meanings of "file" are consistent with the commencement of arbitration under s. 23 of the *Arbitration Act, 1991*.

203 To the extent that there is ambiguity in the Waiver, as it is an exclusionary provision, it ought to be construed strictly against the forfeiture of legal rights. This principle of interpretation is particularly apt in the present case where Plan sought to commence arbitration in a manner which complied with a plain reading of the Arbitration Clause and with the express purpose of protecting its rights and Bell raised no objection to the form of the purported commencement of arbitration until many months later. The broader interpretation advanced here recognizes commencement of arbitration by any means allowable in law and would not work an injustice by causing the loss of rights.

204 I do not intend to suggest that the Waiver is irrelevant or unimportant. To the contrary. On its own, the Waiver is important as it is the mechanism that the parties chose to ensure that claims would be raised in a timely fashion. Furthermore, if this matter were permitted to proceed to arbitration, as I have mentioned, it raises a significant issue for the arbitrator to decide.

The result is reasonable, fair and commercially sensible

205 In the quotation from *Consolidated Bathurst* set out above, the Supreme Court states that where a provision admits of more than one construction, the court should choose the one which produces a result that is more reasonable, fair and commercially sensible.

206 The result, on the interpretation advanced above, is that Plan may assert that it commenced arbitration on December 12, 2005, when it delivered to Bell the Notice pursuant to s. 23 of the *Arbitration Act, 1991*, if not earlier. That matter, however, remains to be determined by the arbitrator. I say that because, as I have already explained, the Order does not declare that Plan has commenced arbitration and, if so, on what date. By answering the question in the manner in which the parties had framed it (*i.e.* in the negative), the application judge left the question of when Plan commenced arbitration, if at all, to be determined by the arbitrator.

207 In my view, this result is reasonable, fair and commercially sensible.

208 When parties have agreed that disputes are to be settled by arbitration and that the *Arbitration Act, 1999* applies, it is reasonable for the parties to follow the provisions of that legislation regarding commencement of arbitration.

209 Moreover, this interpretation promotes a fair result as it would permit the arbitration to proceed while leaving it to the parties to pursue the issues of both commencement and operation of the Waiver before the arbitrator.

210 There is no commercial necessity that would augur in favour of excluding the operation of s. 23 of the *Arbitration Act, 1991*.

211 No commercial injustice arises from this interpretation. Bell was given ample notice of Plan's intention to take its claim to arbitration. It took advantage of that notice by demanding extensive particulars in respect of the claim. Moreover, Bell was manifestly aware of all the elements of a notice of request to arbitrate under the Institute's then-current rules.

212 There is no evidence that Bell would suffer any prejudice from this interpretation of the Arbitration Clause. Instead, the evidence suggests opportunism on the part of Bell. It seeks - very late in the day - to invoke the Waiver on grounds that are entirely formalistic in nature. Plan delivered the Draft Notice to Bell on August 26, 2005, when it initiated the good faith discussions required by art. 22.1(a). Bell raised no objection then to the fact that the Draft Notice was made under the *Arbitration Act, 1991* instead of the Institute rules. Nor did it suggest that such a notice would not be adequate to preserve Plan's rights with respect to the Waiver. It raised the Waiver, but only to suggest that Plan's claim was out of time as the occurrences on which it was based had taken place over 12 months previously.

213 In the context of good faith discussions, Bell should have raised this objection at that time, if it were genuine. At the very least, if no objection were raised when the Draft Notice was delivered, Bell should have raised its concerns when the Notice was delivered on December 12, 2005. Instead, Bell remained silent on this issue, demanded further particulars and suggested that the good faith discussions might continue.

214 In summary, interpreting the Arbitration Clause to allow commencement of arbitration in any manner recognized by s. 23 of the *Arbitration Act, 1991*- which would include the Institute rules as well as delivery of a notice demanding arbitration - meets the reasonable expectations of the parties, reflects their intention as expressed in the Alliance Agreement in 1999 when they executed the agreement, and produces a result that is reasonable, fair and commercially sensible.

DISPOSITION

215 Accordingly, I would dismiss the appeal with costs to the respondents fixed at $20,000, inclusive of disbursements and G.S.T.

E.E. GILLESE J.A.

cp/e/qlaim/qlpxm/qlaxw/qlced/qlhcs/qlmxl/qlaxr/qlhcs/qlcal

1 This appears to be a mistake. The reference should be to Section 22.1.

2 I have italicized the two provisions in the Agreement that are central to the appeal.

3 "Application" here is used in the sense of "motion". See *Buck Bros., infra*, at p. 1000.

4 See e.g. *Petty v. Telus Corp.* (2002), 164 B.C.A.C. 152 (C.A.); *IWA - Forest Industry Pension Plan (Trustees of) v. Aspen Planers Ltd.*, (2006), 56 B.C.L.R. (4th) 1 (C.A.); *A.L. Sott Financial (FIR) Inc. v. PDF Training Inc.* (2008), 77 B.C.L.R. (4th) 154 (C.A.).

5 See e.g. *Double N Earthmovers Ltd. v. Edmonton (City)* (2005), 363 A.R. 201 (C.A.), aff'd [2007] 1 S.C.R. 116; *Alberta v. Western Irrigation District* (2002), 312 A.R. 358 (C.A.); *Dreco Energy Services Ltd. v. Wenzel* (2008), 440 A.R. 273 (C.A.); *942925 Alberta Ltd. v. Thompson* (2008), 432 A.R. 177 (C.A.).

6 See e.g. *Robichaud, Williamson, Theriault and Johnstone v. Pharmacie Acadienne de Beresford Ltée* (2008), 328 N.B.R. (2d) 205 (C.A.), at para. 16; *Ryan v. Sun Life Assurance* (2005), 230 N.S.R. (2d) 132 (C.A.), at para. 15; *White v. E.B.F. Manufacturing Ltd.* (2005), 239 N.S.R. (2d) 270 (C.A.), at para. 16; *United Gulf Developments Ltd. v. Iskandar* (2008), 267 N.S.R. (2d) 318 (C.A.), at para. 5.

7 This appears to be a mistake. The reference should be to Section 22.1.

8 That it was ultimately not renewed is immaterial.

9 The latter caveat has no relevance to the case at bar.

10 See also, *The Canadian Oxford Dictionary*, 2d ed., *s.v.* "file" and "deliver"; *Black's Law Dictionary*, 8th ed. *s.v.* "file" and "deliver".

11 **The facts are taken largely from the Notice Demanding Arbitration prepared by Plan.**

12 It can be found at para. 107 below.

13 *MacDougall* at para. 30.

14 *Housen* at para. 36. Although stated to be an example of an extricable error in the negligence context, I see no reason that it ought not to apply equally to contractual interpretation.

15 *Ibid.*

16 Article 24.6 provides:

> ***Governing Law.*** This Agreement shall be governed and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. The Parties hereby attorn to the non-exclusive

jurisdiction of the Courts of Ontario.

Tab 11

Consolidated-Bathurst Export Limited *(Plaintiff) Appellant*;

and

Mutual Boiler and Machinery Insurance Company *(Defendant) Respondent.*

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

Exportations Consolidated Bathurst Limitée *(Demanderesse) Appelante*;

et

Mutual Boiler and Machinery Insurance Company *(Défenderesse) Intimée.*

1979: 13 mars; 1979: 21 décembre.

Présents: Les juges Martland, Ritchie, Pigeon, Dickson, Beetz, Estey et McIntyre.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Assurance — Interprétation des contrats d'assurance — Définition d'accident — Dommages directs et indirects.

L'appelante, un fabricant de produits du papier, a dû fermer une partie de son usine en raison de la panne de trois échangeurs de chaleur, ce qui lui a occasionné une perte de $158,289.24, dont $15,604.44 de dommages directs aux tubes des échangeurs. L'intimée est l'assureur aux termes d'une police relative à certains biens de l'appelante, y compris ces échangeurs de chaleur. L'intimée conteste la réclamation de l'appelante pour la perte susmentionnée au motif que les dommages résultent de la corrosion des tubes à l'intérieur des échangeurs de chaleur et que ce risque est spécifiquement exclu de la protection offerte par la police d'assurance. La Cour supérieure et la Cour d'appel ont toutes deux adopté cette position. La demanderesse se pourvoit donc devant cette Cour.

Arrêt (les juges Martland, Ritchie et McIntyre sont dissidents): Le pourvoi est accueilli.

Les juges Pigeon, Dickson, Beetz et Estey: La question est de savoir si la perte causée par la corrosion des échangeurs de chaleur est garantie par les clauses de la police. Le cœur de l'argument est que bien que la définition du mot accident dans la police ne comprenne pas le cas de la corrosion ou des cas semblables tels que «l'usure normale, la détérioration, l'épuisement ou l'érosion du matériel», la définition inclut, aux dires de l'appelante, ce qui suit la corrosion et qui peut en résulter.

Dans l'interprétation d'un contrat d'assurance, tout comme dans n'importe quel autre contrat, il faut d'abord donner effet à l'intention des parties qui se dégage des mots qu'elles ont employés. La deuxième étape est l'application, lorsqu'il y a ambiguïté, de la doctrine *contra proferentem*; elle prévoit que le doute quant au sens et à la portée de la clause d'exclusion ou limitative sera résolu contre la partie qui l'a introduite et

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".

[*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.

qui cherche maintenant à l'invoquer. Même indépendamment de cette doctrine, les règles normales d'interprétation amènent une cour à rechercher une interprétation qui, vu l'ensemble du contrat, tend à traduire et à présenter l'intention véritable des parties au moment où elles ont contracté. Il n'est pas contesté que les échangeurs de chaleur sont protégés par le contrat d'assurance. Il n'est pas non plus sérieusement contesté que la corrosion des tubes à l'intérieur des échangeurs de chaleur, probablement causée par la présence d'eau de mer, a été la cause réelle de leur panne. Comme il en a le droit, l'assureur a cherché dans les termes du contrat à limiter sa protection à la perte accidentelle, ce qu'il a fait en essayant de restreindre la définition d'accident. Interpréter la «corrosion» au sens où ce mot est employé dans la définition d'accident, comme le désire l'intimée, équivaudrait à éliminer de la protection de l'assurance toutes les pertes subies par l'assurée en raison de la présence de corrosion. Pareille interprétation entraînerait nécessairement la suppression d'une partie importante de la protection prévue au contrat.

Les juges Martland, Ritchie et McIntyre, *dissidents*: Bien que la police en l'espèce garantisse les dommages à des biens autres que l'objet lui-même, la garantie est limitée à une indemnité relativement à la perte des biens de l'assurée ou aux dommages subis par eux résultant directement d'un accident au sens donné à ce mot par la définition de la police. En conséquence, on ne peut adopter une interprétation qui protégerait l'assurée des dommages indirects qu'ils aient été causés par la corrosion ou par autre chose. Les seuls dommages «directs» à un objet quelconque dans l'usine de l'appelante sont ceux subis par les tubes eux-mêmes et les termes clairs employés dans le contrat d'assurance pour définir le mot «accident» prévoient l'événement même qui s'est produit ici, savoir, les dommages causés à un objet appartenant à l'assurée suite à la «corrosion du . . . matériel», et l'excluent de la garantie.

[Jurisprudence: *Indemnity Insurance Company of North America c. Excel Cleaning Service*, [1954] R.C.S. 169, arrêt suivi; *Pense v. Northern Life Assurance Co.* (1907), 15 O.L.R. 131, conf. par (1908), 42 R.C.S. 246; *Stevenson c. Reliance Petroleum Ltd.; Reliance Petroleum Ltd. c. Canadian General Insurance Co.*, [1956] R.C.S. 936; *Cornish v. Accident Insurance Co.* (1889), 23 Q.B. 453 (C.A.).]

POURVOI à l'encontre d'un arrêt de la Cour d'appel du Québec qui a confirmé un jugement de la Cour supérieure. Pourvoi accueilli, les juges Martland, Ritchie et McIntyre étant dissidents.

Guy Desjardins, Q.C., for the appellant.

Marcel Cinq-Mars, Q.C., for the respondent.

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:

Guy Desjardins, c.r., pour l'appelante.

Marcel Cinq-Mars, c.r., pour l'intimée.

Version française des motifs des juges Martland, Ritchie et McIntyre rendus par

LE JUGE RITCHIE (*dissident*)—Il s'agit d'un pourvoi à l'encontre d'un arrêt de la Cour d'appel de la province de Québec qui confirme le jugement rendu en première instance par le juge Bisson et rejette la réclamation de l'appelante contre son assureur pour dommages à ses biens situés dans une usine qu'elle exploite à New Richmond dans la province de Québec, où elle fabrique du papier et des sous-produits du papier et du bois.

Suite à leur mauvais fonctionnement, des dommages directs ont été causés à plusieurs tubes dans les échangeurs de chaleur utilisés pour chauffer du mazout lourd de catégorie «C», ce qui a nécessité la fermeture temporaire de l'usine. La réclamation de l'appelante dans cette action comprend non seulement les dommages directs aux tubes, mais la perte indirecte présumément subie suite à l'avarie des tubes.

J'ai eu l'avantage de lire les motifs de jugement préparés par mon collègue le juge Estey dans cette affaire mais, puisque je parviens à une conclusion différente quant au risque assuré par la police en question, j'ai jugé nécessaire d'exposer mon point de vue séparément.

La réclamation de l'appelante est fondée sur un contrat d'assurance qu'elle a conclu avec l'intimée et qui était en vigueur au moment des événements susmentionnés et aux termes duquel l'intimée

[TRADUCTION] Eu égard au paiement de la prime la Compagnie convient par la présente avec l'Assurée désignée, relativement à la perte résultant d'un accident, tel que défini dans la présente:

. . .

1. ... D'indemniser l'Assurée pour la perte de ses biens ou les dommages subis par eux, résultant directement d'un accident *à un objet* ou, si la Compagnie le préfère, de réparer ou de remplacer lesdits biens endommagés; ...

(Les italiques sont de moi.)

Les objets protégés par la police sont définis comme suit dans la première annexe:

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

[TRADUCTION] Les objets protégés par cette annexe sont de la catégorie désignée comme suit:

1. Toute soupape de métal soumise ou non soumise à la flamme; et

2. Toute tuyauterie dans l'usine de l'assurée ou entre ces bâtiments, reliée à un tel récipient et qui contient de la vapeur ou un autre moyen d'échange de chaleur ou condensat de celle-ci, air, réfrigérant ou eau d'alimentation de chaudière entre la pompe d'alimentation ou l'injecteur et une chaudière, ainsi que les soupapes, accessoires, séparateurs et purgeurs de toute ladite tuyauterie.

A mon avis, sont assurés par cette convention les dommages aux biens de l'assurée «causés directement» à un «objet» par un «accident» au sens donné à ce mot par la définition de la police. Bien que la police garantisse les dommages à des biens autres que l'objet lui-même, elle ne les garantit que lorsqu'il ont été causés directement par un «accident» à un «objet». Je suis convaincu que les tubes sont des «objets» au sens de la définition susmentionnée et que les dommages directement causés aux tubes auraient été garantis par le contrat d'assurance n'eût été les termes de la définition d'«accident» y contenue dont voici le texte:

[TRADUCTION] C. Définition d'accident—En ce qui concerne un objet garanti par cette Annexe, «accident» signifie un événement soudain et accidentel touchant l'objet, ou une partie de celui-ci, qui l'endommage et en nécessite la réparation ou le remplacement total ou partiel; mais accident ne signifie pas a) *l'épuisement, la détérioration, la corrosion ou l'érosion du matériel*, b) l'usure normale, c) la fuite d'un raccord, d'un calage, d'un joint d'étanchéité, d'un presse-étoupe, d'un joint ou d'un contact, d) l'avarie d'un tube à vide, d'un tube à gaz ou d'une brosse, e) l'avarie d'une structure ou d'une fondation soutenant l'objet ou une partie de celui-ci, ni f) le fonctionnement d'un dispositif de sécurité ou de sûreté.

(Les italiques sont de moi.)

Le juge de première instance et la Cour d'appel étaient convaincus que les dommages aux tubes ont été causés par la corrosion et cette conclusion est confirmée par le fait qu'une grande quantité d'eau salée a circulé dans les tuyaux. Un témoin expert a été cité par l'appelante pour appuyer la prétention que les dommages ont été causés par un effet de coup de bélier d'origine soudaine qui a

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*

imposé une pression excessive dans les tuyaux et les tubes, causant leur rupture. Cependant, cette preuve n'a pas été acceptée en première instance ni en Cour d'appel et je n'estime pas nécessaire de l'examiner. Finalement, il a été jugé en première instance et en appel que la corrosion était la cause des dommages aux tubes et aux tuyaux et il découle des termes de la «définition d'accident» que ces dommages ne sont pas assurés par la police en question.

On a également prétendu que même si la protection accordée par la police ne comprenait pas les dommages causés par «l'épuisement, la détérioration, la corrosion» ou «l'usure normale» au sens de la définition d'«accident», elle rendait néanmoins l'assureur responsable de la perte indirecte subie par l'assurée suite à la rupture soudaine de l'échangeur de chaleur, qu'elle ait ou non été causée par la corrosion. Étant donné que la garantie est limitée à une indemnité relativement à la perte des biens de l'assurée ou aux «dommages subis par eux résultant directement d'un accident à un objet», je ne peux adopter une interprétation qui protégerait l'assurée des dommages indirects qu'ils aient été causés par la «corrosion» ou par autre chose. A mon avis, les seuls dommages «directs» à un objet quelconque dans l'usine de l'appelante sont ceux subis par les tubes eux-mêmes et les termes clairs employés dans le contrat d'assurance pour définir le mot «accident» prévoient, selon moi, l'événement même qui s'est produit ici, savoir, les dommages causés à un objet appartenant à l'assurée suite à la «corrosion du . . . matériel», et l'excluent de la garantie.

On a avancé que les termes employés dans la police devraient être interprétés contre la compagnie d'assurances qui en est l'auteur, conformément à la règle *contra proferentem* qui est fréquemment invoquée dans l'interprétation des contrats d'assurance lorsque la cour arrive à la conclusion qu'aucune autre règle d'interprétation ne lui permet d'établir le sens réel de la police.

A cet égard, mon collègue le juge Estey a fait référence aux motifs du juge Cartwright, alors juge puîné, dans *Stevenson c. Reliance Petroleum Limited; Reliance Petroleum Limited c. Canadian*

v. Canadian General Insurance Company[1] 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*[2], 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:

[1] [1956] S.C.R. 936.
[2] [1954] S.C.R. 169.

General Insurance Company[1] où il est dit à la p. 953:

> [TRADUCTION] Les plaidoiries ont insisté sur la règle exprimée dans la maxime *verba fortius accipiuntur contra proferentem*, mais il faut recourir à cette règle seulement lorsque aucune autre règle d'interprétation ne permet à la Cour de s'assurer du sens d'un document.

Ce que j'ai dit indique toutefois que je n'estime pas nécessaire de recourir à cette règle pour interpréter la police examinée ici.

Toutefois, mon collègue le juge Estey est d'avis qu'en interprétant la police et en particulier la définition du mot accident y contenue de la manière adoptée dans les présents motifs et dans ceux de la majorité de la Cour d'appel, on [TRADUCTION] «annulerait en grande partie, sinon totalement, l'objet de l'assurance» ce qui constitue «une situation qui doit être évitée, dans la mesure où les termes employés le permettent». A cet égard, on s'appuie sur l'arrêt de cette Cour, *Indemnity Insurance Company of North America c. Excel Cleaning Service*[2], aux pp. 177 et 178, mais, avec égards, je ne puis établir un rapport entre les circonstances de cette affaire et celles de la présente.

Dans l'affaire *Excel Cleaning Service* une entreprise de «service de nettoyage à domicile» était protégée par une police d'assurance responsabilité civile pour les dommages matériels causés par un accident survenant dans l'exécution de ses travaux. Cette police contenait cependant une exclusion relative [TRADUCTION] «aux dommages ou à la destruction des biens appartenant à l'assurée, loués, occupés, utilisés par celle-ci ou sous sa responsabilité, sa garde et son contrôle». L'assureur a prétendu qu'une moquette couvrant le plancher d'une maison où l'assurée avait travaillé et qui avait été endommagée était sous «sa responsabilité, sa garde ou son contrôle» et donc exclue de la garantie. Selon ce raisonnement, tous les biens du client sur lesquels l'assurée travaillait étaient aussi exclus, ce qui aurait signifié que la police n'offrait absolument aucune protection à l'entreprise de l'assurée. C'est à ce sujet que la Cour a dit aux pp. 177 et 178:

[1] [1956] R.C.S. 936.
[2] [1954] R.C.S. 169.

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

[TRADUCTION] Une telle interprétation [celle de l'assureur] annulerait en grande partie, sinon totalement, l'objet de l'assurance—une situation qui doit être évitée, dans la mesure où les termes employés le permettent.

Je suis respectueusement d'avis que cette affaire-là porte sur une situation très différente de celle qui nous occupe ici. L'interprétation qu'on a voulu donner à la police d'Excel Cleaning Service aurait signifié que, bien qu'elle se veuille une police d'assurance responsabilité civile pour les dommages matériels protégeant l'entreprise de l'assurée, cette police n'assurait en fait rien, alors que la présente police offre une assurance à [TRADUCTION] «l'assurée pour la perte de ses biens ou les dommages à eux causés» résultant directement d'un accident suivant la définition de ce mot dans la police. Le sens donné au mot «accident» dans la police ne constitue pas une exclusion de la garantie mais est plutôt une partie de la définition du risque assuré.

Pour tous ces motifs, de même que pour ceux énoncés par le juge Turgeon, je suis d'avis de rejeter ce pourvoi avec dépens.

Version française du jugement des juges Pigeon, Dickson, Beetz et Estey rendu par

LE JUGE ESTEY—L'appelante exploite une usine de fabrication de produits du papier, y compris des boîtes de carton, à New Richmond (Québec) et l'intimée est l'assureur aux termes d'une police d'assurance relative à certains biens de l'appelante, y compris les biens qui font l'objet de cette action, savoir, trois échangeurs de chaleur. Le juge de première instance décrit les échangeurs de chaleur en ces termes:

Les pièces qui nous intéressent plus particulièrement dans ce système sont trois échangeurs de chaleur, sorte de tuyaux mesurant quinze pieds de long avec un diamètre inférieur de dix pouces.

A l'intérieur de chacun des ces trois échangeurs, on retrouve 102 tubes de treize pieds de longueur, d'un diamètre extérieur de 5/8 de pouce et dont la paroi métallique mesure 1/16 de pouce ou .065 pouce.

A chacune de leurs extrémités, à l'intérieur de l'échangeur, les 102 tuyaux pénètrent dans une plaque tubulaire métallique d'un pouce d'épaisseur.

D'autre part, les 102 tubes de chaque échangeur sont eux-mêmes divisés en trois groupes de 34 tubes chacun, de façon à ce que l'huile s'écoulant dans les tubes fasse

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

trois fois le circuit de l'échangeur pour être chauffée à point avant d'en sortir pour se diriger comme combustible vers les bouilloires.

Quant à la vapeur, elle circule dans les échangeurs, pénétrant par l'extrémité de gauche immédiatement à droite de la plaque tubulaire, pour en ressortir à l'extrémité de droite, tout juste au moment où elle frappe l'autre plaque tubulaire.

Chaque échangeur est scellé à chacune des deux extrémités par un couvercle.

L'échangeur mesurant quinze pieds, et les tubes, treize pieds, il faut en conclure qu'il reste un espace d'un pied à chaque extrémité entre la plaque tubulaire et le couvercle qui ferme l'échangeur.

Le tout forme une unité scellée dont on a établi qu'il ne saurait être question de l'ouvrir sans la démanteler et y causer des dommages considérables.

En raison de la panne de ces échangeurs de chaleur, l'appelante a dû fermer une partie de son usine, ce qui lui a occasionné une perte évaluée par les parties à $158,289.24. Ce montant est détaillé dans la déclaration de l'appelante et comprend la «perte directe» de $15,604.44. L'assureur conteste la réclamation de l'appelante au motif que les dommages résultent de la corrosion des tubes à l'intérieur des échangeurs de chaleur et que ce risque est spécifiquement exclu de la protection offerte par la police d'assurance. Les clauses essentielles de la police d'assurance délivrée par l'intimée sont les suivantes:

[TRADUCTION]

CONVENTION D'ASSURANCE

Eu égard au paiement de la prime la Compagnie convient par la présente avec l'Assurée désignée, relativement à la perte résultant d'un accident, tel que défini dans la présente:

GARANTIE A—BIENS DE L'ASSURÉE

1. VALEUR RÉELLE—D'indemniser l'Assurée pour la perte de ses biens ou les dommages subis par eux, résultant directement d'un accident à un objet ou, si la Compagnie le préfère, de réparer ou de remplacer lesdits biens endommagés; et

Voici la définition du mot accident employé dans l'extrait ci-dessus:

[TRADUCTION] En ce qui concerne un objet garanti par cette Annexe, «accident» signifie un événement soudain et accidentel touchant l'objet, ou une partie de celui-ci, qui l'endommage et en nécessite la réparation ou le

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 value, 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

remplacement total ou partiel; mais accident ne signifie pas a) l'épuisement, la détérioration, la corrosion ou l'érosion du matériel, b) l'usure normale, c) la fuite d'un raccord, d'un calage, d'un joint d'étanchéité, d'un presse-étoupe, d'un joint ou d'un contact, d) l'avarie d'un tube à vide, d'un tube à gaz ou d'une brosse, e) l'avarie d'une structure ou d'une fondation soutenant l'objet ou une partie de celui-ci, ni f) le fonctionnement d'un dispositif de sécurité ou de sûreté.

Les employés de l'appelante se sont aperçus de la panne des échangeurs de chaleur lorsqu'ils ont remarqué des taches d'huile sur des feuilles de carton en voie de fabrication à l'usine. La source de l'huile a été retracée dans la chaudière et de là dans les échangeurs de chaleur où l'on a découvert un certain nombre de tuyaux fissurés.

Voici les deux prétentions principales de l'appelante:

a) que les dommages ont été causés par l'effet d'un coup de bélier; et,
b) subsidiairement, que les dommages ont été causés par la corrosion et que les termes de la police n'excluent pas les dommages ainsi causés.

Le savant juge de première instance a jugé que les dommages avaient été causés par la corrosion et discute ainsi de l'effet de la chute de pression:

Que le dommage se soit manifesté de façon soudaine, cela ne fait aucun doute, mais le phénomène qui l'a entraîné c'est-à-dire le processus chimique de la corrosion ne s'est pas réalisé de façon soudaine et accidentelle, de sorte qu'on ne peut dire qu'il y a eu «accident».

Le 4 décembre 1968, un événement, vraisemblablement la chute de pression de vapeur d'eau dans l'échangeur de chaleur, a provoqué la rupture de certains tubes d'huile, qui se seraient d'ailleurs rupturés à plus ou moins brève échéance.

Mais il n'en reste pas moins que la cause du dommage a été la corrosion.

La majorité de la Cour d'appel a jugé que les dommages avaient été causés par la corrosion et qu'ils étaient donc exclus de la protection de la police. Le juge Turgeon a traité ainsi de la théorie du coup de bélier:

Il s'agit là d'une possibilité invoquée par l'expert Mahoney de l'appelante à son interrogatoire en chef, non d'une probabilité. Cependant, lorsqu'il fut contre-

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 strip-

interrogé, il a admis qu'il ne pouvait fournir aucune preuve directe qu'il se serait produit un «hydraulic hammer» ni qu'il y avait eu une pression excessive, ni enfin que les valves de sécurité n'avaient pas fonctionné adéquatement.

Le juge Kaufman, dissident, a retenu en partie la théorie que le coup de bélier a joué comme «déclic» qui a accéléré les fuites dans les tubes. Le savant juge a poursuivi:

> [TRADUCTION] Mais lorsque, comme en l'espèce, la pression augmente soudainement, l'assureur ne peut accuser la corrosion et dire que, dans un avenir plus ou moins rapproché, les tubes auraient éclaté de toute façon.

Il est donc clair que les deux cours d'instance inférieure ont conclu que la cause des dommages était la corrosion des tubes qui, selon elles, n'est pas un risque ou un péril garanti par le contrat d'assurance.

Donc, la question est simplement de savoir si la perte que l'on admet avoir été subie par l'appelante et qui a été causée par la corrosion des échangeurs de chaleur est une perte garantie par les clauses précitées de la police d'assurance délivrée par l'intimée à l'appelante. Ceci laisse la prétention subsidiaire de l'appelante, savoir, que les clauses du contrat d'assurance garantissent les dommages qu'elle a subis. Le cœur de cet argument est que bien que la définition du mot accident ne comprenne pas le cas de la corrosion ou des cas semblables tels que «l'usure normale, la détérioration, l'épuisement ou l'érosion du matériel», la définition inclut, aux dires de l'appelante, ce qui suit la corrosion et qui peut en résulter. Ainsi, l'assureur ne serait pas responsable en vertu du contrat du coût des réparations ou du remplacement d'un bien assuré endommagé par «épuisement, détérioration, corrosion, usure normale etc.», mais le serait de toute perte indirecte subie par l'assurée après la rupture soudaine de l'échangeur de chaleur, qu'elle soit ou non causée par la «corrosion» ou «l'usure normale» etc.

Dans les dispositions préliminaires sur la garantie accordée par la police d'assurance, la définition d'accident est, bien sûr, fondamentale et, si l'on ne

ping 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

retient que les mots pertinents à l'espèce, la définition devient:

Accident signifie un événement soudain et accidentel touchant l'objet . . . mais accident ne signifie pas . . . la corrosion . . .

L'examen d'un chapitre de la police que l'on trouve plus loin et qui est intitulé «Exclusions» peut jeter un peu de lumière sur cette difficulté d'interprétation. Les extraits suivants illustrent la technique de rédaction utilisée dans la police lorsque des risques en sont exclus:

[TRADUCTION]

EXCLUSIONS

Cette police ne s'applique pas aux

1. **AVARIES CAUSÉES PAR LA GUERRE**—La perte résultant d'un accident causé directement ou indirectement par

a) une action hostile ou belliqueuse, comprenant une manœuvre de diversion, de combat ou de défense contre une attaque réelle, imminente ou prévue, par

. . .

2. **DANGERS NUCLÉAIRES**—La perte, qu'elle soit directe ou indirecte, immédiate ou éloignée,

a) résultant d'un accident causé directement ou indirectement par une réaction nucléaire . . .

b) résultant d'une réaction nucléaire, d'une radiation nucléaire ou d'une contamination radioactive, qu'elles soient ou non contrôlées, causées directement ou indirectement, entraînées ou aggravées par un accident;

. . .

3. **RISQUES DIVERS**—La perte en vertu des garanties A et B résultant

. . .

b) d'un accident causé directement ou indirectement par le feu ou l'usage de l'eau ou d'un autre moyen d'extinction du feu;

. . .

d) l'inondation, à moins qu'un accident s'ensuive, et la Compagnie sera alors seulement responsable de la perte résultant d'un tel accident subséquent;

. . .

(C'est moi qui souligne.)

On peut donc prétendre que lorsque le rédacteur a voulu exclure les conséquences d'un événement, il a employé les mots «directement ou indirecte-

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.*[3] 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,

[3] (1907), 15 O.L.R. 131.

ment». Si cette technique avait été adoptée dans les dispositions de garantie de base citées précédemment, le texte aurait été:

Accident ne signifie pas ce qui résulte directement ou indirectement de la corrosion.

Subsidiairement, si les parties ne désiraient pas que les conséquences de la corrosion soient visées par le contrat, ces circonstances auraient été incluses sous le tire «Exclusions» dans un alinéa comparable à l'un de ceux que j'ai cités.

Au mieux, il faut conclure que la définition d'accident, qui mentionne effectivement la corrosion, laisse deux interprétations possibles évidentes. Premièrement, la définition peut n'inclure aucun événement relié à la corrosion. Deuxièmement, la définition peut exclure seulement ce qu'il en coûte pour réparer la corrosion elle-même.

Les contrats d'assurance et les difficultés d'interprétation qu'ils posent ont été examinés par les cours depuis au moins deux siècles, et c'est un truisme de dire que lorsque l'on conclut que le texte du contrat est ambigu, il doit être interprété contre l'assureur qui est l'auteur, ou du moins la partie qui a la haute main sur le contenu du contrat. Ceci n'est pas entièrement vrai, bien sûr, à cause des modifications au contrat imposées par la loi, mais aucune de ces dispositions imposées n'est en litige ici. Dans l'arrêt *Pense v. Northern Life Assurance Co.*[3] à la p. 137, le juge Meredith de la Cour d'appel a formulé la proposition que:

[TRADUCTION] Il n'y a aucune raison valable pour appliquer à un contrat d'assurance une règle d'interprétation différente de celle applicable à un contrat d'une autre nature; et il ne peut y avoir aucune sorte d'excuse pour jeter le doute sur le sens de pareil contrat en vue de l'interpréter contre l'assureur, quel grand que soit le parti pris naturel ou la sympathie que peut éveiller la demande d'indemnité qu'on lui adresse. Dans ce contrat, tout comme dans tous les autres, il faut donner effet à l'intention des parties qui se dégage des mots qu'elles ont employés. Un demandeur doit pouvoir établir son droit de recouvrer une indemnité d'après les termes du contrat; un défendeur doit de même établir une défense fondée sur la convention. Le fardeau de la preuve, si je peux utiliser cette expression à l'égard de l'interprétation d'un écrit, est exactement le même pour chaque

[3] (1907), 15 O.L.R. 131.

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[4].)

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*[5] 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*

[4] (1908), 42 S.C.R. 246.
[5] [1954] S.C.R. 169.

partie respectivement. Nous sommes tous, très probablement, assurés et non assureurs et donc, très probablement, plus ou moins influencés par le parti pris naturel qui se dégage d'une telle position; aussi, faut-il prendre garde aux effets de ce parti pris en prenant entièrement conscience de son existence.

(Adoptée par cette Cour en 1908.[4])

On peut qualifier pareille proposition de première étape du processus d'interprétation. La deuxième étape est l'application, lorsqu'il y a ambiguïté, de la doctrine *contra proferentem*. Cette doctrine est souvent exposée dans notre droit et on peut citer à titre d'exemple ce qu'en dit *Cheshire and Fifoot's Law of Contract* (9e éd.), aux pp. 152 et 153:

[TRADUCTION] S'il y a le moindre doute quant au sens et à la portée de la clause d'exclusion ou limitative, l'ambiguïté sera résolue contre la partie qui l'a introduite et qui cherche maintenant à l'invoquer. Puisqu'elle cherche à se protéger contre une responsabilité à laquelle elle serait autrement assujettie, il lui incombe de prouver que les mots qu'elle a employés décrivent clairement et convenablement l'éventualité qui s'est en fait produite.

Cette Cour a appliqué la doctrine dans *Indemnity Insurance Company of North America c. Excel Cleaning Service*[5] où elle a dit, aux pp. 179 et 180:

[TRADUCTION] C'est, dans un tel cas, une règle générale que de donner aux termes employés une interprétation qui soit favorable à l'assuré. Le fondement de cette règle est que l'assureur cherche par de semblables clauses à imposer des exceptions et des restrictions à la protection qu'il a déjà décrite et, par conséquent, doit employer des termes qui expriment clairement l'étendue et l'importance de ces exceptions et restrictions, et, dans la mesure où il omet de le faire, ce sont les termes décrivant la protection qui doivent prévaloir ... De plus, les paroles de lord Greene dans *Woolfall & Rimmer, Ltd. v. Moyle*, [1942] 1 K.B. 66 à la p. 73, sont appropriées. Il a dit:

> Je ne peux m'empêcher de penser que si les assureurs désirent limiter par quelque condition un risque qu'à première vue, ils acceptent en des termes clairs, ils devraient très nettement l'énoncer.

Comme je l'ai déjà dit, il s'agit bien sûr de la deuxième étape de l'interprétation d'un tel contrat. Le juge Cartwright, alors juge puîné, a dit dans

[4] (1908), 42 R.C.S. 246.
[5] [1954] R.C.S. 169.

v. *Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company*[6] 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*[7], 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

[6] [1956] S.C.R. 936.
[7] (1889), 23 Q.B. 453 (C.A.).

Stevenson c. Reliance Petroleum Limited; Reliance Petroleum Limited c. Canadian General Insurance Company[6] à la p. 953:

> [TRADUCTION] Les plaidoiries ont insisté sur la règle exprimée dans la maxime *verba fortius accipiuntur contra preferentem*, mais il faut recourir à cette règle seulement lorsque aucune autre règle d'interprétation ne permet à la Cour de s'assurer du sens d'un document.

Le lord juge Lindley l'a dit en ces termes:

> [TRADUCTION] Dans un cas limite, lorsqu'il y a un doute réel, il faut interpréter la police de façon plus stricte contre les assureurs; ils conçoivent la police et introduisent les exceptions. Mais ce principe ne doit être appliqué que pour écarter un doute et non pour en créer un ou grossir une ambiguïté, lorsque les circonstances de l'affaire ne soulèvent aucune difficulté réelle.
>
> *Cornish v. Accident Insurance Company*[7], à la p. 456.

Même indépendamment de la doctrine *contra proferentem* dans la mesure où elle est applicable à l'interprétation des contrats, les règles normales d'interprétation amènent une cour à rechercher une interprétation qui, vu l'ensemble du contrat, tend à traduire et à présenter l'intention véritable des parties au moment où elles ont contracté. Dès lors, on ne doit pas utiliser le sens littéral lorsque cela entraînerait un résultat irréaliste ou qui ne serait pas envisagé dans le climat commercial dans lequel l'assurance a été contractée. Lorsque des mots sont susceptibles de deux interprétations, la plus raisonnable, celle qui assure un résultat équitable, doit certainement être choisie comme l'interprétation qui traduit l'intention des parties. De même, une interprétation qui va à l'encontre des intentions des parties et du but pour lequel elles ont à l'origine conclu une opération commerciale doit être écartée en faveur d'une interprétation de la police qui favorise un résultat commercial raisonnable. C'est un truisme de faire remarquer que l'on doit éviter une interprétation d'une clause contractuelle ambiguë qui rendrait futile l'effort déployé par l'assuré pour obtenir la protection d'une assurance. En d'autres mots, les cours devraient être réticentes à appuyer une interprétation qui permettrait soit à l'assureur de toucher une prime sans risque soit à l'assuré d'obtenir une

[6] [1956] R.C.S. 936.
[7] (1889), 23 Q.B. 453 (C.A.).

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 defeat 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

indemnité que l'on n'a pas pu raisonnablement rechercher ni escompter au moment du contrat.

L'arrêt *Cornish*, précité, illustre la ligne de conduite généralement suivie lorsque pareils contrats sont soumis aux tribunaux. La cour y interprète un contrat d'assurance dans le contexte du décès de l'assuré survenu alors qu'il traversait une voie ferrée. La police comportait une exception aux risques assurés en cas de [TRADUCTION] «risques évidents de blessures pris par l'assuré». Dans le cours de son jugement, le lord juge Lindley a dit:

[TRADUCTION] Les mots sont «risques évidents de blessures pris par l'assuré». Ces mots suggèrent les questions suivantes: Risques pris par qui? Évidents: quand et pour qui? Il faut remarquer que ces mots sont très généraux. Il n'y a aucun mot tel que «intentionnel» ou «téméraire» ou «négligent»; et pour s'assurer du sens réel de l'exception, il faut examiner le document dans son ensemble et garder toujours à l'esprit l'objet qu'avaient les parties à ce contrat. L'objet du contrat est d'assurer contre la mort ou les blessures accidentelles, et le contrat ne doit pas être interprété d'une manière telle qu'il détruise cet objet, ou le rende pratiquement illusoire. Un homme qui traverse une rue ordinairement encombrée s'expose à des risques évidents de blessures; et, si l'on interprète littéralement les mots en question, les défendeurs ne seront pas responsables si l'assuré est tué ou blessé en traversant, même s'il a été raisonnablement prudent. Pareil résultat est si manifestement contraire à l'intention réelle des parties que l'on doit rejeter une interprétation qui y mène. Mais, si cela est vrai, une interprétation littérale est irrecevable et il faut assortir les mots employés de certaines réserves. (à la p. 456)

On trouve un exemple de l'application des mêmes principes dans *Indemnity Insurance Company of North America c. Excel Cleaning Service*, précité, où l'on a conclu aux pp. 177 et 178:

[TRADUCTION] Une telle interprétation [celle de l'assureur] annulerait en grande partie, sinon totalement, l'objet de l'assurance—une situation qui doit être évitée, dans la mesure où les termes employés le permettent.

L'appelante, en qualité de propriétaire et d'exploitant d'une grande usine de produits forestiers, a voulu assurer la machinerie utilisée dans l'usine à des fins industrielles. Il n'est pas contesté que les échangeurs de chaleur en question sont protégés par le contrat d'assurance. Il n'est pas non plus sérieusement contesté, du moins lorsque le litige

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

est venu devant cette Cour, que la corrosion des tubes à l'intérieur des échangeurs de chaleur, probablement causée par la présence d'eau de mer, a été la cause réelle de leur panne et de la fuite consécutive d'huile dans l'eau de condensation. Comme il en a le droit, l'assureur a cherché dans les termes du contrat à limiter sa protection à la perte accidentelle, ce qu'il a fait en essayant de restreindre la définition d'accident. Si une cour devait accepter la prétention de l'intimée, que la perte subie par l'assurée en raison de la panne de la machinerie causée par l'usure normale et que l'immobilisation consécutive de l'usine étaient exclues par la définition d'accident, alors l'assurée n'aurait obtenu, par ses primes, aucune garantie pour ce qui peut bien être la source de perte la plus vraisemblable, ou certainement un risque constant dans presque toute l'usine. De même, interpréter la corrosion au sens où ce mot est employé dans la définition d'accident, comme le désire l'intimée, équivaudrait à éliminer de la protection de l'assurance toutes les pertes subies par l'assurée en raison de la présence de corrosion. Pareille interprétation entraînerait nécessairement la suppression d'une partie importante de la protection prévue au contrat. Il est possible que des assureurs prétendent que la prime sera fixée en fonction d'une garantie aussi limitée. Il n'y a aucune preuve à cet effet en l'espèce.

Il est également bien possible que l'industrie des assurances prétende qu'appliquer l'interprétation la plus favorable à cette disposition ambiguë va imposer un fardeau inutile et injuste à l'assureur. L'assureur en vertu de cette police peut invoquer au moins deux mécanismes de défense pour lui venir facilement en aide: premièrement, le droit d'inspection qui a été exercé en l'espèce, avant et pendant le contrat; et, deuxièmement le droit de mettre fin au contrat si l'assureur est d'avis que l'état de la machinerie est tel qu'il est impossible d'accorder la garantie de la manière stipulée au contrat.

Je suis donc d'avis d'accueillir le pourvoi, d'infirmer le jugement de la cour de première instance et l'arrêt de la Cour d'appel et d'ordonner que l'appelante a le droit de recouvrer $158,289.24 avec intérêt à compter du 1er avril 1969, tel que

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.*

Solicitors for the appellant: Desjardins, Ducharme, Desjardins & Bourque, Montreal.

Solicitors for the respondent: Martineau, Walker, Allison, Beaulieu, MacKell & Clermont, Montreal.

demandé (soit la date du dépôt de la réclamation, date qui n'a été contestée devant aucune cour dans les présentes procédures), et les dépens dans toutes les cours. Si les parties ne s'entendent pas sur la question de savoir si les dommages-intérêts pour la «perte directe» au montant de $15,604.44 susmentionné s'appliquent en fait à la réparation des dommages causés par la corrosion et ne devraient donc pas être inclus dans les dommages-intérêts accordés, compte tenu des présents motifs, elles devront s'adresser à un juge de la Cour supérieure pour faire trancher cette question.

Pourvoi accueilli avec dépens, les juges MARTLAND, RITCHIE *et* MCINTYRE étant *dissidents.*

Procureurs de l'appelante: Desjardins, Ducharme, Desjardins & Bourque, Montréal.

Procureurs de l'intimée: Martineau, Walker, Allison, Beaulieu, MacKell & Clermont, Montréal.

Tab 12

Case Name:

Hryniak v. Mauldin

Robert Hryniak, Appellant;
v.
Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith, Respondents, and Ontario Trial Lawyers Association and Canadian Bar Association, Interveners.

[2014] S.C.J. No. 7

[2014] A.C.S. no 7

2014 SCC 7

2014EXP-319

J.E. 2014-162

EYB 2014-231951

File No.: 34641.

Supreme Court of Canada

Heard: March 26, 2013;
Judgment: January 23, 2014.

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

(96 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil litigation -- Civil procedure -- Disposition without trial -- Judgments and orders -- Summary judgments -- Availability -- Appeal by Hryniak from Ontario Court of Appeal judgment that affirmed decision granting respondents' motion for summary judgment dismissed -- Respondent brought civil fraud action after money invested with Hryniak disappeared -- Motion judge found trial against Hryniak not required and Hryniak committed fraud -- Court of Appeal found case not appropriate for summary judgment but dismissed Hryniak's appeal -- Summary judgment rules must be interpreted broadly, favouring proportionality and fair access to affordable, timely and just adjudication of claims -- Inappropriate use of summary judgment motions created own costs and delays -- However, judges could mitigate such risks by making use of powers to manage and focus process and, where possible, remain seized of proceedings -- Motion judge found no credible evidence to support Hryniak's claim he was legitimate trader, and outcome was clear -- Motion judge concluded there was no issue requiring trial -- He made no palpable and overriding error in granting summary judgment -- Rules of Civil Procedure, Rule 20.

Appeal by Hryniak from an Ontario Court of Appeal judgment that affirmed a decision granting the respondents' motion for summary judgment. The respondents invested money with Hryniak and his company, Tropos. Tropos wired the funds to an offshore bank and the funds disappeared. The respondents lost their investment. The respondents brought an action for civil fraud against Hryniak, during which they brought motions for summary judgment. The motion judge concluded a trial was not required against Hryniak. Despite concluding this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied the record supported the finding Hryniak had committed the tort of civil fraud against the respondents and, therefore, dismissed Hryniak's appeal. Hryniak appealed.

HELD: Appeal dismissed. Undue process and protracted trials, with unnecessary expense and delay, prevented the fair and just resolution of disputes. The summary judgment motion was an important tool for enhancing access to justice because it could provide a cheaper, faster alternative to a full trial. Generally, summary judgment was available where there was no genuine issue for trial. The new powers in Rules 20.04(2.1) and (2.2) expanded the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences. Summary judgment motions had to be granted whenever there was no genuine issue requiring a trial. There was no genuine issue requiring a trial when the judge was able to reach a fair and just determination on the merits on a motion for summary judgment. On a motion for summary judgment under Rule 20.04, the judge should first determine if there was a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. If there appeared to be a genuine issue requiring a trial, she should then determine if the need for a trial could be avoided by using the new powers under Rules 20.04(2.1) and (2.2). Absent an error of law, the exercise of powers under the new summary judgment

rule attracted deference. Provided that it was not against the "interest of justice", a motion judge's decision to exercise the new powers was discretionary. Thus, unless the motion judge misdirected herself, or came to a decision that was so clearly wrong it resulted in an injustice, her decision should not be disturbed. The motion judge found no credible evidence to support Hryniak's claim he was a legitimate trader, the outcome was therefore clear, so the motion judge concluded there was no issue requiring a trial. He made no palpable and overriding error in granting summary judgment. It was neither against the interest of justice for the motion judge to use his fact-finding powers nor was his discretionary decision to do so tainted with error.

Statutes, Regulations and Rules Cited:

Code of Civil Procedure, R.S.Q., c. C-25, art. 4.2, art. 54.1 et seq., art. 165(4)

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 20, Rule 20.01, Rule 20.01(1), Rule 20.01(2), Rule 20.01(3), Rule 20.02, Rule 20.02(1), Rule 20.02(2), Rule 20.03, Rule 20.03(1), Rule 20.03(2), Rule 20.03(3), Rule 20.03(4), Rule 20.04, Rule 20.04(1), Rule 20.04(2), Rule 20.04(2)(a), Rule 20.04(2)(b), Rule 20.04(2.1), Rule 20.04(2.1)1., Rule 20.04(2.1)2., Rule 20.04(2.1)3., Rule 20.04(2.2), Rule 20.04(3), Rule 20.04(4), Rule 20.04(5), Rule 20.05, Rule 20.05(1), Rule 20.05(2), Rule 20.05(2)(a), Rule 20.05(2)(b), Rule 20.05(2)(c), Rule 20.05(2) (d), Rule 20.05(2)(e), Rule 20.05(2)(f), Rule 20.05(2)(g), Rule 20.05(2)(h), Rule 20.05(2)(i), Rule 20.05(2)(j), Rule 20.05(2)(k), Rule 20.05(2)(l), Rule 20.05(2)(m), Rule 20.05(2) (n), Rule 20.05(2)(o), Rule 20.05(2)(p), Rule 20.05(3), Rule 20.05(4), Rule 20.05(5), Rule 20.05(6), Rule 20.05(7), Rule 20.06, Rule 20.06(a), Rule 20.06(b), Rule 20.07, Rule 20.08, Rule 20.09

Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 1-3(2), Rule 1.04(1), Rule 1.04(1.1)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Civil Procedure -- Summary Judgment -- Investors bringing action in civil fraud and subsequently bringing a motion for summary judgment -- Motion judge granting summary judgment -- Purpose of summary judgment motions -- Access to Justice -- Proportionality -- Interpretation of recent amendments to Ontario Rules of Civil Procedure -- Trial management orders -- Standard of review for summary judgment motions -- Whether motion judge erred in granting summary judgment -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 20.

Court Summary:

In June 2001, two representatives of a group of American investors met with H and others to discuss an investment opportunity. The group wired US$1.2 million, which was pooled with other funds and

transferred to H's company, Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank and the money disappeared. The investors brought an action for civil fraud against H and others and subsequently brought a motion for summary judgment. The motion judge used his powers under Rule 20.04(2.1) of the *Ontario Rules of Civil Procedure* (amended in 2010) to weigh the evidence, evaluate credibility, and draw inferences. He concluded that a trial was not required against H. Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that H had committed the tort of civil fraud against the investors, and therefore dismissed H's appeal.

Held: The appeal should be dismissed.

Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

A shift in culture is required. The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure. Summary judgment motions provide an opportunity to simplify pre-trial procedures and move the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. Summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

Rule 20 was amended in 2010 to improve access to justice. These reforms embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes. They offer significant new tools to judges, which allow them to adjudicate more cases through summary judgment motions and attenuate the risks when such motions do not resolve the entire case. The new powers in rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.

Summary judgment motions must be granted whenever there is no genuine issue requiring a trial. There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

The new fact-finding powers granted to motion judges in Rule 20.04 may be employed on a motion for summary judgment unless it is in the interest of justice for them to be exercised only at trial. When the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. The power to hear oral evidence should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where

extensive oral evidence can be heard. Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge and to provide a description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

Failed, or even partially successful, summary judgment motions add to costs and delay. This risk can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction. These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion. Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge.

Absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law which should not be overturned, absent palpable and overriding error. Similarly, the determination of whether it is in the interest of justice for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) is also a question of mixed fact and law which attracts deference.

The motion judge did not err in granting summary judgment in the present case. The tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss. In granting summary judgment to the group against H, the motion judge did not explicitly address the correct test for civil fraud but his findings are sufficient to make out the cause of action. The motion judge found no credible evidence to support H's claim that he was a legitimate trader, and the outcome was therefore clear, so the motion judge concluded there was no issue requiring a trial. It was neither against the interest of justice for the motion judge to use his fact-finding powers nor was his discretionary decision to do so tainted with error.

Cases Cited

Referred to: *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371; *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311; *Bal*

Global Finance Canada Corp. v. Aliments Breton (Canada) inc., 2010 QCCS 325 (CanLII); *Vaughan v. Warner Communications, Inc.* (1986), 56 O.R. (2d) 242; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4) 257; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

Statutes and Regulations Cited

Code of Civil Procedure, R.S.Q., c. C-25, arts. 4.2, 54.1 *et seq.*, 165(4).

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 20.

Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 1- 3(2).

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Walsh, Teresa, and Lauren Posloski. "Establishing a Workable Test for Summary Judgment: Are We There Yet?", in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation 2013*. Toronto: Thomson Carswell, 2013, 419.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Winkler C.J.O. and Laskin, Sharpe, Armstrong and Rouleau JJ.A.), 2011 ONCA 764, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 14 C.P.C. (7) 242, 13 R.P.R. (5) 167, 93 B.L.R. (4) 1, 344 D.L.R. (4) 193, 10 C.L.R. (4) 17, [2011] O.J. No. 5431 (QL), 2011 CarswellOnt 13515 (*sub nom. Combined Air Mechanical Services Inc. v. Flesch*), affirming a decision of Grace J., 2010 ONSC 5490, [2010] O.J. No. 4661 (QL), 2010 CarswellOnt 8325. Appeal dismissed.

Counsel:

Sarit E. Batner, Brandon Kain and *Moya J. Graham*, for the appellant.

Javad Heydary, Jeffrey D. Landmann, David K. Alderson, Michelle Jackson and *Jonathan A. Odumeru*, for the respondents.

Allan Rouben and Ronald P. Bohm, for the intervener the Ontario Trial Lawyers Association.

Paul R. Sweeny and David Sterns, for the intervener the Canadian Bar Association.

The judgment of the Court was delivered by

1 **KARAKATSANIS J.**:-- Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

2 Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

3 Summary judgment motions provide one such opportunity. Following the *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) (the Osborne Report), Ontario amended the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (*Ontario Rules* or Rules) to increase access to justice. This appeal, and its companion, *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, address the proper interpretation of the amended Rule 20 (summary judgment motion).

4 In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

5 To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

6 As the Court of Appeal observed, the inappropriate use of summary judgment motions creates its own costs and delays. However, judges can mitigate such risks by making use of their powers to manage and focus the process and, where possible, remain seized of the proceedings.

7 While I differ in part on the interpretation of Rule 20, I agree with the Court of Appeal's disposition of the matter and would dismiss the appeal.

I. Facts

8 More than a decade ago, a group of American investors, led by Fred Mauldin (the Mauldin Group),

placed their money in the hands of Canadian "traders". Robert Hryniak was the principal of the company Tropos Capital, which traded in bonds and debt instruments; Gregory Peebles, is a corporate-commercial lawyer (formerly of Cassels Brock & Blackwell) who acted for Hryniak, Tropos and Robert Cranston, formerly a principal of a Panamanian company, Frontline Investments Inc.

9 In June 2001, two members of the Mauldin Group met with Cranston, Peebles, and Hryniak, to discuss an investment opportunity.

10 At the end of June 2001, the Mauldin Group wired US$1.2 million to Cassels Brock, which was pooled with other funds and transferred to Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank, and the money disappeared. Hryniak claims that at this point, Tropos's funds, including the funds contributed by the Mauldin Group, were stolen.

11 Beyond a small payment of US$9,600 in February 2002, the Mauldin Group lost its investment.

II. Judicial History

A. *Ontario Superior Court of Justice, 2010 ONSC 5490 (CanLII)*

12 The Mauldin Group joined with Bruno Appliance and Furniture, Inc. (the appellants in the companion appeal) in an action for civil fraud against Hryniak, Peebles and Cassels Brock. They brought motions for summary judgment, which were heard together.

13 In hearing the motions, the judge used his powers under the new Rule 20.04(2.1) to weigh the evidence, evaluate credibility, and draw inferences. He found that the Mauldin Group's money was disbursed by Cassels Brock to Hryniak's company, Tropos, but that there was no evidence to suggest that Tropos had ever set up a trading program. Contrary to the investment strategy that Hryniak had described to the investors, the Mauldin Group's money was placed in an account with the offshore New Savings Bank, and then disappeared. He rejected Hryniak's claim that members of the New Savings Bank had stolen the Mauldin Group's money.

14 The motion judge concluded that a trial was not required against Hryniak. However, he dismissed the Mauldin Group's motion for summary judgment against Peebles, because that claim involved factual issues, particularly with respect to Peebles' credibility and involvement in a key meeting, which required a trial. Consequently, he also dismissed the motion for summary judgment against Cassels Brock, as those claims were based on the theory that the firm was vicariously liable for Peebles' conduct.

B. *Court of Appeal for Ontario, 2011 ONCA 764, 108 O.R. (3d) 1*

15 The Court of Appeal simultaneously heard Hryniak's appeal of this matter, the companion *Bruno Appliance* appeal, and three other matters which are not before this Court. This was the first occasion on which the Court of Appeal considered the new Rule 20.

16 The Court of Appeal set out a threshold test for when a motion judge could employ the new evidentiary powers available under Rule 20.04(2.1) to grant summary judgment under Rule 20.04(2)(a). Under this test, the "interest of justice" requires that the new powers be exercised only at trial, unless a

motion judge can achieve the "full appreciation" of the evidence and issues required to make dispositive findings on a motion for summary judgment. The motion judge should assess whether the benefits of the trial process, including the opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first-hand, are necessary to fully appreciate the evidence in the case.

17 The Court of Appeal suggested that cases requiring multiple factual findings, based on conflicting evidence from a number of witnesses, and involving an extensive record, are generally not fit for determination in this manner. Conversely, cases driven by documents, with few witnesses, and limited contentious factual issues are appropriate candidates for summary judgment.

18 The Court of Appeal advised motion judges to make use of the power to hear oral evidence, under Rule 20.04(2.2), to hear only from a limited number of witnesses on discrete issues that are determinative of the case.

19 The Court of Appeal concluded that, given its factual complexity and voluminous record, the Mauldin Group's action was the type of action for which a trial is generally required. There were numerous witnesses, various theories of liability against multiple defendants, serious credibility issues, and an absence of reliable documentary evidence. Moreover, since Hryniak and Peebles had cross-claimed against each other and a trial would nonetheless be required against the other defendants, summary judgment would not serve the values of better access to justice, proportionality, and cost savings.

20 Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that Hryniak had committed the tort of civil fraud against the Mauldin Group, and therefore dismissed Hryniak's appeal.

III. Outline

21 In determining the general principles to be followed with respect to summary judgment, I will begin with the values underlying timely, affordable and fair access to justice. Next, I will turn to the role of summary judgment motions generally and the interpretation of Rule 20 in particular. I will then address specific judicial tools for managing the risks of summary judgment motions.

22 Finally, I will consider the appropriate standard of review and whether summary judgment should have been granted to the respondents.

IV. Analysis

A. *Access to Civil Justice: A Necessary Culture Shift*

23 This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

24 However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where

government funding is available,[1] ordinary Canadians cannot afford to access the adjudication of civil disputes.[2] The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in *Bruno Appliance*) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

25 Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.

26 In some circles, private arbitration is increasingly seen as an alternative to a slow judicial process. But private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined.

27 There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

28 This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible -- proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

29 There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

30 The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice.[3] For example, Ontario Rules 1.04(1) and 1.04(1.1) provide:

> **1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> **1.04** (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

31 Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes ... an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation" (*Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53).

32 This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

33 A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

B. *Summary Judgment Motions*

34 The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary judgment mechanism in their respective rules of civil procedure.[4] Generally, summary judgment is available where there is no genuine issue for trial.

35 Rule 20 is Ontario's summary judgment procedure, under which a party may move for summary judgment to grant or dismiss all or part of a claim. While, Ontario's Rule 20 in some ways goes further than other rules throughout the country, the values and principles underlying its interpretation are of general application.

36 Rule 20 was amended in 2010, following the recommendations of the Osborne Report, to improve access to justice. These reforms embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes.

37 Early summary judgment rules were quite limited in scope and were available only to plaintiffs with claims based on debt or liquidated damages, where no real defence existed.[5] Summary judgment existed to avoid the waste of a full trial in a clear case.

38 In 1985, the then new Rule 20 extended the availability of summary judgement to both plaintiffs and defendants and broadened the scope of cases that could be disposed of on such a motion. The rules were initially interpreted expansively, in line with the purposes of the rule changes.[6] However, appellate jurisprudence limited the powers of judges and effectively narrowed the purpose of motions for summary judgment to merely ensuring that: "claims that have no chance of success [are] weeded out at an early stage".[7]

39 The Ontario Government commissioned former Ontario Associate Chief Justice Coulter Osborne Q.C., to consider reforms to make the Ontario civil justice system more accessible and affordable, leading to the report of the Civil Justice Reform Project (the Osborne Report). The Osborne Report concluded that few summary judgment motions were being brought and, if the summary judgment rule was to work as intended, the appellate jurisprudence that had narrowed the scope and utility of the rule had to be reversed (p. 35). Among other things, it recommended that summary judgment be made more widely available, that judges be given the power to weigh evidence on summary judgment motions, and that judges be given discretion to direct that oral evidence be presented (pp. 35-36).

40 The report also recommended the adoption of a summary trial procedure similar to that employed in British Columbia (p. 37). This particular recommendation was not adopted, and the legislature made the choice to maintain summary judgment as the accessible procedure.

41 Many of the Osborne Report's recommendations were taken up and implemented in 2010. As noted above, the amendments codify the proportionality principle and provide for efficient adjudication when a conventional trial is not required. They offer significant new tools to judges, which allow them to adjudicate more cases through summary judgment motions and attenuate the risks when such motions do not resolve the entire case.

42 Rule 20.04 now reads in part:[8]

> **20.04** ...
>
> (2) [General] The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring
>
> a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined
>
> by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
>
> (2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
> 2. Evaluating the credibility of a deponent.
> 3. Drawing any reasonable inference from the evidence.

(2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

43 The Ontario amendments changed the test for summary judgment from asking whether the case presents "a genuine issue for trial" to asking whether there is a "genuine issue requiring a trial". The new rule, with its enhanced fact-finding powers, demonstrates that a trial is not the default procedure. Further, it eliminated the presumption of substantial indemnity costs against a party that brought an unsuccessful motion for summary judgment, in order to avoid deterring the use of the procedure.

44 The new powers in Rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.[9]

45 These new fact-finding powers are discretionary and are presumptively available; they may be exercised *unless* it is in the interest of justice for them to be exercised only at a trial; Rule 20.04(2.1). Thus, the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.

46 I will first consider when summary judgment can be granted on the basis that there is "no genuine issue requiring a trial" (Rule 20.04(2)(a)). Second, I will discuss when it is against the "interest of justice" for the new fact-finding powers in Rule 20.04(2.1) to be used on a summary judgment motion. Third, I will consider the power to call oral evidence and, finally, I will lay out the process to be followed on a motion for summary judgment.

(1) When is There no Genuine Issue Requiring a Trial?

47 Summary judgment motions must be granted whenever there is no genuine issue requiring a trial (Rule 20.04(2)(a)). In outlining how to determine whether there is such an issue, I focus on the goals and principles that underlie whether to grant motions for summary judgment. Such an approach allows the application of the rule to evolve organically, lest categories of cases be taken as rules or preconditions which may hinder the system's transformation by discouraging the use of summary judgment.

48 The Court of Appeal did not explicitly focus upon when there is a genuine issue requiring a trial. However, in considering whether it is against the interest of justice to use the new fact-finding powers, the court suggested that summary judgment would most often be appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or when the record could be supplemented by oral evidence on discrete points. These are helpful observations but, as the court itself recognized, should not be taken as delineating firm categories of cases where summary judgment is and is not appropriate. For example, while this case is complex, with a voluminous record, the Court of Appeal ultimately agreed that there was no genuine issue requiring a trial.

49 There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1)

allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

50 These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

51 Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.

(2) The Interest of Justice

52 The enhanced fact-finding powers granted to motion judges in Rule 20.04(2.1) may be employed on a motion for summary judgment unless it is in the "interest of justice" for them to be exercised only at trial. The "interest of justice" is not defined in the Rules.

53 To determine whether the interest of justice allowed the motion judge to use her new powers, the Court of Appeal required a motion judge to ask herself, "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?" (para. 50).

54 The Court of Appeal identified the benefits of a trial that contribute to this full appreciation of the evidence: the narrative that counsel can build through trial, the ability of witnesses to speak in their own words, and the assistance of counsel in sifting through the evidence (para. 54).

55 The respondents, as well as the interveners, the Canadian Bar Association, the Attorney General of Ontario and the Advocates' Society, submit that the Court of Appeal's emphasis on the virtues of the traditional trial is misplaced and unduly restrictive. Further, some of these interveners submit that this approach may result in the creation of categories of cases inappropriate for summary judgment, and this will limit the development of the summary judgment vehicle.

56 While I agree that a motion judge must have an appreciation of the evidence necessary to make dispositive findings, such an appreciation is not only available at trial. Focussing on how much and what kind of evidence could be adduced at a trial, as opposed to whether a trial is "requir[ed]" as the Rule directs, is likely to lead to the bar being set too high. The interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability. Otherwise, the adjudication permitted with the new powers -- and the purpose of the amendments -- would be frustrated.

57 On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute. A documentary record, particularly when supplemented by the new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly. The powers provided in Rules 20.04(2.1) and 20.04(2.2) can provide an equally valid, if less extensive, manner of fact finding.

58 This inquiry into the interest of justice is, by its nature, comparative. Proportionality is assessed in relation to the full trial. It may require the motion judge to assess the relative efficiencies of proceeding by way of summary judgment, as opposed to trial. This would involve a comparison of, among other things, the cost and speed of both procedures. (Although summary judgment may be expensive and time consuming, as in this case, a trial may be even more expensive and slower.) It may also involve a comparison of the evidence that will be available at trial and on the motion as well as the opportunity to fairly evaluate it. (Even if the evidence available on the motion is limited, there may be no reason to think better evidence would be available at trial.)

59 In practice, whether it is against the "interest of justice" to use the new fact-finding powers will often coincide with whether there is a "genuine issue requiring a trial". It is logical that, when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure.

60 The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

(3) The Power to Hear Oral Evidence

61 Under Rule 20.04(2.2), the motion judge is given the power to hear oral evidence to assist her in making findings under Rule 20.04(2.1). The decision to allow oral evidence rests with the motion judge since, as the Court of Appeal noted, "it is the motion judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed" (para. 60).

62 The Court of Appeal suggested the motion judge should only exercise this power when

> (1) Oral evidence can be obtained from a small number of witnesses and gathered in a manageable period of time; (2) Any issue to be dealt with by presenting oral evidence is likely to have a significant impact on whether the summary judgment motion is granted; and (3) Any such issue is narrow and discrete -- *i.e.*, the issue can be separately decided and is not enmeshed with other issues on the motion. [para. 103]

This is useful guidance to ensure that the hearing of oral evidence does not become unmanageable; however, as the Court of Appeal recognized, these are not absolute rules.

63 This power should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure.

64 Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge in weighing the evidence, assessing credibility, or drawing inferences and to provide a "will say" statement or other description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

65 Thus, the power to call oral evidence should be used to promote the fair and just resolution of the dispute in light of principles of proportionality, timeliness and affordability. In tailoring the nature and extent of oral evidence that will be heard, the motion judge should be guided by these principles, and remember that the process is not a full trial on the merits but is designed to determine if there is a genuine issue requiring a trial.

(4) The Roadmap/Approach to a Motion for Summary Judgment

66 On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

67 Inquiring first as to whether the use of the powers under Rule 20.04(2.1) will allow the dispute to be resolved by way of summary judgment, before asking whether the interest of justice requires that those powers be exercised only at trial, emphasizes that these powers are presumptively available, rather than exceptional, in line with the goal of proportionate, cost-effective and timely dispute resolution. As well, by first determining the consequences of using the new powers, the benefit of their use is clearer. This will assist in determining whether it is in the interest of justice that they be exercised only at trial.

68 While summary judgment *must* be granted if there is no genuine issue requiring a trial,[10] the decision to use either the expanded fact-finding powers or to call oral evidence is discretionary.[11] The discretionary nature of this power gives the judge some flexibility in deciding the appropriate course of action. This discretion can act as a safety valve in cases where the use of such powers would clearly be inappropriate. There is always the risk that clearly unmeritorious motions for summary judgment could be abused and

used tactically to add time and expense. In such cases, the motion judge may choose to decline to exercise her discretion to use those powers and dismiss the motion for summary judgment, without engaging in the full inquiry delineated above.

C. *Tools to Maximize the Efficiency of a Summary Judgment Motion*

(1) Controlling the Scope of a Summary Judgment Motion

69 The *Ontario Rules* and a superior court's inherent jurisdiction permit a motion judge to be involved early in the life of a motion, in order to control the size of the record, and to remain active in the event the motion does not resolve the entire action.

70 The Rules provide for early judicial involvement, through Rule 1.05, which allows for a motion for directions, to manage the time and cost of the summary judgment motion. This allows a judge to provide directions with regard to the timelines for filing affidavits, the length of cross-examination, and the nature and amount of evidence that will be filed. However, motion judges must also be cautious not to impose administrative measures that add an unnecessary layer of cost.

71 Not all motions for summary judgment will require a motion for directions. However, failure to bring such a motion where it was evident that the record would be complex or voluminous may be considered when dealing with costs consequences under Rule 20.06(a). In line with the principle of proportionality, the judge hearing the motion for directions should generally be seized of the summary judgment motion itself, ensuring the knowledge she has developed about the case does not go to waste.

72 I agree with the Court of Appeal (at paras. 58 and 258) that a motion for directions also provides the responding party with the opportunity to seek an order to stay or dismiss a premature or improper motion for summary judgment. This may be appropriate to challenge lengthy, complex motions, particularly on the basis that they would not sufficiently advance the litigation, or serve the principles of proportionality, timeliness and affordability.

73 A motion for summary judgment will not always be the most proportionate way to dispose of an action. For example, an early date may be available for a short trial, or the parties may be prepared to proceed with a summary trial. Counsel should always be mindful of the most proportionate procedure for their client and the case.

(2) Salvaging a Failed Summary Judgment Motion

74 Failed, or even partially successful, summary judgment motions add -- sometimes astronomically -- to costs and delay. However, this risk can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction.

75 Rule 20.05(1) and (2) provides in part:

> **20.05** (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and

> defining the issues to be tried, and order that the action proceed to trial expeditiously.
>
> (2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just ...

76 Rules 20.05(2)(a) through (p) outline a number of specific trial management orders that may be appropriate. The court may: set a schedule; provide a restricted discovery plan; set a trial date; require payment into court of the claim; or order security for costs. The court may order that: the parties deliver a concise summary of their opening statement; the parties deliver a written summary of the anticipated evidence of a witness; any oral examination of a witness at trial will be subject to a time limit or; the evidence of a witness be given in whole or in part by affidavit.

77 These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion. The motion judge should look to the summary trial as a model, particularly where affidavits filed could serve as the evidence of a witness, subject to time-limited examinations and cross-examinations. Although the Rules did not adopt the Osborne Report's recommendation of a summary trial model, this model already exists under the simplified rules or on consent. In my view, the summary trial model would also be available further to the broad powers granted a judge under Rule 20.05(2).

78 Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge. I agree with the Osborne Report that the involvement of a single judicial officer throughout

> saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue. [p. 88]

79 While such an approach may complicate scheduling, to the extent that current scheduling practices prevent summary judgment motions being used in an efficient and cost effective manner, the courts should be prepared to change their practices in order to facilitate access to justice.

D. *Standard of Review*

80 The Court of Appeal concluded that determining the appropriate test for summary judgment -- whether there is a genuine issue requiring a trial -- is a legal question, reviewable on a correctness standard, while any factual determinations made by the motions judge will attract deference.

81 In my view, absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error in principle, findings of mixed fact and law, should not be overturned,

absent palpable and overriding error, *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.

82 Similarly, the question of whether it is in the "interest of justice" for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) depends on the relative evidence available at the summary judgment motion and at trial, the nature, size, complexity and cost of the dispute and other contextual factors. Such a decision is also a question of mixed fact and law which attracts deference.

83 Provided that it is not against the "interest of justice", a motion judge's decision to exercise the new powers is discretionary. Thus, unless the motion judge misdirected herself, or came to a decision that is so clearly wrong that it resulted in an injustice, her decision should not be disturbed.

84 Of course, where the motion judge applies an incorrect principle of law, or errs with regard to a purely legal question, such as the elements that must be proved for the plaintiff to make out her cause of action, the decision will be reviewed on a correctness standard (*Housen v. Nikolaisen*, at para. 8).

E. *Did the Motion Judge Err by Granting Summary Judgment?*

85 The motion judge granted summary judgment in favour of the Mauldin Group. While the Court of Appeal found that the action should not have been decided by summary judgment, it nevertheless dismissed the appeal. Hryniak argues this constituted "prospective overruling" but, in light of my conclusion that the motion judge was entitled to proceed by summary judgment, I need not consider these submissions further. For the reasons that follow, I am satisfied that the motion judge did not err in granting summary judgment.

(1) The Tort of Civil Fraud

86 The action underlying this motion for summary judgment was one for civil fraud brought against Hryniak, Peebles, and Cassels Brock.

87 As discussed in the companion *Bruno Appliance* appeal, the tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss.

(2) Was There a Genuine Issue Requiring a Trial?

88 In granting summary judgment to the Mauldin Group against Hryniak, the motion judge did not explicitly address the correct test for civil fraud but, like the Court of Appeal, I am satisfied that his findings support that result.

89 The first element of civil fraud is a false representation by the defendant. The Court of Appeal agreed with the motion judge that "[u]nquestionably, the Mauldin group was induced to invest with Hryniak because of what Hryniak said to Fred Mauldin" at the meeting of June 19, 2001 (at para. 158), and this

was not disputed in the appellant's factum.

90 The motion judge found the requisite knowledge or recklessness as to the falsehood of the representation, the second element of civil fraud, based on Hryniak's lack of effort to ensure that the funds would be properly invested and failure to verify that the eventual end-point of the funds, New Savings Bank, was secure. The motion judge also rejected the defence that the funds were stolen, noting Hryniak's feeble efforts to recover the funds, waiting some 15 months to report the apparent theft of US$10.2 million.

91 The motion judge also found an intention on the part of Hryniak that the Mauldin Group would act on his false representations, the third requirement of civil fraud. Hryniak secured a US$76,000 loan for Fred Mauldin and conducted a "test trade", actions which, in the motion judge's view, were "undertaken ... for the purpose of dissuading the Mauldin group from demanding the return of its investment" (para. 113). Moreover, the motion judge detailed Hryniak's central role in the web of deception that caused the Mauldin Group to invest its funds and that dissuaded them from seeking their return for some time after they had been stolen.

92 The final requirement of civil fraud, loss, is clearly present. The Mauldin Group invested US$1.2 million and, but for a small return of US$9,600 in February 2002, lost its investment.

93 The motion judge found no credible evidence to support Hryniak's claim that he was a legitimate trader, and the outcome was therefore clear, so the motion judge concluded there was no issue requiring a trial. He made no palpable and overriding error in granting summary judgment.

(3) Did the Interest of Justice Preclude the Motion Judge from Using his Powers Under Rule 20.04?

94 The motion judge did not err in exercising his fact-finding powers under Rule 20.04(2.1). He was prepared to sift through the detailed record, and was of the view that sufficient evidence had been presented on all relevant points to allow him to draw the inferences necessary to make dispositive findings under Rule 20. Further, while the amount involved is significant, the issues raised by Hryniak's defence were fairly straightforward. As the Court of Appeal noted, at root, the question turned on whether Hryniak had a legitimate trading program that went awry when the funds were stolen, or whether his program was a sham from the outset (para. 159). The plaintiffs are a group of elderly American investors and, at the return date of the motion, had been deprived of their funds for nearly a decade. The record was sufficient to make a fair and just determination and a timely resolution of the matter was called for. While the motion was complex and expensive, going to trial would have cost even more and taken even longer.

95 Despite the fact that the Mauldin group's claims against Peebles and Cassels Brock had to proceed to trial, there is little reason to believe that granting summary judgment against Hryniak would have a prejudicial impact on the trial of the remaining issues. While the extent of the other defendants' involvement in the fraud requires a trial, that matter is not predetermined by the conclusion that Hryniak clearly was a perpetrator of the fraud. The motion judge's findings speak specifically to Hryniak's involvement and neither rely upon, nor are inconsistent with, the liability of others. His findings were clearly supported by the evidence. It was neither against the interest of justice for the motion judge to use his fact-finding powers

nor was his discretionary decision to do so tainted with error.

V. Conclusion

96 Accordingly, I would dismiss the appeal, with costs to the respondents.

* * * * *

APPENDIX

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

RULE 20 SUMMARY JUDGMENT

20.01 [Where Available] (1) [To Plaintiff] A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

(3) [To Defendant] A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

20.02 [Evidence on Motion] (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

20.03 [Factums Required] (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

(4) Revoked.

20.04 [Disposition of Motion] (1) [General] Revoked.

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

(2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

(2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

(4) [Only Genuine Issue Is Question Of Law] Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

(5) [Only Claim Is For An Accounting] Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

20.05 [Where A Trial Is Necessarry] (1) [Powers of Court] Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

(2) [Directions And Terms] If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

    (i) there is a reasonable prospect for agreement on some or all of the issues, or

    (ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

(n) that the action be set down for trial on a particular date or on a particular

trial list, subject to the direction of the regional senior judge;

(o) for payment into court of all or part of the claim; and

(p) for security for costs.

(3) [Specified Facts] At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice.

(4) [Order re Affidavit Evidence] In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration.

(5) [Order re Experts, Costs] If an order is made under clause (2) (k), each party shall bear his or her own costs.

(6) [Failure To Comply With Order] Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default.

20.06 [Costs Sanctions For Improper Use Of Rule] The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or

(b) the party acted in bad faith for the purpose of delay.

20.07 [Effect Of Summary Judgment] A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief.

20.08 [Stay Of Execution] Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just.

20.09 [Application To Counterclaims, Crossclaims And Third Party Claim] Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

Appeal dismissed with costs.

Solicitors:

Solicitors for the appellant: McCarthy Tétrault, Toronto.

Solicitors for the respondents: Heydary Hamilton, Toronto.

Solicitors for the intervener the Ontario Trial Lawyers Association: Allan Rouben, Toronto; SBMB Law, Richmond Hill, Ontario.

Solicitors for the intervener the Canadian Bar Association: Evans Sweeny Bordin, Hamilton; Sotos, Toronto.

cp/e/qlhbb/qlmlt

1 For instance, state funding is available in the child welfare context under *G. (J.)* orders even where legal aid is not available (see *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, or for cases involving certain minority rights (see the Language Rights Support Program).

2 In M. D. Agrast, J. C. Botero and A. Ponce, the 2011 *Rule of Law Index*, published by the World Justice Project, Canada ranked 9th among 12 European and North American countries in access to justice. Although Canada scored among the top ten countries in the world in four rule of law categories (limited government powers, order and security, open government, and effective criminal justice), its lowest scores were in access to civil justice. This ranking is "partially explained by shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases" (p. 23).

3 This principle has been expressly codified in British Columbia, Ontario, and Quebec: *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 1- 3(2); *Ontario Rules*, Rule 1.04(1.1); and *Code of Civil Procedure*, R.S.Q., c. C-25, art. 4.2. Aspects of Alberta's and Nova Scotia's rules of court have also been interpreted as reflecting proportionality: *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312, at para. 11; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371, at para. 12.

4 Quebec has a procedural device for disposing of abusive claims summarily: see arts. 54.1 ff of the *Code of Civil Procedure*. While this procedural device is narrower on its face, it has been likened to summary judgment: see *Bal Global Finance Canada Corp. v. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII). Moreover, s. 165(4) of the Code provides that the defendant may ask for an action to be dismissed if the suit is "unfounded in law".

5 For a thorough review of the history of summary judgment in Ontario, see T. Walsh and L. Posloski, "Establishing a Workable Test for Summary Judgment: Are We There Yet?", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2013* (2013), 419, at pp. 422-32.

6 *Ibid.*, at p. 426; for example, see *Vaughan v. Warner Communications, Inc.* (1986), 56 O.R. (2d) 242 (H.C.J.).

7 *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 10.

8 The full text of Rule 20 is attached as an Appendix.

9 As fully canvassed by the Court of Appeal, the powers in Rule 20.04(2.1) were designed specifically to overrule a number of long-standing appellate decisions that had dramatically restricted the use of the rule; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.); *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

10 Rule 20.04(2): "The court shall grant summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial ...".

11 Rule 20.04(2.1): "In determining ... whether there is a genuine issue requiring a trial ... if the determination is being made by a judge, the judge may exercise any of the following powers ... 1. Weighing the evidence. 2. Evaluating the credibility of a deponent. 3. Drawing any reasonable inference from the evidence." Rule 20.04(2.2): "A judge may... order that oral evidence be presented ...".

Tab 13

Case Name:

George Weston Ltd. v. Domtar Inc.

RE: George Weston Limited, Plaintiff, and Domtar Inc., Defendant
AND RE: 1318214 Ontario Limited, 1464167 Ontario Limited, 1469789 Ontario Limited, 1476182 Ontario Limited, 1478822 Ontario Limited, 2024036 Ontario Limited and 2144011 Ontario Limited, Plaintiffs, and Sobeys Capital Incorporated, Defendant

[2012] O.J. No. 4123

2012 ONSC 5001

112 O.R. (3d) 190

354 D.L.R. (4th) 121

30 C.P.C. (7th) 252

2012 CarswellOnt 10880

220 A.C.W.S. (3d) 301

Court File Nos. 07-CL-7061, 10-8668-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: June 12, 2012 (George Weston v. Domtar); July 27, 2012 (1318214 Ontario Limited v. Sobeys Capital).
Judgment: September 3, 2012.

(138 paras.)

Civil litigation -- Civil procedure -- Judgments and orders -- Summary judgments -- Availability -- For part of claim -- To dismiss action -- Motions by defendant, Domtar, to strike out motion by plaintiff, Weston, for summary judgment dismissed -- Motion by defendant, Sobeys, to strike out action by seven frachisees dismissed -- Weston's motion at this stage was not good candidate for summary judgment as action involved factual disputes and complex issues of contractual interpretation and application of price adjustment clause to intricate plan of arrangement -- Sobeys' partial summary judgment motion required reviewing evidence of up to 10 years of contractual dealing between parties -- Scheduling of summary judgment motion did not promote proportionally just, expeditious and inexpensive determination of case.

Motion by the defendant, Domtar Inc., to strike out a motion by the plaintiff, George Weston Ltd. for summary judgment. Motion by the defendant, Sobeys Capital Inc., to strike out an action by seven frachisees. Weston sued Domtar for $110 million alleging entitlement to that amount pursuant to the terms of a price adjustment clause contained in a June 16, 1998 Share Purchase Agreement (SPA) under which Weston sold Domtar its shareholdings in E.B. Eddy Ltd. for a combination of cash and Domtar Shares. The SPA contained a Purchase Price Adjustment clause which provided that in the event a person acquired more than 50 per cent of the outstanding Voting Shares of Domtar, the consideration payable by Domtar for Weston's shares in Eddy would increase by stipulated amounts. In March 2007, Domtar acquired the fine paper business of Weyerhauser Company through back-to-back transactions carried out by way of a plan of arrangement. Weston contended that the Weyerhauser Arrangement, in particular its treatment of the Domtar Shares, triggered Domtar's obligation to pay the purchase price adjustment. Domtar argued that the Arrangement fell within exclusions contained in the clause. Weston did not prosecute the action with diligence. Pleadings were closed in September 2007, and there had been no examinations for discovery as of March 2011, when Weston served its summary judgment motion record. In the Sobeys action, the plaintiffs were franchisees operating Price Chopper grocery stores in Ontario. They alleged that as a result of the manner in which Sobeys exercised its discretion under their Franchise Agreements, they had been systematically deprived of the ability to earn genuine profits from their businesses. They further alleged that Sobeys administered the Price Chopper program contrary to the franchisees' legitimate expectations in such a way as to keep the profits of the system for itself, to keep the franchisees perpetually indebted to it and to prevent the franchisees from building equity in their businesses. The franchisees sought damages of $3 million each for their breach of contract, breach of fair dealing and breach of accounting duties claims. Sobeys sought to schedule a motion seeking partial summary judgment against four of the plaintiffs in respect of aspects of their contract/fair dealing claim.

HELD: Motions dismissed. The motion undertaken by Weston at this stage of the proceedings was not a good candidate for summary judgment. The action involved complex issues of contractual interpretation and the application of the price adjustment clause to an intricate plan of arrangement. Significant factual disputes existed on the record that had to be resolved, even if only in the context of a voir dire regarding the admissibility of some of the extrinsic evidence about the formation of the SPA. Both parties relied on expert evidence, but had not indicated how a motion judge would be able to question those expert witnesses should he or she wish to. Weston agreed to produce a witness for discovery, but failed to include his affidavit in its summary judgment record. Disputes existed about the adequacy of documentary production, and the amount at issue in the action raised serious questions about the proportionality of

employing a summary judgment procedure to determine the case on its merits. The most efficient means of satisfying the full appreciation test was to develop a modified trial preparation plan, incorporating elements of traditional discovery and making use of the work undertaken to date in creating the summary judgment record, with a view to proceeding to a non-conventional trial in 2013 to adjudicate finally the claim. The parties were directed to consult and develop a trial preparation plan before October 5, 2012, which included the completion of all examinations for discovery by December 30, 2012. On its face, Sobeys' partial summary judgment motion required reviewing evidence of up to 10 years of contractual dealing between the parties. To have one judge (the motion judge) review that history to consider some of the complaints asserted by the plaintiffs in respect of the long course of contractual dealings between the parties and then to have another judge (the trial judge) review most or all of that history to review other complaints would be an unnecessary and wasteful duplication of judicial effort. When the savings in trial time estimated by Sobeys resulting from a successful prescription-focused motion was weighed against the potential for the delay in the action involving the other four plaintiffs and the need to consider the same limitations defence against those four defendants, the scheduling of a summary judgment motion on that matter did not promote a proportionally just, expeditious and inexpensive determination of the case.

Statutes, Regulations and Rules Cited:

Arthur Wishart Act, s. 3

Ontario Rules of Civil Procedure, Rule 1.04, Rule 1.04(1), Rule 1.04(1.1), Rule 1.04(2), Rule 1.05, Rule 6.1.01, Rule 20, Rule 20.01(1), Rule 20.04(2.1), Rule 20.04(2.2), Rule 21.01(1)(a)

Counsel:

C. Bredt, M. Kremer and M. Furrow, for the Plaintiff/Responding Party.

A. Mark, O. Pasparakis and L. O'Brien, for the Defendant/Moving Party.

D. Sterns, for the Plaintiffs/Moving Parties.

B. Hanna and G. Moysa, for the Defendant/Responding Party

REASONS FOR DECISION
(corrected)

D.M. BROWN J.:--

I. Rule 1.04/1.05 motions to strike out or stay summary judgment motions

1 A tension exists between the theoretical purpose of summary judgment motions and the reality of their practice. As articulated by the Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch*, the package of rule amendments introduced in 2010, including the expanded powers of motion judges on

Rule 20 motions, was motivated by "the overriding objective of making the litigation system more accessible and affordable for Ontarians", with the motion for summary judgment "intended to provide a means for resolving litigation expeditiously and with comparatively less cost than is associated with a conventional trial,"[1] as well as offering a more efficient resolution of disputes. Indeed, the principle of proportionality is advanced by the expansion of the availability of summary judgment.[2]

2 That is the theory; the practice can be quite different. As the Court of Appeal observed:

> [T]he inappropriate use of Rule 20 has the perverse effect of creating delays and wasted costs associated with preparing for, arguing and deciding a motion for summary judgment, only to see the matter sent on for trial.[3]

3 The Court of Appeal suggested one way this tension could be resolved in the event a party brought a motion for summary judgment which seemed inconsistent with the objectives of Rule 20:

> A party faced with a premature or inappropriate summary judgment motion should have the option of moving to stay or dismiss the motion where the most efficient means of developing a record capable of satisfying the full appreciation test is to proceed through the normal route of discovery. This option is available by way of a motion for directions pursuant to rules 1.04(1), (1.1), (2) and 1.05.[4]

4 In these two Commercial List actions separate motions were brought to strike out motions for summary judgment. The summary judgment motions arise at different stages of the proceedings. In the *George Weston v. Domtar* action the plaintiff has embarked on developing a summary judgment motion before examinations for discovery have taken place. By contrast, in the *1318214 Ontario Limited v. Sobeys Capital Incorporated* proceeding discoveries basically are complete, although some undertakings and a few days of re-attendance examinations are required. When the plaintiffs in the *Sobeys* action sought a trial date, the defendant advised that it intended to bring a motion for partial summary judgment to limit the issues for trial.

5 Since both motions raise important procedural issues about motions to strike, or stay, summary judgment motions, I have decided to release one set of reasons for both motions. Part I of these Reasons will address common principles concerning motions to strike. Parts II and III will apply those principles to the particular facts of the motion in each action.

PART I: GENERAL CONSIDERATIONS ABOUT MOTIONS TO STRIKE, OR STAY, SUMMARY JUDGMENT MOTIONS

6 To treat motions to strike out summary judgment motions as just another type of motion which should be added to the judicial docket would ignore, in my view, the larger context within which these hitherto uncommon motions must be considered. Consequently, before addressing the specific issues raised by these motions to strike, one must take account of the larger context in which contemporary civil litigation occurs in Ontario, a context which informs the proportionality-oriented case management approach I propose for dealing with these motions to strike.

7 In proceedings on the Toronto Region Commercial List concerns about the prematurity or appropriateness of any summary judgment motion should be addressed through the 9:30 appointment or case conference case management tools currently employed on the List. Given those case management tools, motions to strike out summary judgment motions should only be brought with the leave of the Commercial List case management judge. Treating the appropriateness of a summary judgment motion as a case management-type of issue flows from several factors: (i) the constrained operating environment facing the Superior Court of Justice, (ii) the flexibility of the inherent powers enjoyed by judges of this Court, (iii) the guidance offered by the Court of Appeal in the *Combined Air* decision about when it is appropriate to resort to a summary judgment motion, and (iv) the need to approach the alternative to summary judgment motions - the civil trial - in new ways. Let me turn, then, to consider these contextual factors which inform the approach I have adopted for dealing with these two particular motions to strike.

II. The larger context

A. The primacy of public courts in civil litigation

8 Although not unheard of prior to the *Combined Air* decision, a motion to strike out, or stay, another motion was rare. The *Combined Air* decision suggested resorting to such motions as a possible means by which to address concerns about premature or inappropriate summary judgment motions and, not surprisingly, the Bar has responded by initiating such motions.

9 At the heart of these two motions lies the issue about how courts should best manage the summary judgment process and fashion an approach which ensures that parties use summary judgment motions in the circumstances identified as appropriate by the Court of Appeal in *Combined Air*. The disposition which I make of these two motions rests in a specific view of the case management powers of a superior court of record and how those powers can and should be used to ensure that Ontario's public courts continue to provide timely, cost-effective and fair access to justice to civil litigants. If we, as judges of a superior court of record, are unable to respond to the challenges and stresses presently confronting our civil litigation system, we risk losing litigants to the private-sector justice system in which an ever increasing number of private arbitration centres offer parties dispute-resolution services employing modern technological systems and well-trained arbitrators, quite often retired judges of this court.

10 Private arbitration, of course, is all well and good, and it enjoys a place in society's dispute-resolution processes. But, if we continue to believe that a democracy requires its public courts to play the primary role in adjudicating civil disputes and in driving the development of civil jurisprudence, then those involved in the public court system - judges and administrators alike - must work hard, and must work creatively, to preserve the primacy of public courts. Whereas courts enjoy a monopoly with respect to the adjudication of criminal cases, increasingly public courts are simply one of several options from which litigants can select the forum in which they wish to present their civil disputes. To limit judges who hear civil cases to the old ways of adjudicating disputes risks ceding the primary role in civil dispute resolution to the private sector. Such a result would be sad day for a free and democratic society.

B. The present day challenges facing Ontario's civil litigation system

11 Today this Court operates subject to considerable pressures and handicaps. First, as the demand for

judicial decision-making time has increased, especially in the larger urban centres of Ontario, the available amount of judicial decision-making time has not kept pace.[5] Simply put, the demand for judicial time exceeds available supply. Put another way, no civil litigant reasonably can expect access to an unlimited amount of judicial time devoted to its case. If that occurred, intolerable delays would arise within the civil court system. Choices must be made by judges about how to best use scarce judicial resources in civil litigation.

12 Second, as I have written elsewhere, our Court's lack of a modern administrative infrastructure, including proper electronic case management and document filing technologies, results in the inefficient use of judicial and litigant time.

13 Third, aspects of the litigation culture of those who practice in our Courts add further pressures, in particular the spiralling costs of e-discovery, the preference of many in the Bar to consume court time with process-related interlocutory motions, instead of proceeding to a timely adjudication of a case on the merits and, finally, a puzzling reluctance to think creatively about how to conduct civil trials. Of course, these are generalizations, and amongst the Bar there are, thankfully, exceptions, but I think these generalizations capture the prevailing trends within the contemporary Ontario Bar.

14 Combined, these three constraints and pressures risk imposing intolerable delays on the ordinary person or business who seeks access to our civil system of justice and also risk prompting those litigants with ample financial resources to look outside the public court system for more timely and efficient private dispute services. Failing to deal promptly and creatively with these pressures and constraints makes the emergence of a two-tier, private and public justice system, a real possibility.

15 So, how should our Court respond? A comprehensive response requires actions by both judges and court administrators. In these Reasons I focus only on one aspect of how judges can respond, specifically how the court should treat requests to schedule complex summary judgment motions.

16 In my view the starting point for any response must be to recall first principles. As a "General Principle" Rule 1.04(1) of the *Rules of Civil Procedure* requires a liberal construction of the Rules "to secure the just, most expeditious and least expensive determination on its merits" of every civil case. A co-ordinate fundamental principle finds expression in Rule 1.04(1.1) which requires the making of orders and the giving of directions "that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding". Too often these two rules are viewed as nothing more than vague expressions of "motherhood and apple pie" sentiments. They are not. They define how litigation should be conducted and, more importantly, how courts should manage civil litigation. Whether interpreting and applying the *Rules of Civil Procedure*, or exercising their inherent case management powers, judges of this Court are to manage the litigation before them in such a way as to secure fair results by using fast, affordable and proportionate procedures. Further, if litigants propose to stray from these fundamental principles, judges must pull them back to the Proportionate Way, so to speak.

17 The judicial task of ensuring that disputants litigate in accordance with these fundamental principles is not limited to the interpretation and application of the *Rules of Civil Procedure*. The Rules constitute the legislative expression of a combination of mandatory and permissive steps applicable to civil actions. The Rules do not define the limits of what judges can do to manage litigation to "the just, most expeditious and

least expensive determination on its merits". In a common law court system judges of a superior court of record possess broad inherent powers to manage civil cases to achieve those fundamental principles; their inherent powers to regulate and control their own process and proceedings include tools other than those which are conferred on them by legislation, including delegated legislation such as rules of practice.[6]

18 These inherent powers are broad, and it is difficult to specify the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process because those limits cannot impair the need of the court to fulfill its judicial functions in the administration of justice. As I wrote in *Abrams v. Abrams*:

> The scope of a court's contemporary inherent powers to control its own proceedings and to prevent abuse of its process necessarily reflects the trend that has emerged in the past few decades towards greater judicial oversight of civil proceedings.
>
> ...
>
> [J]udges have become more active in the pre-hearing phases of civil litigation. As put recently by Deschamps J. in her minority decision in *Marcotte v. Longueuil (City)*, [2009] 3 S.C.R. 65, "[w]hat is clear from these different sources is that the purpose of [proportionality] is to reinforce the authority of the judge as case manager. The judge is asked to abandon the role of passive arbiter."
>
> ...
>
> The Alberta Court of Appeal articulated the contemporary duties and powers of judges in the following way:
>
> > In our view, it is the unpleasant duty of the courts to see to it that justice is not unduly delayed. Even when every party to a proceeding seems to be content to see litigation drag on, it is in the public interest to prevent that unhappy result. The modern concept of case management requires a judge not merely to see to it that every party has a fair hearing, but also to see to it that the parties do not abuse that right. For example, parties - and their counsel - should prepare for a step in a proceeding when preparation is required in order to move the proceedings along, and not just when it suits their calendars or their other interests. Courts today must decide, and give directions on, matters that unreasonably delay proceedings. Unreasonable delay can come from prolixity, but also hairsplitting and other techniques. *Increasingly judges in the future will be required to ration time and effort for motions and objections in terms of the quality of the application.*

> The purpose underlying this recognition of the enhanced role of judges to manage proceedings was succinctly put in the *Lesage-Code Report*:
>
> > The common law powers are very effective tools of judicial case management because they encourage efficient, focused and well-prepared lawyering.[7]

Of course, the exercise of inherent powers must not undermine principles of procedural natural justice or fairness.[8]

19 In the world of contemporary civil litigation, judges of the Ontario Superior Court of Justice necessarily possess the inherent power to give directions to the parties, in appropriate cases, about the conduct and completion of both the pre-hearing and hearing steps in a proceeding, so that the case receives a just, expeditious and least expensive determination on its merits and the pre-hearing and hearing steps unfold in a proportionate manner. Such inherent powers are necessary to enable the court to act effectively within its jurisdiction.[9]

20 The term "case management" refers to the broad range of powers exercised by judges in the course of managing a civil proceeding. Through case management a judge intervenes in the proceeding prior to trial in order to give directions for the preparation of the case for trial, for the actual conduct of the trial, or to attempt to resolve the proceeding. Case management requires the application of a range of management tools in order to secure the just, most expeditious, least expensive and proportionate determination of the proceeding on its merits.[10]

21 Against this background, current pressures and constraints facing this Court necessitate that judges find ways to manage civil litigation more efficiently, using their inherent powers, as well as the tools contained in the *Rules*, to ensure that the fundamental objective of a fair, fast and affordable final determination on the merits is met, and that intolerable delays in the adjudication of civil disputes do not become the norm. Such case management must focus on giving priority to two requests made by litigants of this Court: (i) to make *final* determinations on the merits of their cases; and, (ii) to adjudicate urgent requests for interim relief to preserve the *status quo* until a final determination can be made. If reasonably timely justice remains a goal of our public court system, judges of our court hearing civil matters lack the resources to spend much time on other civil matters, especially the unreasonably high number of process-related interlocutory motions which infest our civil court system.

III. *Combined Air*: The purpose and place of summary judgment motions

22 To achieve this goal the Court must manage the civil litigation before it to ensure that summary judgment motions do not stray beyond their proper place in the adjudication of disputes. What is that proper place? Under our *Rules of Civil Procedure* several methods exist to secure a disposition of a case on the merits: (i) the determination of a question of law raised by a pleading (Rule 21.01(1)(a)); (ii) stating a special case (Rule 22); (iii) judgment pursuant to an application; (iv) the grant of full summary judgment (Rule 20); and, (v) a trial. For most actions where material facts are in dispute, the options for a final determination on the merits boil down to a choice between a summary judgment motion and a trial.

23 In its *Combined Air* decision the Court of Appeal provided extensive guidance about the purpose of summary judgment motions and the circumstances in which they are appropriate. The Court of Appeal observed that while the 2010 amendments to Rule 20 were meant to introduce significant changes in the manner in which summary judgment motions are to be decided,[11] the purpose of the new rule was to eliminate *unnecessary* trials, not to eliminate all trials.[12] The guiding consideration must be whether the summary judgment process, in the circumstances of a given case, will provide an appropriate means for effecting a fair and just resolution of the dispute before the court.[13] The appropriateness of a summary judgment motion for the final determination of a claim on its merits, instead of proceeding to trial, depends on the nature of the issues posed and the evidence led by the parties:

> In some cases, it is safe to determine the matter on a motion for summary judgment because the motion record is sufficient to ensure that a just result can be achieved without the need for a full trial. In other cases, the record will not be adequate for this purpose, nor can it be made so regardless of the specific tools that are now available to the motion judge. In such cases, a just result can only be achieved through the trial process. This pivotal determination must be made on a case-by-case basis.[14]

24 As the Court of Appeal noted, generally speaking there are three types of cases amenable to summary judgment: (i) cases where the parties agree that it is appropriate to determine an action by way of a motion for summary judgment; (ii) cases where the claims or defences can be shown to be without merit in the sense that they have no chance of success; and, (iii) cases where the trial process is not required in the "interest of justice" to perform a final adjudication on the merits.[15] In deciding if the powers under Rule 20.04(2.1) should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?[16]

25 The Court of Appeal stated that it is not necessary for a motion judge to try to categorize the type of case in question - the second and third classes of cases described above are not to be viewed as discrete compartments. The important element of the analysis under the amended Rule 20 is that before using the powers in Rule 20.04(2.1), the motion judge must apply the full appreciation test in order to be satisfied that the interest of justice does not require that these powers be exercised only at a trial.[17]

26 The full appreciation test requires motion judges to do more than simply assess if they are capable of reading and interpreting all of the evidence that has been put before them; a motion judge is required to assess whether the attributes of the trial process are necessary to enable him or her to fully appreciate the evidence and the issues posed by the case. In making this determination, the motion judge is to consider, for example, whether he or she can accurately weigh and draw inferences from the evidence without the benefit of the trial narrative, without the ability to hear the witnesses speak in their own words, and without the assistance of counsel as the judge examines the record in chambers.[18] Unless the full appreciation of the evidence and issues that is required to make dispositive findings is attainable on the motion record - as may be supplemented by the presentation of oral evidence under rule 20.04(2.2) - the judge cannot be "satisfied" that the issues are appropriately resolved on a motion for summary judgment.[19]

27 The Court of Appeal provided guidance - although they stressed it was not exhaustive guidance - on the types of cases which would, and would not, be appropriate for a summary judgment motion:

> (i) Summary judgment usually is not appropriate in cases calling for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record. Hallmarks of the type of actions in which, generally speaking, the full appreciation of the evidence and issues can only be achieved at trial include: (i) a voluminous motion record; (ii) evidence from a large number of witnesses; (iii) multiple defendants against whom different theories of liability are advanced; (iv) the need to make numerous findings of fact to decide the motion; (v) conflicting evidence on key issues requiring credibility determinations; and/or (vi) the absence of reliable documentary yardsticks against which to assess credibility;[20]
>
> (ii) By contrast, summary judgment might be appropriate in (i) document-driven cases with limited testimonial evidence, (ii) cases with limited contentious factual issues, (iii) cases where the record can be supplemented to the requisite degree at the motion judge's direction by hearing oral evidence on discrete issues,[21] (iv) the presence of limited and un-contentious documentary evidence, (v) a limited number of witnesses, and/or (vi) where no dispute exists about the governing legal principles.[22]

28 One cannot stress enough the passage in the *Combined Air* decision in which the Court of Appeal reminded the Bar of their obligation to apply their professional judgment in advising their clients about when it would be appropriate to bring a motion for summary judgment:

> It is important to underscore the obligation that rests on members of the bar in formulating an appropriate litigation strategy.[23]

29 A motion for summary judgment under Rule 20 is not intended to perform the same function as the device of the summary trial available under the British Columbia and Alberta rules of practice. What was called a Rule 18A summary trial in British Columbia (now Rule 9-7) afforded parties, under certain circumstances, the opportunity to conduct a trial using only a written record.[24] Ontario's Rule 20 does not create an alternative mode of trial; it provides a mechanism by which an action may be disposed of on the merits without proceeding to a trial. Since the enactment of the 2010 amendments to Rule 20 parties, especially in more complex cases, often seem to ignore this important distinction between a summary judgment motion and a summary trial. That parties increasingly are looking for ways to avoid the costs of a "conventional" trial is quite understandable. As I will discuss below, new, creative approaches to modes of trial are necessary. But trying to push the square peg of a Rule 20 motion into the round hole of a trial is not the way to go about securing a less costly trial. Often the result is quite the opposite - increased overall costs of the action.

IV. Trials as an alternative to summary judgment motions

A. Why are there not more trials?

30 In light of the clear and detailed guidance given by the Court of Appeal in *Combined Air* about when it would be appropriate to bring a motion for summary judgment, why do counsel still attempt to bring summary judgment motions in inappropriate cases instead of proceeding to trial? Why does there continue to exist a "motions culture" in the Toronto Region - which I again observed during my stints in civil Motions Scheduling Court this past summer - which sees counsel preferring to wait nine months for a hearing date for a complex (i.e. full day) summary judgment motion instead of accepting a trial date three months hence? A summary judgment motion may result in the grant of full summary judgment, or it may not. By contrast, a trial will always result in a final determination on the merits. From the perspective of the allocation of scarce judicial resources, the trial exerts a strong attraction because the amount of judicial time devoted to hearing a trial always will result in a final determination on the merits, whereas devoting an equal amount of time to dealing with a complex summary judgment motion may or may not result in a final adjudication. In a time of constrained judicial resources, it should not surprise the Bar or litigants that judges prefer devoting time to achieving a final determination of a case than to dealing with a series of indeterminate, interlocutory motions, including summary judgment motions.

31 Yet the Bar, at least the Toronto Region Bar, does not appear to share that perspective. From my observations two reasons seem to influence the local Bar's preference for summary judgment motions over trials. The first reason stems from a lack of experience and familiarity with civil trials, particularly amongst members of the Bar who have practiced for less than 15 years. In a sense they have not tasted the trial process, which brings to mind the insights provided by an iconic story about the reluctance to taste something unknown.

32 Recall the Dr. Seuss story of the efforts by Sam-I-am to persuade a skeptical interlocutor about the merits of green eggs and ham. Sam-I-am asked: "Do you like green eggs and ham?"[25] To which the curmudgeonly interlocutor responded:

> I do not like them,
> Sam-I-am.
> I do not like
> Green eggs and ham.

Persistent efforts by Sam-I-am to persuade the other of the fine merits of green eggs and ham culminated in his final exhortation to the interlocutor:

> You do not like them.
> So you say.
> Try them! Try them!
> And you may.
> Try them and you may, I say.

In the face of such repeated attempts at suasion our interlocutor finally breaks down and says:

> Sam!

> If you will let me be,
> I will try them
> You will see.

With a doubting look our interlocutor eyes, then tries, the proffered green eggs and ham. We all know the results of his taste-testing:

> Say!
> I like green eggs and ham!
> I do! I like them, Sam-I-am!

Our interlocutor then expounds at length on his new-found love for that which he previously shunned.

33 Are civil trials the legal equivalent of green eggs and ham? Is *Green Eggs and Ham* an allegory in which Sam-I-am represents the Bench, and the interlocutor the Bar? I will leave the finer points of literary analysis to the critics, but the story does bear a striking resemblance to the on-going dialogue between Bench and Bar regarding the respective merits of civil trials and motions.

B. "Conventional" and "non-conventional" trials

34 So how can the court entice litigants and the Bar to taste the benefits of the trial and eschew the indeterminacy, delays and costs of motions, including complex summary judgment motions? That brings me to the second reason which appears to incline counsel to prefer giving summary judgment "a shot" over proceeding to trial - the fear that a "conventional trial" is cost-prohibitive while summary judgment offers a cheaper alternative, albeit one with no guarantee of resulting in a final determination on the merits.

35 The renewed interest in summary judgment motions has deflected attention from a more important task - re-thinking the civil trial, especially the judge-alone civil trial. While a school of thought (and practice) still exists that a civil trial is only a real civil trial if *viva voce* evidence reigns supreme from beginning to end, civil trials are capable of adapting (and indeed must adapt) to new ways of adjudicating cases. May I repeat what I wrote a few months ago in *1318214 Ontario Limited v. Sobeys Capital Incorporated*:

> Counsel should no longer think of a trial as a "one size fits all" procedure. Our Court is open to creative ways to structure and conduct trials, including using hybrid written and *viva voce* records. Often the use of creative ways to present the evidence and argument at trial goes a long way towards addressing the concerns of litigants about the costs involved in going to trial.[26]
>
> More recently, in my costs decision in *D'Addario v. EnGlobe Corp.* I wrote:
>
> In my view the days of the so-called "conventional trial" in civil cases which uses only *viva voce* evidence must be put behind us. In a very real and pressing sense, if our courts do not discard the "conventional trial" as the norm in civil cases in favour of more creative and efficient modes of trial, public civil litigation

> in this province will atrophy. Our court lacks the resources to conduct each civil trial in a "conventional" fashion; they take too much time. In many cases, such as the present one, much of the factual evidence can be placed before the court in written form, whether by way of agreed statements of fact, affidavits of witnesses or out-of-court examinations of those witnesses. Any *viva voce* evidence at the trial should focus on enabling the trial judge to understand and decide credibility issues, including material disputed facts.[27]

36 Where the nature of the issues and the quality of the evidentiary record in a case do not permit a motion judge to gain a "full appreciation" of the issues in dispute, the result need not be propelling parties towards a costly, full-blown conventional *viva voce* trial. Creative, and less costly, alternatives do exist. The 2010 amendments to the *Rules of Civil Procedure* made available to judges and counsel alike a big box of LEGO-like building blocks with which they can construct a wide variety of modes of trial: witnesses testifying by *viva voce* evidence; witnesses testifying, in whole or in part, by affidavit; using pre-hearing affidavits and cross-examinations as examinations for discovery; using pre-hearing affidavits as part of the trial evidence-in-chief of a witness and pre-hearing transcripts as part of the trial cross-examination of a witness;[28] placing time limits on examinations at trial; using written opening statements; pre-trial hot-tubbing by experts; and, filing an agreed statement of facts.[29] The range of alternatives is not limited by the specific examples identified in the *Rules* because a judge "may give such directions or impose such terms as are just" in respect of the trial[30] and make such order as the judge "considers necessary or advisable with respect to the conduct of the proceeding".[31]

37 Under our *Rules* the "conventional trial" no longer exists as a norm; the *Rules* have made the civil trial modular in nature, with counsel and the judge able to fashion trials tailor-made to the circumstances of each a particular case. Our Court must use these trial building blocks to offer litigants creative, cost-attractive trial options if we stand any hope of limiting complex summary judgment motions to the role defined for them by the Court of Appeal in the *Combined Air* decision and preserving the role of the public courts as the primary adjudicators of civil cases.

IV. How to deal with issues regarding the appropriateness of summary judgment motions?

38 Let me summarize my analysis to this point. The *Combined Air* decision described the purpose and place of summary judgment motions in the civil litigation process and stated that parties should have the means to raise concerns about premature and inappropriate summary judgment motions. Given the existing constraints on the judicial resources of our Court, I suggested that any such concerns about summary judgment motions on the Toronto Region Commercial List should not be raised by way of motion, but through the Commercial List case conference/case management process. In dealing with concerns through case management, judges of the Commercial List can draw on their broad inherent powers to manage the court process, including the proposed summary judgment motion, and they can offer litigants creative alternatives to the "conventional trial".

39 Before considering such a case management approach in more detail, let me first turn to consider the approaches taken to date by our Court when faced with motions to strike out or stay other motions, including summary judgment motions.

A. The jurisprudence on motions to strike/stay other motions

A.1 The pre-*Combined Air* jurisprudence

40 Much of the pre-*Combined Air* jurisprudence on motions to strike was summarized by Cullity J. in his decision in *Millgate Financial Corporation v. BF Realty Holdings Limited*[32] where he considered a motion brought to stay motions for summary judgment as frivolous, vexatious and an abuse of process. Drawing on the jurisprudence up until that point of time, Cullity J. concluded that he should apply a form of abuse of process analysis:

> [12] The *Rules of Civil Procedure* do not expressly provide for motions to strike notices of motion and I believe that the interests of efficiency and finality provide good reasons for this. There is no close analogy between a motion to strike pleadings in an action and a motion to strike another motion that would require the issues raised in the former to be determined. It was, however, common ground among counsel that there must be such a jurisdiction to deal with clear cases of abuse of process.
>
> [13] This was the view of Molloy J. in *Meditrust Healthcare Inc., v. Shoppers Drugmart,* [2000] O.J. No. 3762 (S.C.J.) and of Steele J. in *Iona Corporation. v Town of Aurora* (1991), 3 O.R. (3d) 579 (G.D.). In the former, the learned judge said:
>
> > "I accept that the court has jurisdiction to dismiss (or perhaps, more correctly, quash) any motion that is improperly brought, including in appropriate circumstances, because it constitutes an abuse of process. For example, where a motion is brought prematurely, or is brought in the wrong court or under a Rule which has no application, it may well be appropriate to determine that issue as a preliminary matter without examining the merits of the motion itself. ... The only case on point, as far as counsel could determine, is the decision of Steele J. in Iona Corporation v. Corporation of the Town of Aurora ... In that case, the defendant moved to dismiss the plaintiff's summary judgment motion. Steele J. held at p.580:
> >
> > 'I am of the opinion that I do not have the power under rule 20.01 to dismiss a motion for summary judgment at this stage, unless I find the plaintiff's motion is an abuse of process.'"
>
> [14] In consequence, I believe I should deal with these motions on the basis that whether they succeed or fail will depend upon whether the grounds on which the defendants rely require the motions for summary judgment to be quashed as an abuse of process. In *Canam Enterprises Inc. v. Coles* 2000 CanLII 8514 (ON CA), (2000), 51 O.R. (3d) 481 (C.A.), Finlayson J.A. stated:

> "Abuse of process is a discretionary principle that is not limited by any set number of categories. It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public policy. The doctrine can be relied upon by persons who were not parties to the previous litigation but who claim that if they were going to be sued they should have been sued in the previous litigation."

41 In *Millgate* Cullity J. concluded that the motions for summary judgment did not constitute abuses of process, and he concurred with the view expressed by Molloy J. in the *Meditrust Healthcare* decision that a court should resist being sucked into ruling on the sufficiency of the evidence of a party bringing a motion for summary judgment in advance of the hearing of the motion through a preliminary motion to quash.[33]

42 In a 2009 decision in *Oz Optics Limited v. American Home Insurance Company*[34] Power J. struck out a motion for summary judgment brought by the defendant less than two months before the scheduled trial date. The court concluded that the motion for summary judgment was "a bad faith motion"... made for tactical reasons":[35]

> [39] Obviously, it is up to the trial judge to determine how she or he will conduct the trial. However, it is clear to me that the defendants' motion for an adjournment and for summary judgment is an abuse of process and that the motion for summary judgment, in all the circumstances, is a bad faith attempt to buttress the request for an adjournment of the trial.
>
> [40] In these circumstances, the plaintiff's motion to strike the defendants' motion is, in my opinion, the appropriate remedy ...

43 A year later, in *Valemont Group Ltd. v. Philmor Goldplate Homes Inc.,*[36] Karakatsanis J., as she then was, refused to strike a motion for summary judgment as an abuse of process, observing that the "mere bringing of a motion when a trial is pending is not itself an abuse of process".[37] In that case the motion for summary judgment was scheduled to be heard a full year before the fixed trial date.

A.2 Post-*Combined Air* jurisprudence

44 Counsel brought to my attention two post-*Combined Air* decisions on motions to strike out summary judgment motions. In an unreported handwritten endorsement, Perell J. opined that in *Combined Air* the Court of Appeal "intended motions for directions for cases where the action had not proceeded to discoveries and it was therefore arguable that a motion for a summary judgment would be premature. The case at bar is post the discovery stage, and there should be no additional hurdle in the way of the summary judgment motion."[38] Perell J. set one day for the argument of the summary judgment motion, but his endorsement did not describe the issues in play or the complexity of the proposed motion record.

45 More recently, in *Ghaffari v. Asiyaban,*[39] J.E. Ferguson J. dismissed a motion to stay a summary judgment motion on the ground it was premature and inappropriate. The summary judgment motion was

brought prior to examinations for discovery and involved the single issue of when the plaintiff had discovered her cause of action. In the course of her decision J.E. Ferguson J. applied the following approach to the motion to stay:

> I agree with the defence submissions as to the test a party must meet in order to obtain a stay (I was told that there is no case law yet on the point) which is as follows:
>
> (i) the court should look at the motion for summary judgment and the reasonable chances of success in determining whether a stay is appropriate. The party seeking the stay should put their best foot forward as they would on a motion for summary judgment to say there is a genuine issue requiring a trial or why the matter is too complicated for the motion judge to ascertain the full appreciation of the case;
>
> (ii) the court then ought to determine whether the matter is complicated; what are the issues; the nature of the evidence and law to determine the issues; and whether the case can be determined without the necessity of a full trial; and
>
> (iii) only in the clearest of cases should the court impose a stay.[40]

B. A case management approach to dealing with concerns about lengthy, complex summary judgment motions brought on the Commercial List

46 What, then, should a case management approach to addressing concerns about pending or proposed summary judgment motions look like? Let me first offer a few comments on what it should not look like.

B.1 What a case management approach should not look like

47 First, I do not read *Combined Air* as encouraging the development of a "motions to strike out" cottage industry around Rule 20. That some procedural device should exist to deal with patently premature or inappropriate motions for summary judgment does not mean that motions to strike should now form "step one" in most summary judgment motions. Nor does our Court possess sufficient judicial bodies to devote significant amounts of case management time to all summary judgment motions. Only if the proposed summary judgment motion likely will consume significant court time, say one day or more of hearing time, does it make some sense to dedicate judicial time to deal with concerns about the appropriateness of a summary judgment motion. If our court possessed the resources to move towards a docket-like system such as exists in the United States federal court system, then universal case-management would be possible, but we do not have such resources, so we must be more selective in our case-management approach.

48 Second, I agree whole-heartedly with the views expressed by Cullity J. and Malloy J. in the *Millgate Financial* and *Meditrust Healthcare* decisions that any review of the appropriateness of a pending summary judgment motion should not require a court to engage in a detailed review of the merits of the proposed motion. A court should only have to review the merits of a matter once; to require a motion

judge hearing a motion to strike out a summary judgment motion (or case managing concerns about a summary judgment motion) to dive into the merits of the motion and, if the motion is not strike out, then to require another judge to consider the merits of the summary judgment motion on the motion proper would result in an utter waste of scarce judicial resources.

49 Third, I part company with the abuse of process approach adopted by the courts in the *Millgate Financial* and *Meditrust Health* cases because the introduction of the principle of proportionality in the *Rules of Civil Procedure* in 2010, when coupled with the direction of the Court of Appeal in *Combined Air* that the appropriateness of summary judgment motions falls to be decided under a combination of Rules 1.04(1), (1.1), (2) and 1.05, signals that a more proportionality-oriented, case management approach should be applied to issues of the appropriateness or prematurity of summary judgment motions. The analysis in *Combined Air* points a motions court more to examining whether the proposed summary judgment motion is a good or appropriate candidate for a summary disposition because the "right fit" exists between, on the one hand, the nature of the issues raised on the motion and the quality of the record which the motion will generate and, on the other hand, the summary procedure available under Rule 20.

50 Finally, I respectfully disagree with my learned colleague, Perell J., that a post-discovery review of the appropriateness of a motion for summary judgment is not available. A case management approach to addressing concerns about the scheduling of a motion for summary judgment should be available following the close of discoveries. Issues of the proportionality of process exist equally post-discovery as they do pre-discovery.

B.2 What a case management approach should look like

Timing and forum

51 As already mentioned, while in *Combined Air* the Court of Appeal referred to the possibility of bringing a "motion for directions" to deal with inappropriate or premature summary judgment motions, the scheduling practices of the Toronto Region Commercial List make the most appropriate mechanism for considering the appropriateness of setting a date for a summary judgment motion the 9:30 appointment or, perhaps more realistically, a slightly longer case conference, rather than a formal motion. Any dispute over the scheduling of a summary judgment motion involves, at its heart, the need to make directions about how scarce judicial resources should best be allocated to bring the adjudication of the parties' dispute on the merits closer to reality. Those directions, in the Toronto Region Commercial List practice, occur through the 9:30 appointment/case conference mechanisms.

52 Consequently, litigants on the Toronto Region Commercial List should not bring motions to strike summary judgment motions unless, in the circumstances, the case management judge thinks leave to bring such a motion should be granted. Concerns about the appropriateness of any summary judgment motion should be addressed at a 9:30 appointment or at a 30 to 60 minute case conference when the moving party seeks to schedule a summary judgment motion which will require a full day or more of hearing time. Quite frankly, once counsel ask for more than three hours of hearing time for a Rule 20 motion, I begin to wonder where the "summary" is in the proposed "summary judgment" motion. Setting the line for case management at proposed motions of a full day or more initially may strike the right balance because a request for that amount of hearing time signals that the issues in the case, whether factual, legal or both, are

moving towards the "complex" end of the spectrum, and the need for proportionality-oriented case management therefore arises.

Case managing pre-discovery requests for summary judgment hearing dates

53 Where a party is seeking a full day or more for the hearing of a proposed summary judgment motion and the opposing party raises concerns about the appropriateness or timing of the motion, what factors should a court consider as part of its proportionality-oriented case management of the request? In my view slightly different factors will inform the case management analysis depending upon whether a party seeks to move for summary judgment prior to the commencement of examinations for discoveries or after the completion of discoveries and productions.

54 In *Combined Air* the Court of Appeal identified the concerns involved with summary judgment motions brought before the parties have exercised their production and discovery rights:

> It will not be in the interest of justice to exercise rule 20.04(2.1) powers in cases where *the nature and complexity of the issues demand that the normal process of production of documents and oral discovery be completed* before a party is required to respond to a summary judgment motion. In such a case, forcing a responding party to build a record through affidavits and cross-examinations will only anticipate and replicate what should happen in a more orderly and efficient way through the usual discovery process.
>
> Moreover, *the record built through affidavits and cross-examinations at an early stage may offer a less complete picture of the case than the responding party could present at trial.* As we point out below ... counsel have an obligation to ensure that they are adopting an appropriate litigation strategy. A party faced with a premature or inappropriate summary judgment motion should have the option of moving to stay or dismiss the motion where the most efficient means of developing a record capable of satisfying the full appreciation test is to proceed through the normal route of discovery ...[41]

55 Accordingly, where a judge faces a request to schedule a lengthy summary judgment motion before the parties have embarked upon or completed discoveries, factors to take into account would include:

(i) the nature and complexity of the issues raised in the action;

(ii) the extent of the record the parties are likely to develop if a summary judgment motion proceeds prior to the completion of productions and discoveries;

(iii) whether a record so built through a summary judgment motion will offer a less complete picture of the case than the responding party could present at trial and, if it would, in what respects;

(iv) would the responding party to the summary judgment motion enjoy the equivalent access to key documents as would exist through the

documentary discovery process?

(v) would the responding party be able to examine the representative of the party which it would have selected for purposes of examination for discovery?

(vi) whether the most efficient means of developing a record capable of satisfying the full appreciation test given the nature and complexity of the issues in play is to proceed through the normal route of discovery; and,

(vii) whether the most efficient means of satisfying the full appreciation test would be to develop a modified discovery plan, incorporating elements of traditional discovery and the preparation of a summary judgment record, with a view to proceeding to a non-conventional trial which would ensure the just, most expeditious and least expensive determination of the case on its merits.

Case managing post-discovery requests for summary judgment hearing dates

56 Where a request is made to schedule a lengthy summary judgment motion following the completion of the production and discovery process concerns about the appropriateness of such a motion relate not so much to the quality of the record developed in light of the nature and complexity of the issues - the parties will have availed themselves of the discovery rights accorded by the *Rules* - but (i) to whether any "upside" exists to spending client money and judicial time conducting a motion-based review of a case's merits when the parties can set the action down for and proceed to trial, and (ii) to whether the summary judgment process, in the circumstances of the case, will provide an appropriate means for effecting a fair and just resolution of the dispute[42] by allowing the trier of fact to gain a full appreciation of the issues before the Court. Put another way, the focus of the case management analysis should be on (i) whether the proposed summary judgment motion will assist the efficient resolution of the proceeding or (ii) whether the issues raised by the action are suitable for disposition by way of a summary judgment motion.[43] As I wrote in an earlier endorsement in the *1318214 Ontario Limited v. Sobeys Capital Incorporated*[44] proceeding:

> I think that on an attendance to schedule a lengthy Post-Discovery summary motion the ultimate question is whether the interest of justice is best served by scheduling such a motion or by requiring, instead, that the parties proceed to trial.

57 Such a case management analysis cannot occur in a vacuum. The parties must file information which will assist the court in performing this case management analysis. For example:

> Where one party wishes to bring a one day or longer Post-Discovery summary judgment motion and the other party opposes arguing, instead, that the court should set a trial date, in my view both parties should file on the scheduling appointment - a 9:30 appointment or short case conference - detailed, focused and reasoned (i.e. not speculative) information which will allow the court to answer the following questions:

(i) What will the proposed summary judgment motion look like?

(ii) What will the proposed trial look like?

(iii) If full or partial summary judgment were granted, what amount of pre-trial preparation and trial time would be saved?[45]

58 Schedule "A" to these Reasons details the type of information a court could require from the parties in order to conduct the sort of cost/benefit analysis involved in requests to schedule lengthy summary judgment motions following the completion of discoveries.

59 If the type of issues raised (complex) and the nature of record (many witnesses, material disputed facts, credibility) clearly make the case an inappropriate candidate for summary judgment, then court should not schedule the proposed summary judgment motion and, instead, in consultation with parties, the Court should issue directions for managing the case to a final determination on the merits in more appropriate, proportionate way. If in light of nature of issues raised and the nature of record it is unclear whether a summary judgment motion would be appropriate, it would be open to the court to permit the development of a summary judgment motion record, on terms, but require periodic reporting from the parties. As the record develops, it may become apparent that a summary judgment motion would not be appropriate. The case management judge and the parties would then need to work on crafting an appropriate mode for trial which makes use of the work product generated for the intended summary judgment. Finally, other cases will bear those hallmarks identified by the Court of Appeal in *Combined Air* which make it an appropriate candidate for a summary judgment motion: whether the motion succeeds is quite another matter.

60 Does this proportionality-oriented case management approach to more lengthy, complex proposed pre- and post-discovery summary judgment motions mean that in some cases a court may decline to schedule a summary judgment motion? Yes. The express powers of judges under the *Rules* to make proportional orders and their inherent powers to case manage litigation, exercised in a time of scarce judicial resources, permit such a result if the court concludes that the proposed motion does not fall into the category of appropriate candidates identified by the Court of Appeal in *Combined Air* and the scheduling of the proposed summary judgment motion would not meet the principles set out in Rules 1.04(1) and (1.2).

61 Let me now apply those case management principles to the two motions to strike out which were argued before me.

PART II: The *George Weston Limited v. Domtar Inc.* action

V. Overview of the action

A. Ripeness of the action

62 The *George Weston v. Domtar* action is an old one which has not proceeded with appropriate dispatch. Commenced over five years ago on June 12, 2007, this action has not yet proceeded to trial. In fact, it has not even proceeded to examinations for discovery. Instead, just over a year ago the plaintiff, George Weston Limited, served a motion for summary judgment. Both parties have delivered their

affidavits for the summary judgment motion, but cross-examinations have not commenced. On February 6 of this year the defendant, Domtar Inc., took the position that the nature of the dispute made a motion for summary judgment inappropriate, so it brought a motion to strike out Weston's motion for summary judgment. So here the parties sit, almost precisely 5 years after the start of this action, fighting over whether a motion can or cannot be brought; a final adjudication of their dispute on the merits appears to remain well over the horizon.

B. Nature of the dispute

63 Weston sues Domtar for $110 million alleging entitlement to that amount pursuant to the terms of a price adjustment clause contained in a June 16, 1998 Share Purchase Agreement ("SPA") under which Weston sold Domtar its shareholdings in E.B. Eddy Ltd. for a combination of cash and Domtar Shares. Section 2.3 of that SPA contained a Purchase Price Adjustment clause which provided that in the event a person acquired more than 50% of the outstanding Voting Shares of Domtar, the consideration payable by Domtar for Weston's shares in Eddy would increase by stipulated amounts.

64 In March, 2007 Domtar acquired the fine paper business of Weyerhauser Company through back-to-back transactions carried out by way of a plan of arrangement. Weston contends that the Weyerhauser Arrangement, in particular its treatment of the Domtar Shares, triggered Domtar's obligation to pay the purchase price adjustment under section 2.3 of the SPA. Domtar disagrees, arguing that the Arrangement fell within exclusions contained in section 2.3.

C. Procedural history

65 Weston has not prosecuted this action with diligence. Pleadings were closed in September, 2007. Weston waited almost 18 months before serving its affidavit of documents in May, 2009 and sought to examine Domtar. The defendant served its affidavit of documents in August, 2009 and sought to examine Mr. Stewart Green, the person at Weston whom it viewed as playing the principal role in negotiating the SPA.

66 Nothing more happened until March, 2011, when Weston served its summary judgment motion record. Between March, 2011 and February of this year the parties served their respective records for the summary judgment motion. Cross-examinations have not commenced.

67 In a February 6, 2012 email Domtar's counsel advised Weston:

> [W]e are now of the view that this case is not suitable for summary judgment motion. It is complex with multiple factual and legal issues including credibility issues. Frankly even if neither of us objected very much I doubt any judge would agree to hear it.

Thus came about this motion to strike.

D. Positions of the parties

68 Domtar submitted that Weston's motion for summary judgment was not appropriate in light of (i) the

volume of the evidence and the complexity of the contractual interpretation issues, (ii) the existence of material disputed facts regarding the factual matrix from which the SPA emerged, (iii) the need to examine for discovery a representative of Weston, Mr. Green, whom Domtar had sought to discover, but who did not file file an affidavit on the summary judgment motion, and (iv) the existence of expert evidence on the motion. Alternatively, Domtar contended that the summary judgment motion should be stayed until examinations for discovery had been conducted.

69 Not surprisingly Weston sees matters differently, describing its action as "the quintessential case for summary judgment". Pointing to a recent decision of this court in *Fairview Donut Inc. v. The TDL Group Corp.*,[46] Weston argued that complex document cases are well-suited to summary judgment motions. Although Weston acknowledged that certain factual disputes existed on the record, it contended that the disputed evidence would be inadmissible in any event. Weston argued that it was open to Domtar to examine Mr. Green pursuant to Rule 39.03 as a witness on a pending motion.

VI. Analysis of the relevant factors

A. The significance of the procedural history of the summary judgment motion

70 This case involves a "transitional" summary judgment motion - i.e. one which was started, but not completed, before the release of the *Combined Air* decision. Domtar initially consented on several occasions to the scheduling of Weston's summary judgment motion. Weston served its motion on March 31, 2011. That led to an attendance by the parties before Cumming J. on May 27, 2011. A *consent order* emanated from that attendance under which the parties agreed to a timetable for the preparation of the record for the summary judgment motion, including cross-examinations, and in which Cumming J. ordered that the summary judgment motion be heard in February, 2012.

71 Certain delays ensued which led the parties to attend before Wilton-Siegal J. on September 27, 2011 at which time they *consented* to an order amending the timetable for the summary judgment motion which would see the argument of the motion soon after May 18, 2012.

72 On November 30, 2011, Domtar delivered its responding motion record for the summary judgment motion. Weston delivered its reply record on January 12, 2012. As noted, on February 6 Domtar took the position, for the first time, that the summary judgment motion was inappropriate, yet it served sur-reply materials on February 29, 2012.

73 In sum, Domtar now seeks to strike out a summary judgment motion which previously it had agreed could be heard in accordance with a consent timetable and in respect of which both parties obviously have spent a lot of time and money in preparing their respective records. Weston's motion record runs to 776 pages; Domtar's responding record totals 1,313 pages; Weston's reply record stands at 31 pages; and, Domtar filed a 12-page supplementary responding record.

74 The time for objecting to the hearing of a summary judgment motion as inappropriate is when the moving party first proposes to bring the motion - i.e. before time and money is spent on developing a record. By that time the pleadings will have framed the issues in dispute, and it should be apparent from the pleadings which issues are in dispute and those which are not. It follows that by the close of pleadings both

parties should possess some idea about the material facts which are in dispute - for that is the purpose of pleadings - and the type and amount of evidence which they will have to file at trial to support their respective cases (apart from admissions from the other side which they might obtain on examinations for discovery). If one party proposes to bring a summary judgment motion before discoveries have commenced, then the other should raise any concerns about the appropriateness of a summary judgment motion in light of the issues framed by the pleadings when the moving party seeks to schedule its motion and before money is spent preparing a summary judgment record, not 11 months after the fact following the expenditure of money on preparing the evidentiary record.

75 One cannot ignore, however, the distinctive timing feature of this case - Domtar consented to the hearing schedule before the Court of Appeal had released its decision in *Combined Air*. Although parties should be held to the procedural bargains which they have struck, at the same time it would be fair to say that the notion of bringing a motion to strike or stay summary judgment motions was not commonplace before *Combined Air* was released. However, as a result of the consent timetable for the summary judgment motion both parties in this action have expended time and money in preparing their motion records. That expenditure of money should not go to waste.

B. The nature of the claim and its quantum

76 Weston estimated that its summary judgment motion would require two days to argue; Domtar contended that three to four days was a more realistic estimate.

77 From the materials filed I have very strong reservations about whether Weston's motion is an appropriate candidate for summary judgment. First, Weston's action and motion engage important issues of contractual interpretation which bear very significant financial consequences. If the court accepts Weston's claim, then damages indeed will amount to $110 million by virtue of the terms of the SPA. Given such stakes the court deciding the merits of Weston's claim will want to have the fullest appreciation of all factual and legal issues before making its decision. I question whether a summary proceeding under Rule 20 brought prior to examinations for discovery is a proportionate mechanism to adjudicate the claims asserted by Weston. Further, section 2.3 of the SPA is a complex price adjustment clause and, from the factums filed by the parties, it certainly appears that its application to the Weyerhauser Arrangement will require some intricate contractual interpretation.

C. Disputed facts and issues of admissibility

78 Second, the summary judgment motion record compiled to date disclosed disputes on the evidence about what arguably might constitute material facts concerning the "factual matrix" in which the SPA was negotiated. Weston's initial motion record contained only one affidavit which, in turn, appended a handful of key documents. The affiant, Mr. Robert Balcom, provided a brief history of the SPA transaction (although he had had no direct involvement in negotiating or drafting the SPA), but he spent most of his affidavit explaining why Weston thought the Weyerhauser Arrangement triggered the price adjustment clause.

79 Domtar filed a 3-volume responding record which contained four affidavits, two of which were from participants in the SPA negotiations who dealt at length with the "factual matrix" leading up to the execution

of that agreement, including evidence of the parties' understanding of the business purpose of certain terms, including the purchase price adjustment clause. Domtar also filed two expert reports. The report from Morrison Park Advisors provided expert evidence on the benefits and risks of the exchangeable debenture structure used by Weston as part of the SPA transaction, as well as expert evidence designed to show that the structure used for the Weyerhauser Arrangement did not trigger the price adjustment clause under the SPA. An expert report from Duff & Phelps Canada Limited addressed the issue of the economic equivalency of one exchangeable share of Domtar Canada Paper Inc. to one common share of Domtar Corporation in the Weyerhauser Arrangement.

80 In reply Weston filed an affidavit from Mr. Bradley Holland who had participated in the negotiations for the SPA. Mr. Holland disputed assertions made by the two Domtar witnesses about the business understanding surrounding certain terms of the SPA, including the purpose of the purchase price adjustment clause. A second affidavit contained expert evidence focusing on one element of the issue about whether the structure of the Weyerhauser Arrangement would have triggered the purchase price adjustment clause.

81 Finally, Domtar filed two further affidavits, both of which provided additional evidence about the circumstances surrounding the negotiation of the SPA, and both of which disputed certain evidence given by Mr. Holland, Weston's affiant.

82 Weston took the position that the obvious factual disputes between its affiant and those of Domtar regarding the factual matrix were not relevant to the issue of contractual interpretation lying at the heart of its claim because evidence about the subjective intentions of the parties is not admissible to interpret a contract.[47] Domtar responded that the disputed evidence went not to any issue of subjective intent designed to alter the words of the contract, but to the factual matrix or context informing the interpretation of the words agreed to by the parties, and Domtar argued that a consideration of the context in which the written agreement was made is an integral part of the process of interpreting a contract.[48]

83 Given that Weston's summary judgment motion will put in play a dispute about the admissibility of evidence and the contested evidence is characterized by material disputes, it is worth recalling the approach taken by the trial judge in *Kentucky Fried Chicken of Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Foods Services Inc.*,[49] to the issue of the admissibility of extrinsic evidence on the issue of contractual interpretation. In that case at the conclusion of opening statements the plaintiff moved to exclude as inadmissible any evidence of the negotiations leading up to the agreement in dispute and evidence of either party's subjective intention. The defendants opposed the motion on the grounds that it was premature, that the court should not determine the issue of parol evidence in a vacuum and, in any event, the law was in an unsatisfactory state and it was difficult to determine what evidence would be permissible as forming part of the "factual matrix". In the result the trial judge reserved his decision until the end of trial because:

> ... until I had heard all of the factual evidence I believed that it was premature to give a decision, even if I was so inclined, no matter how desirable it might have been to shorten the trial. There were no reported cases cited where blanket types of evidence were ruled out in advance. I stated that to rule on part only of

> the motion might create arguments during trial as to what was covered or not covered by my ruling. I stated that by reserving the decision, all of the evidence would be available for consideration by me at the end of the trial and, in the event that I should err in my conclusion, by an appellate court. The risk of an erroneous ruling on blanket areas of evidence is far greater than a ruling on an isolated question. The admission of evidence can create no harm.[50]

84 Such an approach affords the trier of fact the best opportunity to gain the fullest appreciation of the contested evidence and its relevance, if any, to the issues requiring adjudication. Yet, such an approach would be very difficult to employ on a summary judgment motion where disputes exist about which evidence goes to the "factual matrix" and the contested evidence itself is marked by disputed facts. Further, in the circumstances of this case, credibility findings would have to be made in the absence of an extensive documentary record which could act as a reliable yardstick to make such findings.

85 Weston submitted that even if oral testimony was required to decide contested factual issues, the court could order, in advance of the motion hearing, that *viva voce* evidence be given on the summary judgment motion. As I read the *Combined Air* decision, making such an order in advance of the hearing is not an option available to a case management or scheduling judge. The Court of Appeal stated:

> [W]e stress that the power to direct the calling of oral evidence under rule 20.04(2.2) is not intended to permit the parties to supplement the motion record. Nor can the parties anticipate the motion judge directing the calling of oral evidence on the motion.
>
> The latter point requires that we address a practice issue in the Toronto Region. As a case management matter, parties to a summary judgment motion in Toronto are required to complete a summary judgment form, which includes questions about whether the parties intend to call *viva voce* evidence on an issue in dispute, and estimating the time required for such evidence. Although no doubt well-intentioned, these questions are misplaced in that they create the misconception that a summary judgment motion is in fact a summary trial.[51]

86 Accordingly, in the present case it makes no sense, from a case management perspective, to "park to one side" the issue of how the obvious factual disputes may or may not be handled at the hearing of the summary judgment motion and to permit the motion to proceed, undirected, with full knowledge that this issue must be addressed before a final determination on the merits can be made.

D. Use of expert evidence on a summary judgment motion

87 Both parties filed evidence from expert witnesses directed toward aspects of the issue of whether the nature of the Weyerhauser Arrangement did or did not trigger the price adjustment clause. Expert evidence operates to assist the trier of fact in understanding complex, technical issues, in this case issues relating to the financial aspects of the Weyerhauser Arrangement. Judges often wish to ask experts questions about their evidence, both to gain a better understanding of the area of technical specialty in question, as well as to understand how the expert applied his expertise to the particular facts of the case.

88 I asked counsel how, on a Rule 20 motion using a written record, a judge would be able to ask questions of the three experts who had filed reports. It appeared that the parties had not turned their minds to that issue, although Weston's counsel submitted that a "mini-trial" could be held. I do not agree. If a "mini-trial" were directed for the expert evidence, why not use a "mini-trial" for the other contested evidence? At that point the summary judgment motion would be slipping into a regular trial mode with a number of witnesses giving *viva voce* evidence.

89 The simple reality is that usually if a case is sufficiently complex that its adjudication requires resorting to expert evidence, then that case most likely is not a good candidate for a summary judgment motion. There may be exceptions, such as where the expert evidence is uncontested, but that is not this case.

E. The lack of examinations for discovery

90 Domtar submitted that prior to bringing its motion for summary judgment Weston had agreed to produce Mr. Green for discovery. Weston did not include an affidavit from Mr. Green in its summary judgment records, and now takes the position that Domtar should examine Mr. Green as a witness on a pending motion under Rule 39.03. Domtar argued that requiring it to examine under Rule 39.03 would be unfair because Weston would enjoy rights to cross-examine Mr. Green on such an examination.

91 I accept Domtar's submission that it should not be required to argue the case on its merits without first examining Mr. Green as a representative of the plaintiff on discovery. Weston had agreed to that arrangement before bringing its motion for summary judgment.

92 Domtar also identified what it contended were several deficiencies in Weston's documentary productions and submitted that to date Weston had only produced 55 documents in respect of the issues in this action. Weston contended that Domtar had made no prior complaints about the adequacy of its productions and therefore its present complaints should be viewed as nothing more than tactical positioning to avoid the summary judgment motion.

93 I cannot assess the adequacy or inadequacy of productions on the record before me. Suffice it to say that any judge hearing this matter on the merits will want to be satisfied that each party has produced all relevant documents. That issue must be worked out before any adjudication on the merits takes place.

F. The complexity of the issues

94 Weston pointed to the recent decision of Strathy J. in *Fairview Donut Inc. v. The TDL Group Corp.* as signaling that summary judgment motions are appropriate in complex cases. Any decision of a judge must be read with due regard to the case that was placed before him or her. Counsel should read with care the comments made by Strathy J. about the summary judgment motion aspect of that decision. He noted that (i) the case was "an exception" to the general practice of not permitting summary judgment motions before or at the time of certification and (ii) the summary judgment motion he heard was the product of an agreement between the parties.[52] Strathy J. also had the following to say about the nature of the evidence in that case concerning the factual matrix:

> I pause here to ask whether the resolution of the contractual interpretation issues

> requires the weighing of evidence, evaluation of credibility or the drawing of inferences and, if so, whether a full appreciation of the evidence and issues can only be achieved by a trial. In my view, the resolution of the issue does not require this kind of fact-finding or the exercise of the court's powers under Rule 20.04(2.1). The plaintiffs' arguments turn almost entirely on the interpretation of the franchise agreements and *the evidence concerning the factual matrix underlying the contracts - the contractual history between the parties - is not contentious and is primarily documentary.*[53]

95 The circumstances of the present case differ from those in *Fairview Donut*; here clear factual disputes exist regarding the factual matrix and they are overlain with the issue of the admissibility of some of that evidence.

G. Summary

96 By way of summary, I do not regard the motion undertaken by Weston at this stage of the proceedings as a good candidate, or "fit", for summary judgment: (i) the action involves complex issues of contractual interpretation and the application of the price adjustment clause to an intricate plan of arrangement; (ii) significant factual disputes exist on the record which will have to be resolved, even if only in the context of a *voir dire* regarding the admissibility of some of the extrinsic evidence about the formation of the SPA; (iii) both parties rely on expert evidence, yet have not indicated how a motion judge would be able to question those expert witnesses should he or she wish to; (iv) Weston agreed to produce Mr. Green for discovery, yet failed to include his affidavit in its summary judgment record; (v) disputes exists about the adequacy of documentary production; and, (vi) the amount at issue in this action raises serious questions about the proportionality of employing a summary judgment procedure to determine the case on its merits. To this should be added the dilatory approach which Weston has taken to prosecuting its case. A party who delays so long in moving its case along should not be surprised that a Court may take a skeptical view about the appropriateness of a planned summary judgment motion.

97 Notwithstanding that conclusion, I cannot ignore that as a result of Domtar's initial consent to a summary judgment motion schedule, both parties have spent time and money in preparing a summary judgment record. As I said, that money should not go to waste.

98 In my view the most efficient means of satisfying the full appreciation test would be to develop a modified trial preparation plan, incorporating elements of traditional discovery and making use of the work undertaken to date in creating the summary judgment record, with a view to proceeding to a non-conventional trial in 2013 to adjudicate finally this far too old claim. To that end, I direct the parties to consult and develop a trial preparation plan, for presentation to me at a 9:30 attendance to be held before October 5, 2012, which contains the following features:

(i) The completion of all examinations for discovery by December 30, 2012;

(ii) The use of Rule 34.12(2) on the examinations for discovery, save for documents or facts in respect of which privilege is claimed. Since the

parties already have raised issues about the admissibility of certain evidence which the trial judge will have to decide, I see no point in delaying this action further with a potential refusals motion. All issues of relevance and admissibility arising on the examinations for discovery can be determined by the trial judge pursuant to Rule 34.12(2) if, in fact, any remain by the time of trial;

(iii) The use of the affidavits filed by each party as part of the evidence-in-chief of each affiant at trial. The parties should discuss what additional examination-in-chief, if any, would be required from each such witness;

(iv) The parties shall identify any other witness whom it intends to call at trial and who has not filed an affidavit and shall propose a timetable for the filing of affidavits or "will says" from any such witness so that each party fully understands the evidence it will be facing at trial;

(v) The setting of time limits for the additional examination-in-chief and cross-examination of each witness, including expert witnesses; and,

(vi) The utility of requiring some of the opposing experts to meet with a view to narrowing any disagreements expressed in their expert reports.

99 Further, I allocate each party only one hour for any remaining interlocutory motions to be brought prior to trial, such motions to be heard no later than January 31, 2013. The parties really must focus on moving this action to trial, instead of spending time on interlocutory motions.

100 I will issue further pre-trial directions following the attendance. The directions I have given above are intended as guidelines for shaping the trial of this claim. I am open to receiving creative proposals from counsel about the method of conducting the trial with a view to reducing trial time and moving this action along to a final adjudication on the merits.

101 The costs of this motion are reserved to the trial judge.

Part III: The *1318214 Ontario Limited v. Sobeys Capital Incorporated* action

VII. Overview of the action

A. The nature of the dispute

102 The seven plaintiffs were franchisees of Sobeys Capital Incorporated operating Price Chopper grocery stores in Ontario. The plaintiffs allege that as a result of the manner in which Sobeys exercised its discretion under their Franchise Agreements, they have been systematically deprived of the ability to earn genuine profits from their businesses. They further allege that Sobeys administered the Price Chopper program contrary to the franchisees' legitimate expectations in such a way as to keep the profits of the system for itself, to keep the franchisees perpetually indebted to it and to prevent the franchisees from building equity in their businesses. In particular, the franchisees contend that Sobeys, by controlling both the wholesale and retail prices of merchandise bought and sold by the franchisees, fixed their gross margins in such a way as to ensure the franchisees suffered large, systemic losses.

103 The plaintiffs allege that Sobeys breached the terms of their Franchise Agreements and, as well, breached its duty of fair dealing under section 3 of the *Arthur Wishart Act*, by acting to prevent the plaintiffs from realizing a reasonable gross margin consistent with the Price Chopper Program being an overall successful and valuable system for the franchisees as well as for itself (the "Contract/Fair Dealing Claims"). As put in paragraphs 65 and 67 of their Amended Statement of Claim:

> 65. Sobeys has knowingly and intentionally misused its discretionary powers to generate substantial revenues and profits for itself, including from supplier monies, to the Franchisees' extreme detriment. Sobeys institutionalizes and encourages this practice by awarding bonuses to senior Price Chopper executives based on Sobeys' revenues from the franchise operations, including supplier monies, without regard to franchisee profitability.
>
> ...
>
> 67. Sobeys has knowingly and intentionally breached its contractual obligations and the duty of fair dealing by administering the Price Chopper Program and exercising its significant contractual discretion in such a way as to consistently generate massive losses for the Franchisees under the Price Chopper Program, while appropriating all profits for itself. Sobeys has ensured, through its control over the Franchisees' costs, that the Franchisees will not earn profit beyond the token, discretionary and episodic amounts which Sobeys chooses to confer on them.

104 The plaintiffs also advance a claim against Sobeys for breach of fiduciary duty and negligence in respect of its accounting obligations under the Franchise Agreements (the "Accounting Claims"). As pleaded, the plaintiffs stated that they were required under their Franchise Agreements to use Sobeys' retail and cost accounting systems. The plaintiffs allege that Sobeys misused the accounting system to their detriment:

> 71. Sobeys has used its role as accountant to the Franchisees and its exclusive access to the costing and other financial information to increase costs to the Franchisees without notification to them.
>
> ...
>
> 73. At the direction of Mr. Gilpin and other senior Sobeys executives known only to Sobeys, Sobeys has used its control over the Franchisees' accounting information to increase the Franchisees' costs in Sobeys' favour, and to claw back amounts that the Franchisees would otherwise be entitled to under the Price Chopper Program. For example, at the direction of Mr. Gilpin and other senior Sobeys executives known only to Sobeys, Sobeys has:

(a) systematically reduced the Franchisees' gross margins in order to maximize Sobeys' wholesale profits knowing that this would exacerbate the Franchisees' losses;

(b) increased rents payable by the Franchisees under their leases;

(c) clawed back most of the rebates and allowances which are paid by suppliers to Sobeys intended for Price Chopper franchisees; and

(d) reduced the Franchisees' allowable expenses to below actual requirements, such as maintenance on aging equipment, so that the Franchisees would absorb greater costs.

...

75. In addition to the above acts, at certain periods beginning in or around 2006 following the mandatory introduction of the SAP accounting software, Sobeys denied the Franchisees access to certain costing information and failed to consistently and accurately record the cost of merchandise purchased and sold by the Franchisees.

76. Sobeys has failed to monitor, prevent and correct costing errors, which errors are consistently to the Franchisees' detriment and to Sobeys' benefit. Where such errors have been brought to Sobeys' attention by the Franchisees, Sobeys has corrected costing errors only for the Franchisee which noticed the error, and has deliberately failed to correct the same errors for other Franchisees whose costing information was equally erroneous.

105 The plaintiffs seek damages of $3 million each for their breach of contract, breach of fair dealing and breach of accounting duties claims. Their claims cover a period of time dating from 2001 (in the case of four franchisees) to 2010.

106 In addition, the plaintiffs allege that on the day they commenced this action Sobeys issued notices of default alleging breaches of the Franchise Agreements and stating the agreements would be terminated four days after delivery of the notices unless the particularized breaches were cured. The plaintiffs seek a permanent injunction preventing the termination of their Franchise Agreements and relief from forfeiture of the Franchise Agreements.

107 In its June 11, 2010 Statement of Defence and Counterclaim Sobeys denied that it had administered the Franchise Agreements in bad faith or in a manner which prevented the plaintiffs from realizing genuine profits or equity in their businesses. Sobeys pleaded:

9. The matters about which the plaintiffs now complain were all fully known to them, or would have been fully known to them had they exercised reasonable diligence and skill, before and at the time they entered into the LEP contract documents and became Price Chopper LEP franchisees.

10. In this litigation, the plaintiffs are effectively asking this court to ignore or rewrite

the contractual agreements they entered into with Sobeys. The plaintiffs entered into these agreements freely and voluntarily, after having had the opportunity to obtain, and after having obtained, independent professional advice.

11. Contrary to the allegations made throughout the Amended Statement of Claim, Sobeys did not violate any contractual, common law or statutory obligation owing to the plaintiffs in its operation or administration of the LEP. Further, and as pleaded in greater detail below, Sobeys did not exercise any discretion in a manner contrary to the LEP contractual documents, the reasonable expectations of the plaintiffs or Sobeys' obligations at law.

12. By contrast, the plaintiffs have failed to comply with the requirements of the LEP. In breach of their contractual obligations and their duties of good faith and fair dealing to Sobeys, in 2009 and early 2010 they collectively transferred approximately $560,000 (much of it in a single day) from their business accounts to build a war chest to fund this litigation.

108 The plaintiffs commenced their action on April 8, 2010. Sobeys pleaded that all of the plaintiffs had received franchise disclosure documents by September 30, 2007 and all plaintiffs had experienced operating as a Price Chopper franchisee by December 31, 2007. Sobeys pleaded:

85. Accordingly, the plaintiffs knew or ought to have known of the facts relating to their alleged claims against Sobeys as pleaded in the Amended Statement of Claim by or before December 31, 2007 (the "Discovery Date").

86. Pursuant to the *Limitations Act, 2002,* S.O. 2002 c. 24 (the *"Limitations Act'),* the plaintiffs were required to commence their claims within two years of the Discovery Date. The plaintiffs failed to do so and this action, which was not commenced until April 8, 2010, is therefore statute-barred. Sobeys pleads and relies upon the provisions of the *Limitations Act.*

109 Sobeys also counterclaimed for declaratory, injunctive and compensatory relief in respect of the transfer by the plaintiffs of funds "from their business accounts to build a war chest to fund this litigation." Sobeys also claimed against three of the plaintiffs any amounts which a reconciliation might show they owed to Sobeys when their Franchise Agreements expired on May 2, 2010 in accordance with their terms. As against the other four franchisees Sobeys pleaded:

108. Further, or in the alternative, the four remaining plaintiff franchisees have also breached their contractual obligations and duties of good faith and fair dealing to Sobeys, as pleaded above. As a result, the four remaining plaintiff franchisees are liable to provide an accounting to Sobeys in order to determine the proper amounts owing to Sobeys upon the expiry of their LEP Documents in accordance with same.

110 The pleadings in this action are lengthy: Statement of Claim, 86 paragraphs; Statement of Defence and Counterclaim, 110 paragraphs; Reply and Defence to Counterclaim, 16 paragraphs. While lengthy,

the pleadings are not prolix. Their length reflects the radically different views the parties take about the meaning and administration of the Franchise Agreements (and related agreements) over the long period of time during which they dealt with each other. The pleadings put in issue numerous, complex issues about the meaning of the contractual documents between the parties and the manner in which they were administered over a period of up to 10 years. This is a factually dense action.

B. Procedural history

111 After commencing their action, in July, 2010 the plaintiffs sought and obtained an interlocutory injunction restraining Sobeys from terminating their Franchise Agreements. Nevertheless, most of the Franchise Agreements expired in accordance with their terms and, at present, only one of the seven plaintiffs remains a store operator.

112 The parties have completed their basic examinations for discovery, save and except for any re-attendances required to answer undertakings or refusals ordered to be answered. To date the plaintiffs have conducted three days of examinations of Sobeys; the defendant has conducted eight days of discovery of the plaintiffs. E-discovery issues were addressed through case management over the course of 2011.

113 On May 7, 2012 the parties attended before me at a 9:30 appointment raising the following issues:

> [3] Counsel for the plaintiff franchisees wishes to timetable all matters relating to undertakings and refusals, and also to set dates for a pre-trial conference and the trial, which he estimates will take two to three weeks. Counsel for Sobeys concurred with the timetable regarding undertakings and refusals, but advised that his client wants to bring a motion for partial summary judgment "to narrow the issues for trial", and he sought dates for a one to two day summary judgment motion.
>
> [4] In response plaintiffs' counsel stated that his clients would resist the attempt to bring a summary judgment motion, and he sought a date for a motion to stay the defendant's summary judgment motion.[54]

114 I gave directions for the filing of materials, in the form set out in Schedule "A" to these Reasons, so that I could better understand the positions of the parties. That ultimately led to Sobeys filing a draft notice of motion setting out the relief it plans to seek on its summary judgment motion, and the plaintiffs filing a notice of motion seeking an order staying Sobeys' motion for summary judgment and setting a trial date.

C. Sobeys' proposed summary judgment motion

115 Sobeys' draft notice of motion disclosed that it would seek the following relief on the summary judgment motion which it wants to schedule:

> THE MOTION IS FOR:

(a) an order for summary judgment dismissing the actions of the plaintiffs 1464167 Ontario Ltd., 1469789 Ontario Ltd. and 2144011 Ontario Inc. (together, the "Time-Barred Plaintiffs") in their entirety on the basis that they are time-barred;

(b) further, or in the alternative in the case of the Time-Barred Plaintiffs, an order for partial summary judgment dismissing the following claims of the plaintiffs on the basis that they raise no genuine issue requiring a trial:

(i) That Sobeys failed to disclose the features of the Price Chopper Low Equity Program of which they now complain;

(ii) That Sobeys exercised its discretion with regard to the features referred to in subparagraph (i) above in a manner inconsistent with the plaintiffs' franchise agreements or in bad faith; and

(iii) That Sobeys interfered with the plaintiffs' right to associate under section 4 of the *Arthur Wishart Act (Franchise Disclosure)*;

D. Positions of the parties

Sobeys

116 Sobeys submitted that its summary judgment motion would take two days to argue. Sobeys intends to file affidavits from two persons: Mr. Rob Adams, whom the plaintiffs examined for discovery, and another affiant. Their affidavits will deal with the specific contracts executed by the plaintiffs and the pre-contractual representations allegedly made by Sobeys to the plaintiffs regarding the equity they could expect to earn and the expected repayment schedule for their loans. Sobeys does not intend to file expert evidence on the summary judgment motion. It expects the documents will be limited to the package of contractual documents between Sobeys and each plaintiff, as well as excerpts from the discoveries of the plaintiffs.

117 Sobeys acknowledged that a trial will be required in any event to adjudicate the Accounting Claims advanced by the plaintiffs. Its summary judgment motion was limited to the Contract/Fair Dealing Claims advanced by the plaintiffs. As well, Sobeys argued that three of the seven plaintiffs had acknowledged on discovery that they were aware of most of or the entirety of their complaints more than two years prior to commencing their action, so Sobeys would seek to dismiss the claims by those plaintiffs as statute-barred.

118 If this matter went to trial, Sobeys estimated that it would require up to four weeks of trial time, involving 15 to 20 witnesses. If granted the summary judgment it seeks, Sobeys submitted that the number of witnesses would be reduced by 7 to 10, saving at least one week of trial time on the Contract/Fair Dealing Claims and an additional three days if the action were dismissed against three of the plaintiffs as statute-barred.

The plaintiffs

119 Not surprisingly, the plaintiffs took a different view of the suitability of this action to determination

by a summary judgment motion. The plaintiffs submitted that their Contract/Fair Dealing Claim required "detailed analyses of the complex agreements between the parties; how and why Sobeys changed those agreements mid-stream without disclosure of the material changes; how Sobeys has operated under the agreements; and an analyses of the net result in producing yearly losses to the franchisees and millions of dollars in profit to Sobeys".

120 The plaintiffs estimated that Sobeys motion for summary judgment would require a 5-day hearing, preceded by a week of cross-examinations of a minimum of eight witnesses. Affidavits would be required from each of the plaintiffs and would cover their up to 10 year involvement with Sobeys. The plaintiffs contended that up to 300 hundred documents would be filed on the motion. While the plaintiffs intend to call one or two experts at trial, they could not say whether they would file expert evidence on the summary judgment motion.

121 The plaintiffs submitted that their Accounting Claims are inter-related with their Contract/Fair Dealing Claims and neither is susceptible to discrete adjudication.

122 The plaintiffs estimated that a trial will require three to four weeks, and they intend to file 200 to 300 documents at trial with the assistance of an electronic database.

123 If the summary judgment sought by Sobeys were granted, the plaintiffs saw no potential savings in trial time because of the intertwined nature of the issues asserted against Sobeys.

VIII. Analysis

124 Let me deal first with Sobeys request to schedule a motion seeking partial summary judgment against four of the plaintiffs in respect of aspects of their Contract/Fair Dealing Claim. First, this part of the motion really would involve a review of the evidence concerning all seven plaintiffs because Sobeys wishes to obtain partial summary judgment against them all in the event it fails on the prescription aspect of its motion against three plaintiffs. Accordingly, on its face the summary judgment motion will require reviewing evidence of up to 10 years of contractual dealing between the parties.

125 Second, Sobeys acknowledges that success on that part of its motion will not avoid a trial; one will be necessary in any event to deal with the plaintiffs' Accounting Claims. But, Sobeys argued, its motion would "resolve some of the issues in this litigation"[55] so hearing it would be of procedural benefit.

126 In *Smith v. Rotstein*[56] I attempted to summarize the jurisprudence concerning the availability of partial summary judgment:

> [44] Rule 20.01 provides that summary judgment may be sought "on all or part of a claim" or to dismiss "all or part of the claim". Old Rule 20.05(1) recognized that summary judgment could be "granted only in part". In its general application Old Rule 20 certainly permitted a court to grant summary judgment in respect of only part of a claim. In *Ford Motor Company of Canada, Limited v. Ontario Municipal Employees Retirement Board*, [1997] O.J. No. 4298, the Court of Appeal held that the availability of partial judgment in a particular case was

defined and limited by the purpose of Rule 20 as articulated in the *Irving Ungerman Ltd. v. Galanis*, [1991] O.J. No. 1478, and *1061590 Ontario Ltd. v. Ontario Jockey Club*, [1995] O.J. No. 132, cases:

> [44] The purpose of the summary judgment provisions of Rule 20 was described in this way by Morden A.C.J.O. in *Ungerman Ltd. v. Galinas, supra,* at p. 550:
>
> > A litigant's 'day in court', in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. There can, however, be proceedings in which because they do not involve any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings the successful party is being both unnecessarily delayed in the obtaining of substantive justice and is being obliged to incur added expense. Rule 20 exists as a mechanism or avoiding these failures of procedural justice.
>
> [45] In *Ontario Jockey Club*, the purpose of Rule 20 was described in this way:
>
> > The purpose of Rule 20 is clear. The rule is intended to remove from the trial system, through the vehicle of summary judgment proceedings, those matters in which there is no genuine issue for trial ...
>
> [45] The Court of Appeal in *Ford Motor Company* observed that cases in which summary judgment had been granted for "part of" a claim seemed to fall into three groups - where the evidentiary basis for the judgment consists of an admission by the opposite party; where a party seeks recovery of an amount equal to or less than its "inevitable recovery at trial"; and,
>
> > ... actions where the evidence establishes that there is no genuine issue for trial in respect of a discrete claim. These partial summary judgment cases require no further comment except to say the result of summary judgment for "part of" a claim is consistent with the purpose of Rule 20; the partial summary judgment removes a discrete issue from the issues to be tried and thus shortens the trial. This is consistent with "procedural justice" concerns referred to by Morden A.C.J.O. in *Ungerman* and with the purpose of Rule 20 as referred to in *Jockey Club*.

127 Having reviewed the pleadings and both parties' summaries of the issues in play in this action, I cannot share Sobeys' view that the partial summary judgment it seeks relates to a "discrete claim" or

"discrete issue". At the heart of the plaintiffs' action rests the allegation that Sobeys exercised its discretion under the franchise and related agreements in an unlawful manner, including the wrongful administration of the accounting services it provided to the plaintiffs under those agreements. The judge reviewing that allegation will have to consider detailed evidence about the lengthy history of the business dealings between the franchisees and Sobeys. To have one judge (the motion judge) review that history to consider some of the complaints asserted by the plaintiffs in respect of the long course of contractual dealings between the parties and then to have another judge (the trial judge) review most or all of that history to review other complaints would involve an unnecessary and wasteful duplication of judicial effort. In *Combined Air* the Court of Appeal stated:

> In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial.[57]

The materials filed by the parties clearly indicate that this case falls into that category.

128 In addition, the availability of partial summary judgment must take into account the policy concerning the bifurcation of issues enacted as part of the 2010 amendments to the *Rules of Civil Procedure*. As put by the Court of Appeal in *Kovach (Litigation guardian of) v. Kovach*:

> Rule 6.1.01 - effective January 1, 2010 - is the first time a rule speaking to bifurcation has been promulgated. It signals that, in the opinion of the Rules Committee at least, the bifurcation of a trial, jury or non-jury, is not generally a good idea unless the parties consent. To repeat, rule 6.1.01 states:
>
> > With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.
>
> ...
>
> They are more clearly tied to the *appropriateness* of granting a bifurcation order in particular circumstances - which this Court has said in *Elcano*, [1986] O.J. No. 578, at p. 59, is only to be done "in the clearest cases."[58]

129 Rule 20.01(1) authorizes a motion for summary judgment on "part of the *claim* in the statement of claim". Rule 6.1.01 addresses when separate hearings may be held on "*issues*". As I read Sobeys' proposed notice of motion, it conflates "issues" with "claims". Although I have followed counsel's short-hand in referring to the Contract/Fair Dealing Claim and the Accounting Claim, in fact both are simply facets of the single claim for damages pleaded in paragraph 1(a) of the Amended Statement of Claim. If

successful, the motion would not eliminate the plaintiffs' claims for damages; it only would reduce some of the factual issues underpinning those claims. Such an objective, in my view, is not consistent with the purpose of summary judgment motions and would risk expanding Rule 20 into a device drawing the court into multiple reviews of an underlying fact pattern. Further, a review of the Amended Statement of Claim discloses that the Contract/Fair Dealing issues are connected factually with the Accounting issues; not a surprising circumstance given the length of the history of dealings between the parties put in play in the action.

130 Moreover, making due allowance for the underestimating of potential savings of trial time by the plaintiffs and the accompanying overestimation by the defendant, from the very helpful materials filed by counsel realistically one is looking at a three to four day summary judgment motion, preceded by several days of cross-examination, which, if the motion were granted, would still result in a trial of at least two weeks in length. In terms of the overall expenditure of time and money by the parties, I simply do not see any material savings resulting from Sobeys' proposed motion. Indeed, I strongly suspect the motion, even if successful, would increase the overall costs of this proceeding and, without a doubt, it would delay the trial of this action by at least a year. The motion will require a significant amount of judicial time to review the extensive record which will accompany it, pushing back the start of the trial.

131 Consequently, applying the principles articulated by the Court of Appeal in *Combined Air* about those cases which are appropriate candidates for summary judgment motions, considering the potential savings in trial time resulting from a successful motion for partial summary judgment, and exercising the inherent powers of this Court to manage its own process, I decline to grant Sobeys a hearing date for its proposed motion for summary judgment in respect of the Contract/Fair Dealing issues - i.e. paragraph (b) of its draft notice of motion.

132 Turning to paragraph (a) of the draft notice of motion which seeks full summary judgment against three plaintiffs on the basis that their claims are statute-barred, Sobeys submitted that it intended to rely on admissions given on discovery by three defendants to support this part of its motion for summary judgment. In its Statement of Defence and Counterclaim Sobeys pleaded that the claims of all seven defendants are statute-barred. Sobeys gave no indication that it was abandoning that plea against the four defendants against whom it would not seek summary judgment based on the prescription period, so I proceed on the basis that the limitations defence will also be asserted in any event at the trial against the other four plaintiffs.

133 Although proceeding to secure dismissal of an action against some plaintiffs based on a limitations defence may constitute the sort of discrete claim more susceptible to partial summary judgment, several important factors militate against splitting off that issue from the others in this action. First, if no objection has been taken to the joinder of claims in an action by multiple plaintiffs - as none has in this case - then the presumption is that all joined claims will proceed to trial at the same time. Such a presumption flows from the well-established policy of avoiding the multiplicity of actions. However, permitting a defendant who has pleaded limitations defences against all plaintiffs to move for summary judgment on that basis only against certain of the plaintiffs would result in the same defence being adjudicated by the court on multiple occasions - the limitations defence would be a live issue at the trial involving the remaining four plaintiffs - thereby risking increased costs.

134 Further, conducting a "summary" review of the prescription defence against three of the plaintiffs may well delay the trial of the action asserted by the other four. The unsuccessful party on the summary judgment would be entitled to appeal and, as a practical matter, the trial involving the remaining four plaintiffs could not proceed until that appeal was heard. As a result, a prescription-focused summary judgment motion which Sobeys argued would save no more than two or three days of trial if successful, could significantly delay the trial of the balance of the action, a trial which Sobeys concedes is necessary at least on some issues. Such an approach would not result in "the just, most expeditious and least expensive determination" of the proceeding on the merits.

135 In sum, when the savings in trial time estimated by Sobeys resulting from a successful prescription-focused motion is weighed against the potential for the delay in the action involving the other four plaintiffs and the need to consider the same limitations defence against those four defendants, I do not regard the scheduling of a summary judgment motion on that matter as promoting the General Principle contained in Rule 1.04(1) or the principle of proportionality set out in Rule 1.04(1.1). To the contrary, I view the scheduling of such a motion as violating both principles, and I therefore refuse to schedule that part of the motion planned by Sobeys.

E. Summary

136 In sum, for the reasons set out above I decline to schedule the motion for summary judgment sought by Sobeys. This matter must proceed to trial as requested by the plaintiffs. I therefore make the following directions:

(i) Further examinations on undertakings and refusals, if any, shall take place by October 30, 2012;

(ii) If any issue arises about refusals, the parties shall book a 9:30 appointment on my list. As in the *George Weston v. Domtar* case, my inclination would be to require the parties to adhere to Rule 34.12(2) on their examinations, save for questions involving privilege;

(iii) Before the end of September the parties shall consult and prepare a proposed trial plan, specifying the anticipated length of the trial, identifying all witnesses, establishing deadlines for the delivery of expert reports, and proposing how the parties intend to adduce the documentary evidence at the trial. I repeat my earlier statement that the Court is open to receiving creative proposals from counsel about the method of conducting the trial;

(iv) No later than October 30, 2012 the parties shall appear before Morawetz J. to secure a date for the trial of this action. The parties shall present Morawetz J. with a copy of their proposed trial plan; and,

(v) The costs of this motion are reserved to the trial judge.

IX. Final comment

137 I wish to express my appreciation to counsel in both actions for the most helpful written and oral

submissions which they made on these motions. They were of great assistance.

D.M. BROWN J.

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138

SCHEDULE "A"

Information to be provided by the parties when requesting a date for the hearing of a lengthy post-discovery motion for summary judgment

(excerpted from *1318214 Ontario Limited v. Sobeys Capital Incorporated*[59])

A. What will the proposed summary judgment motion look like?

[18] In order to paint a reasonably detailed and accurate picture for the court about what will be involved in the requested motion for summary judgment, both parties should address the following issues:

(i) **Length of motion:** How long will the motion take using a "real world", not an "ideal world", time estimate? How do the parties propose to divide the time at any motion hearing?

(ii) **Issues:** What specific issues will the court be asked to determine on the motion for summary judgment? Vague descriptions such as "breach of contract" or "breach of fiduciary duty" are not helpful. Specifics are required;

(iii) **Affiants:** Who will they be? What issues will they address? How long will their affidavits be? What period of time will the affiants cover in their affidavits - is this a case where the factual chronology spans a few weeks or several years? Has the affiant been examined for discovery? If so, how long was the discovery? Will the affiant be cross-examined? If so, for how long? Are there any issues about the availability of the affiant as a witness for the trial - e.g. illness, out-of-jurisdiction location, etc.? What, if any, issues are anticipated about the admissibility of the evidence offered by the affiants and how long do counsel expect the argument over admissibility to take?

(iv) **Documents:** Will the documents go in on consent? If not, what admissibility issues may arise? How many documents in total do the parties anticipate placing before the court on the summary judgment motion? How many key documents really are engaged by this case? Usually it is only a handful.

(v) **Experts:** Will there be any expert reports? If so, from whom and on what issues? Are the reports ready? How long will it take to prepare any responding expert report?

(vi) **Prior examinations:** What volume of transcripts from previous examinations

do the parties intend to place before the court? From which witnesses?

(vii) **Legal arguments:** What legal issues will the parties address in their factums? What length of factums do the parties anticipate? How many legal authorities do the parties intend to ask the court to read?

B. What will the proposed trial look like?

[19] To enable the court to understand the alternative to a lengthy Post-Discovery summary judgment motion - i.e. a trial - the parties should submit information which details the following:

(i) **Length of trial**: How long will the trial take, broken down amongst time for opening statements, evidence, closing submissions and intra-trial motions?

(ii) **Evidence:** Each party should identify the witnesses they intend to call at trial and specify the anticipated lengths of the examinations-in-chief and cross-examinations for each witness, including the expert witnesses;

(iii) **Documents:** How many documents do the parties anticipate adducing at trial? How many documents may be contested?

(iv) **In-trial motions:** What motions, if any, do the parties anticipate bringing at the start of or during the trial? How much time should be allocated for each motion?

C. If full or partial summary judgment were granted, what amount of pre-trial preparation and trial time would be saved?

[20] If full summary judgment is granted either dismissing an action or granting judgment in favour of the plaintiff, obviously the entire amount of anticipated trial time would be saved. However, if only partial summary judgment is requested, the moving party should provide the following information:

(i) What issues - factual and legal - would no longer require an adjudication at trial?

(ii) Identify which witnesses, including expert witnesses, would not need to testify at trial or what reduction in the length of their overall trial testimony might occur;

(iii) Identify the anticipated reduction in the number of documents which would be filed at trial;

(iv) Identify the anticipated reduction in the length of opening and closing submissions;

(v) Provide an overall estimate of the anticipated reduction in the length of the trial.

[21] The responding party should provide the court with the following information:

(i) Does the responding party agree with the anticipated trial time savings submitted by the moving party? If not, the responding party should detail the reasons for its disagreement;

(ii) The responding party should identify the areas in dispute upon which it is prepared to agree on the facts.

cp/e/qljel/qlpmg/qlced/qlhcs/qlcas/qlcas

1 2011 ONCA 764, paras. 1 and 2.

2 *Ibid.*, para. 3.

3 *Ibid.*, para. 4.

4 *Ibid.*, para. 58.

5 I developed this point in some detail in *"Sacred Cows and Stumbling Blocks: Whither Civil Procedure Reform?"*, Law Society of Upper Canada, May 31, 2011.

6 See the extensive discussion of the source of inherent powers in *Abrams v. Abrams*, 2010 ONSC 2703, paras. 30 to 34 and 42 to 45; leave to appeal refused 2010 ONSC 4714 (Div. Ct.).

7 *Abrams, SCJ, supra.* paras. 35, 37, 38 and 39.

8 *Ibid.*, para. 34.

9 *Ibid.*, para. 41.

10 *Ibid.*, para. 56.

11 *Combined Air, supra.*, para. 36.

12 *Ibid.*, para. 38

13 *Ibid.*, para. 38

14 *Ibid.*, para. 39.

15 *Ibid.*, paras. 40 to 45.

16 *Ibid.*, para. 50.

17 *Ibid.*, para. 75.

18 *Ibid.*, paras. 53-54

19 *Ibid.*, para. 55.

20 *Ibid.*, para. 148.

21 *Ibid.*, paras. 51 and 52.

22 *Ibid.*, para. 219.

23 *Ibid.*, para. 68.

24 An extensive jurisprudence exists under the British Columbia and Alberta rules of practice about when a summary trial would be appropriate. See, for example: *Duff v. Oshust*, 2005 ABQB 117, para. 24 and *Western Delta Lands Partnership v. 3557537 Canada Inc.*, 2000 BCSC 54, para. 24.

25 Dr. Seuss, *Green Eggs and Ham* (New York: Beginner Books, 1960)

26 2012 ONSC 2784, para. 23.

27 2012 ONSC 4380, para. 16.

28 *Harris v. Leikin Group*, 2011 ONSC 3556, para. 404; *D'Addario v. EnGlobe Corp.*, 2012 ONSC 1918, para. 14.

29 See Rules 20.05(2), 50.07(1)(c), 53.01 and 53.02.

30 Rule 20.05(2).

31 Rule 50.07(1)(c).

32 [2003] O.J. No. 1309, 2003 CanLII 6252 (ON SC)

33 *Meditrust Healthcare Inc. v. Shoppers Drug Mart*, 2000 CarswellOnt 3629 (S.C.J.), para. 11.

34 [2009] O.J. No. 1584, 2009 CanLII 18230 (ON SC).

35 *Ibid.*, para. 19.

36 2010 ONSC 1685

37 *Ibid.*, para. 10.

38 *Livingston v. Gravel*, Court File No. CV-08-359997 (unreported endorsement dated March 8, 2012).

39 2012 ONSC 2724

40 *Ibid.*, para. 14.

41 *Combined Air*, paras. 57 and 58 (emphasis added).

42 *Ibid.*, para. 38.

43 This language is taken from Rule 9-7(11) of the *British Columbia Supreme Court Rules.*

44 2012 ONSC 2784, paras. 14 and 17.

45 *1318214 Ontario Limited v. Sobeys Capital Incorporated*, 2012 ONSC 2784, para. 17.

46 2012 ONSC 1252.

47 *Dumbrell v. The Regional Group of Companies Inc.*, 2007 ONCA 59, paras. 51-56; *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust,* 2007 ONCA 205, para. 24.

48 *Dumbrell, supra.*, paras. 53 and 54.

49 [1997] O.J. No. 3773 (Gen. Div.), appeal allowed [1998] O.J. No. 4368 (C.A.)

50 *Ibid.*, para. 12.

51 *Combined Air, supra.*, paras. 61 and 62. I respectfully disagree with this portion of the *Combined Air* decision, although I am bound to follow it, and I do follow it. I understand the need to prevent Rule 20 motions from sliding into a form of summary trial. As I set out earlier in these Reasons, ample authority exists for a court to direct a mode of trial which is hybrid in nature, drawing extensively on a written record. Turning Rule 20 into a summary trial rule is not necessary to achieve that result. However, the judicial power to direct the hearing of oral evidence under Rule 20.04(2.2) will only gain traction if it does not result in unduly higher motion costs to the parties. By preventing a judicial direction in advance of the motion hearing about whether some oral evidence should be heard, the *Combined Air* decision, for all practical purposes, creates a two-stage Rule 20 hearing in the event that oral evidence is heard. The cost of a two-stage hearing no doubt will prove unattractive for most parties and risks severely restricting judicial resort to the powers contained in Rule 20.04(2.2).

52 *Fairview Donut Inc. v. The TDL Group Corp.,* 2012 ONSC 1252, paras. 367 and 386.

53 *Ibid.*, para. 422

54 2012 ONSC 2784

55 Sobeys' Written Submissions, para. 20

56 2010 ONSC 2117; affirmed (except with respect to costs) 2011 ONCA 491.

57 *Combined Air, supra.*, para. 51.

58 2010 ONCA 126, paras. 33 and 41.

59 2012 ONSC 2784, paras. 14 and 17.

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

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