

Court File No. CV-19-615862-00CL  
Court File No. CV-19-616077-00CL  
Court File No. CV-19-616779-00CL

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE  
OR ARRANGEMENT OF **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE  
OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED**  
AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE  
OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

**BOOK OF AUTHORITIES**

**(PCC Representative Counsel's Motion for Injunctive Relief)**  
**(Returnable on December 9, 2024)**

December 9, 2024

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**THE COMMON SERVICE  
LIST**

## List of Authorities

1. *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12; 1993 CarswellBC 10 (SCC)
2. *Consumers Distributing Co. v. Seiko Time Canada Ltd.*, [1984] 1 S.C.R. 583; 1984 CarswellOnt 869 (SCC)
3. *Moushoom v. Canada (Attorney General)*, 2022 FC 1212
4. *R. v. Canadian Broadcasting Corp*, 2018 SCC 5; 2018 CarswellAlta 206 (SCC)
5. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; 1994 CarswellQue 120 (SCC)

TAB 1

1993 CarswellBC 10  
Supreme Court of Canada

BG Checo International Ltd. v. British Columbia Hydro & Power Authority,

1993 CarswellBC 1254, 1993 CarswellBC 10, [1993] 1 S.C.R. 12, [1993] 2 W.W.R. 321, [1993] B.C.W.L.D. 714, [1993] S.C.J. No. 1, 147 N.R. 81, 14 C.C.L.T. (2d) 233, 20 B.C.A.C. 241, 35 W.A.C. 241, 37 A.C.W.S. (3d) 1202, 5 C.L.R. (2d) 173, 75 B.C.L.R. (2d) 145, 99 D.L.R. (4th) 577, J.E. 93-271, EYB 1993-67096

**BRITISH COLUMBIA HYDRO AND POWER  
AUTHORITY v. BG CHECO INTERNATIONAL LIMITED**

BG CHECO INTERNATIONAL LTD. v. BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Stevenson\* and Iacobucci JJ.

Heard: January 28, 1992

Judgment: January 21, 1993

Docket: Docs. 21939, 21955

Counsel: *Glenn A. Urquhart, Arthur M. Grant and Gordon D. Phillips*, for British Columbia Hydro and Power Authority.  
*Donald J. Sorochan, Q.C., Meredith A. Quartermain and Mari A. Worfolk*, for BG Checo International Ltd.

Subject: Contracts; Torts; Civil Practice and Procedure; Corporate and Commercial

**Headnote**

Actions --- Cause of action — Action in both contract and tort

Construction Law --- Building contract — Execution of formal contract — Tendering process — Relation of subcontractor to contractor

Fraud and Misrepresentation --- Fraudulent misrepresentation — Specific elements — Miscellaneous elements

Parties' intention being that specific contractual obligation qualifying general one.

Court remitting determination of damages for breach of contract and negligent misrepresentation to trial court.

Defendant having no intention to deceive and so not being liable for fraudulent misrepresentation.

Parties' intention being that specific contractual obligation qualifying general one.

Court remitting determination of damages for breach of contract and negligent misrepresentation to trial court.

Parties' intention being that specific contractual obligation qualifying general one.

Court remitting determination of damages for breach of contract and negligent misrepresentation to trial court.

Both parties were large corporations. The defendant utility called for tenders to erect transmission towers. Before submitting a tender, the plaintiff contractor's agent inspected the area. He noted that the right-of-way had been partially cleared, with clearing activity ongoing. The defendant accepted the plaintiff's tender and the parties entered into a written contract which incorporated the tender documents. One clause stated that clearing of the right-of-way had been done by others and formed no part of the work to be performed by the contractor. Another stated that it was the contractor's responsibility to inform itself of all aspects of the work, and to obtain clarification of any errors or ambiguities in the tender documents before submitting its tender. A third clause provided that the contractor would satisfy itself of all site conditions and the sufficiency of the tender for the work. The contract stipulated 15 per cent for overhead and profit on extra work. No further clearing of the right-of-way took place, causing the plaintiff numerous difficulties in completing its work. It sued for damages for negligent misrepresentation or for breach of contract. With the evidence at trial indicating that the defendant knew of the clearing problem and of the impact that would have on the successful tenderer, the plaintiff added a claim in fraud. The trial judge found that the defendant had acted fraudulently. He held the defendant liable for what the plaintiff lost overall on the contract, plus a 15 per cent markup for overhead and profit. The Court of Appeal rejected the finding of fraud as no dishonesty had been proven. It found that there had been a negligent misrepresentation which induced the plaintiff to enter into a contract at a price less than it would have, had it known the true

facts. The court awarded a reduced sum representing the extra work attributable to an improperly cleared work site, plus 15 per cent for overhead and profit. It referred the question of breach of contract and damages flowing therefrom to the trial court. The defendant appealed and the plaintiff cross-appealed.

**Held:**

Appeal dismissed; cross-appeal allowed in part; quantification of damages for negligent misrepresentation and breach of contract referred to trial court.

Per LA FOREST and MCLACHLIN JJ. (L'HEUREX-DUBÉ and GONTHIER JJ. concurring): As there was no intention to deceive, the appeal on the issue of fraudulent misrepresentation should be dismissed.

The various parts of a contract are to be interpreted in the context of the parties' intentions as evident from the contract as a whole. Where there are apparent inconsistencies, the court may reconcile them by construing a specific term as a qualification of a general one. Here, the plaintiff's general obligation for misunderstandings and errors and for satisfying itself as to the site, was not intended to negate the defendant's specific obligation for clearing. The defendant's breach of contract was established. Where a given wrong seems to support an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort. This limitation arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence. The mere fact that the parties have dealt with the matter expressly in their contract does not mean that they intended to exclude the right to sue in tort. It all depends on how they have dealt with it. Insofar as the tort duty is not contradicted by the contract, it remains intact and may be sued upon. Here, the duty in contract and the common law duty in tort were co-extensive. The contract did not negate the defendant's common law duty to avoid negligent misrepresentation. Accordingly, the plaintiff might sue in tort.

There should be no distinction between express and implied terms of a contract as a basis for determining when a contract term may affect tort liability. The law has always treated express and implied contract terms as being equivalent in effect. Moreover, it is difficult to distinguish between them in some cases. Nor is it evident that by including an express contractual term parties intend to oust the availability of the relevant tort remedy. Finally, the distinction will be difficult to apply where the express contractual term does not exactly overlap a tort duty. Here, the contract did not limit the duty of care owed by the defendant to the plaintiff. Nor did the plaintiff waive its common law right to bring a tort action. The plaintiff was entitled to claim against the defendant in tort.

Damages in contract must put the plaintiff in the position it would have been in had the contract been performed as agreed. Damages in tort for negligent misrepresentation must put the plaintiff in the position it would have been in had the misrepresentation not been made. Contract is normally concerned with "expectation" damages and tort with "reliance" damages. In situations of concurrent liability in tort and contract, it would be anomalous to award a different level of damages for essentially the same wrong on the sole basis of the form of action chosen, though particular circumstances or policy may dictate such a course. The main reason to expect a difference between tort and contract damages is the exclusion of bargain elements in standard tort compensation. The denial of "expectation" or "bargain" damages in a misrepresentation case will occur when it is concluded that but for the misrepresentation no contract would have been entered into at all. Here, the plaintiff would have entered the contract in any event, albeit at a higher bid. Therefore, the quantum of damages in tort and contract would be similar. In tort, the real fault was that the defendant misrepresented the situation. Had the plaintiff known the true facts, it would have increased its bid to cover the extra work plus profit and overhead. It might have relied on the misrepresentation in performing its other obligations under the contract. The trial court should determine whether any indirect losses were reasonably foreseeable results of the misrepresentation. In contract, the plaintiff should be put in the position it would have been in had the worksite been cleared properly. It should therefore be reimbursed for all expenses, except those so unexpected as to be too remote. The remoteness test in contract may be of no practical difference from the reasonable foreseeability test in tort. The breach of contract claims should also be remitted to the trial court.

Per IACOBUCCI J. (dissenting in part) SOPINKA J. (concurring): Misrepresentation must be made with intent to deceive in order to be actionable. As there was insufficient evidence to support a finding of deceit against the defendant, the Court of Appeal correctly reversed the trial judge on that point.

The existence of a contract does not generally preclude the existence of a common law duty of care. The plaintiff may select the cause of action most advantageous to it. However, the terms of a contract may limit or exclude either the defendant's liability in tort or its duty in tort. Firstly, a plaintiff may not plead in tort in order to circumvent a contractual clause excluding or limiting the defendant's liability. Secondly, the contractual relationship can bring the parties into sufficient proximity to give rise to a

duty of care. However, no duty of care in tort can be concurrent with a duty of care created by an express term of the contract. If the duty is defined by an express term of the contract, the plaintiff will be confined to whatever remedies are available in the law of contract. While this rule does not depend on the intention of the parties, their wish to have the law of the contract govern respecting a duty can be inferred from the duty having been made an express term. Moreover, where an express term creates a contractual duty, the parties should be held to the certain bargain they have made. Tort duties are of uncertain definition and scope. However, the rule that forecloses a tort claim is not absolute in all circumstances. The court should take into account the context in which the contract is made, and the position of the parties to one another, in assessing whether a tort claim is foreclosed by contractual terms. The policy reasons in favour of the rule are strongest where the contractual context is commercial and the parties are of equal bargaining power. The court should not exclude a duty of care in tort on the basis of an express term of the contract, if the end result for the plaintiff would be a wrong without a remedy. These principles apply to an action in tort for negligent misrepresentation. The fact that the parties are in a contractual relationship is not in itself a bar to such an action. The plaintiff may have the option of concurrent remedies in tort and contract. However, where the duty arising in tort is co-extensive with a duty created by an express term of the contract, the plaintiff will be limited to whatever remedies are available under the contract. Here the contractual duty was co-extensive with the common law duty of care upon which the plaintiff relied for its tort action. The transaction occurred in a commercial setting and there was no inequality of bargaining power. The plaintiff knew that any disputes would potentially be governed by the contract. That context confirmed that the plaintiff should be limited to any remedies which might be available to it under the contract. There was no clause in the contract or in the tender documents which either limited or excluded the defendant's liability for misrepresentation. As the right-of-way was not cleared, the defendant breached the contract. A new trial should be held on the question of damages for breach of contract.

Appeal and Cross-appeal from judgment of Court of Appeal for [British Columbia](#), [1990] 3 W.W.R. 690, 44 B.C.L.R. (2d) 145, 4 C.C.L.T. (2d) 161, 41 C.L.R. 1, allowing in part appeal from judgment of Cohen J., [1988] B.C.W.L.D. 2324, awarding damages for fraudulent misrepresentation but precluding recovery for negligent misrepresentation or breach of contract.

***La Forest and McLachlin JJ. (L'Heureux-Dubé and Gonthier JJ. concurring)::***

1 We have had the advantage of reading the reasons for our colleague Justice Iacobucci. We agree with his conclusion that Hydro is liable to Checo for breach of contract. We disagree, however, with his conclusion that the contract precludes Checo from suing in tort. In our view, our colleague's approach would have the effect of eliminating much of the rationalizing thrust behind the movement towards concurrency in tort and contract. Rather than attempting to establish new barriers to tort liability in contractual contexts, the law should move towards the elimination of unjustified differences between the remedial rules applicable to the two actions, thereby reducing the significance of the existence of the two different forms of action and allowing a person who has suffered a wrong full access to all relevant legal remedies.

2 The facts have been fully set out by our colleague and need not be repeated. The tender documents (subsequently incorporated in the contract) stated that clearing of the right-of-way would be done by others and formed no part of the work to be performed by Checo. The tender documents and contract documents also stated that it was Checo's responsibility to inform itself of all aspects of the work and that should any errors appear in the tender documents, or should Checo note any conditions conflicting with the letter or spirit of the tender documents, it was the responsibility of Checo to obtain clarification before submitting its tender. The tender documents also provided that Checo would satisfy itself of all site conditions and the correctness and sufficiency of the tender for the work and the stipulated prices.

3 Checo argues that the right-of-way was not properly cleared and that the statement in the tender documents and the contract that it had been cleared constituted a breach of contract and negligent misrepresentation.

4 Hydro argues first that it carried out the clearing required by cl. 6.01.03 of the contract, and second, that in any event it was up to Checo to satisfy itself that the site was adequately cleared before tendering. In other words, if there was ambiguity as to what was meant by "cleared" Checo had assumed the risk of clearing which might not meet its expectations.

5 The trial judge found Hydro liable for the tort of deceit. The Court of Appeal found that the evidence fell short of supporting that finding, there being no evidence of intention to deceive. That conclusion cannot seriously be contested and Checo's cross-

appeal on the issue of fraudulent misrepresentation must accordingly be dismissed. The only issues therefore are whether claims lie in contract and tort and if so, what is the measure of damages.

### The Claim in Contract

6 The parties chose to set out their respective rights and obligations in the contract they signed. They chose to incorporate the tender documents into the contract. Thus all rights and obligations flowing from the tender documents onward are set by the parties' own agreement.

7 It follows that a court, in assessing the rights and obligations of the parties, must commence with the contract. It must look to what the parties themselves had to say about those rights and obligations.

8 This brings us to construction of the contract. The problem is that of reconciling provisions in the contract which are said to be inconsistent. One, the provision that placed on Hydro the obligation of clearing the right-of-way, was specific. Clause 6.01.03 stated that "clearing of the right-of-way and foundation installation has been carried out by others and will not form part of this Contract." It went on to state a limited exception for two areas, again drafted in specific terms: "Standing trees and brush have not been removed from the right-of-way in certain valley and gully crossings." The other relevant provisions are the general provisions placing on Checo the responsibility of any misunderstandings as to the conditions of the work or errors in the tender documents (cl. 2.03), and for satisfying itself before bidding as to site conditions, quantities of work, etc., and requiring it to "obtain all necessary information as to risks, contingencies, and other circumstances which may influence or affect [its] Tender" (cl. 4.04).

9 It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole: K. Lewison, *The Interpretation of Contracts* (1989), at p. 124; *Chitty on Contracts*, vol. 1, 26th ed. (1989), at p. 520. Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective: *Chitty on Contracts*, at p. 526; Lewison, at p. 206; *Forbes v. Git* (1921), 62 S.C.R. 1, 59 D.L.R. 155, per Duff J. (as he then was), dissenting, at p. 10 [S.C.R.], reversed [1922] 1 A.C. 256, [1922] 1 W.W.R. 250, 61 D.L.R. 353 (P.C.); *Hassard v. Peace River Co-operative Seed Growers Association Ltd.*, [1954] 2 D.L.R. 50 (S.C.C.), at p. 54. In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term: *Forbes v. Git*, [1922] 1 A.C. 256; *Cotter v. General Petroleums Ltd.*, [1951] S.C.R. 154, [1950] 4 D.L.R. 609. A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms — or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term.

10 Approaching the matter in this way, the provisions referred to above are capable of reconciliation. The parties agreed that Hydro should bear the responsibility of clearing the right-of-way. The only exception was as to the removal of trees and debris in certain valley and gully crossings. The general obligation of Checo for misunderstandings and errors in the tender documents and for satisfying itself as to the site, the work and all contingencies must not have been intended to negate the specific obligation for clearing which the contract placed squarely on the shoulders of Hydro. The failure to discharge that responsibility was not a "misunderstanding" or "error" in the tender documents within cl. 2.03. Nor was it relevant to the tenderer's inspection of the site or responsibility for risks and contingencies that might affect the bid within cl. 4.04. Given the specific nature of Hydro's obligation to clear the right-of-way, the site inspection and contingencies referred to can reasonably be read as relating to matters other than clearing, which was a clearly assigned obligation and thus not a contingency. The same applies to the provision for preparation of the site (cl. 7.01.02). In this way, the clause placing on Hydro the obligation to clear the right-of-way can be reconciled with the clauses placing on Checo the consequences of errors and misunderstandings in the tender documents and the obligation to satisfy itself as to the site, the work and contingencies.

11 We thus conclude that the contract required Hydro to clear the right-of-way as specified in cl. 6.01.03 of the contract and that duty was not negated by the more general clauses relating to errors and misunderstandings in tendering, site conditions



and contingencies. This was the view of the trial judge and the majority in the Court of Appeal. The trial judge, based on the evidence he heard, went on to define what "clearing" meant in the contract; it meant that "the right-of-way would be free of logs and debris." The majority of the Court of Appeal accepted this conclusion. So must we. Since it is not seriously contended that Hydro cleared the right-of-way to this standard, Hydro's breach of contract is established.

12 The plaintiff suing for breach of contract is to be put in the position it would have been in had the contract been performed as agreed. The measure of damages is what is required to put Checo in the position it would have been in had the contract been performed as agreed. If the contract had been performed as agreed, Hydro would have removed the logs and debris from the right-of-way. Checo would not have been required to do the additional work that was necessitated by reason of the worksite being improperly cleared. It might also have avoided certain overhead. The contract stipulated 15 percent for overhead and profit on extra work. Checo may be entitled to a portion of this sum for overhead. It would not be entitled to profit on the cost of clearing the right-of-way, since that would put Checo in a better position than it would have been had Hydro performed its contract; Checo never bargained for profit on this work, which was totally outside the parties' expectations. As will be explained in greater detail later in these reasons, we share Iacobucci J.'s view that if damages are to be assessed for breach of contract regarding the improper clearing of the worksite, the case should be returned to trial for that to be done.

## The Claim in Tort

### *The Theory of Concurrency*

13 The first question is whether the contract precludes Checo from suing in tort.

14 Iacobucci J. concludes that a contract between the parties may preclude the possibility of suing in tort for a given wrong where there is an express term in the contract dealing with the matter. We would phrase the applicable principle somewhat more narrowly. As we see it, the right to sue in tort is not taken away by the contract in such a case, although the contract, by limiting the scope of the tort duty or waiving the right to sue in tort, may limit or negate tort liability.

15 In our view, the general rule emerging from this Court's decision in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, (sub nom. *Central & Eastern Trust Co. v. Rafuse*) 37 C.C.L.T. 117, 42 R.P.R. 161, 34 B.L.R. 187, 31 D.L.R. (4th) 481, is that where a given wrong prima facie supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence. This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility. Thus if a person wishes to engage in a dangerous sport, the person may stipulate in advance that he or she waives any right of action against the person who operates the sport facility: *Dyck v. Manitoba Snowmobile Association Inc.*, [1985] 1 S.C.R. 589, [1985] 4 W.W.R. 319, 32 C.C.L.T. 153, 32 M.V.R. 192, 35 Man. R. (2d) 22, 18 D.L.R. (4th) 635. Similarly, if two business firms agree that a particular risk should lie on a party who would not ordinarily bear that risk at common law they may do so. So a plaintiff may sue either in contract or tort, subject to any limit the parties themselves have placed on that right by their contract. The mere fact that the parties have dealt with a matter expressly in their contract does not mean that they intended to exclude the right to sue in tort. It all depends on *how* they have dealt with it.

16 Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering — the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort. It is only to the extent that this private ordering contradicts the tort duty that the tort duty is diminished. The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon. For example, where the contractual limitation on the tort duty is partial, a tort action founded on the modified duty might lie. The tort duty as modified by the contractual agreement between the parties might be raised in a case where the limitation period for an action for breach of contract has expired but the limitation period for a tort action has not. If one says categorically, as we

understand Iacobucci J. to say, that where the contract deals with a matter expressly, the right to sue in tort vanishes altogether, then the latter two possibilities vanish.

17 This is illustrated by consideration of the three situations that may arise when contract and tort are applied to the same wrong. The first class of case arises where the contract stipulates a more stringent obligation than the general law of tort would impose. In that case, the parties are hardly likely to sue in tort, since they could not recover in tort for the higher contractual duty. The vast majority of commercial transactions fall into this class. The right to sue in tort is not extinguished, however, and may remain important, as where suit in contract is barred by expiry of a limitation period.

18 The second class of case arises where the contract stipulates a lower duty than that which would be presumed by the law of tort in similar circumstances. This occurs when the parties by their contract indicate their intention that the usual liability imposed by the law of tort is not to bind them. The most common means by which such an intention is indicated is the inclusion of a clause of exemption or exclusion of liability in the contract. Generally, the duty imposed by the law of tort can be nullified only by clear terms. We do not rule out, however, the possibility that cases may arise in which merely inconsistent contract terms could negate or limit a duty in tort, an issue that may be left to a case in which it arises. The issue raises difficult policy considerations, viz., an assessment of the circumstances in which contracting parties should be permitted to agree to contractual duties that would subtract from their general obligations under the law of tort. These important questions are best left to a case in which the proper factual foundation is available, so as to provide an appropriate context for the decision. In the second class of case, as in the first, there is usually little point in suing in tort since the duty in tort and consequently any tort liability is limited by the specific limitation to which the parties have agreed. An exception might arise where the contract does not entirely negate tort liability (e.g., the exemption clause applies only above a certain amount) and the plaintiff wishes to sue in tort to avail itself of a more generous limitation period or some other procedural advantage offered by tort.

19 The third class of case arises where the duty in contract and the common law duty in tort are co-extensive. In this class of case, like the others, the plaintiff may seek to sue concurrently or alternatively in tort to secure some advantage peculiar to the law of tort, such as a more generous limitation period. The contract may expressly provide for a duty that is the same as that imposed by the common law. Or the contractual duty may be implied. The common calling cases, which have long permitted concurrent actions in contract and tort, generally fall into this class. There is a contract. But the obligation under that contract is typically defined by implied terms, i.e., by the courts. Thus there is no issue of private ordering as opposed to publicly imposed liability. Whether the action is styled in contract or tort, its source is an objective expectation, defined by the courts, of the appropriate obligation and the correlative right.

20 The case at bar, as we see it, falls into this third category of case. The contract, read as we have proposed, did not negate Hydro's common law duty not to negligently misrepresent that it would have the right-of-way cleared by others. Had Checo known the truth, it would have bid for a higher amount. That duty is not excluded by the contract, which confirmed Hydro's obligation to clear the right-of-way. Accordingly, Checo may sue in tort.

21 We conclude that actions in contract and tort may be concurrently pursued unless the parties by a valid contractual provision indicate that they intended otherwise. This excludes, of course, cases where the contractual limitation is invalid, as by fraud, mistake or unconscionability. Similarly, a contractual limitation may not apply where the tort is independent of the contract in the sense of falling outside the scope of the contract, as the example given in *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522 (H.L.), of the captain of a vessel falling asleep and starting a fire in relation to a claim for cargo damage.

### ***The Express-Implied Distinction***

22 Our colleague asserts that where the parties deal with a matter expressly in their contract, all right to sue in tort is lost. We have suggested, with great respect, that this proposition is unnecessarily draconian. The converse of this proposition is that implied terms of contracts do not oust tort liability.

23 Although Iacobucci J. states at p. 33 [pp. 183-84] of his reasons that he is leaving open the question of "Whether or not an implied term of a contract can define a duty of care in such a way that a plaintiff is confined to a remedy in contract",

the distinction between implied and express terms figures in his discussion of the effect of contract terms on tort liability. For example, at p. 32 [p. 184] of his reasons, our colleague states:

The compromise position adopted by Le Dain J. was that any duty arising in tort will be concurrent with duties arising under the contract, *unless the duty which the plaintiff seeks to rely on in tort is also a duty defined by an express term of the contract*. [The emphasis is Iacobucci J.'s.]

It would seem to follow from this statement that concurrent duties in contract and tort would lie where the contract duty is defined by an *implied* term of the contract, but not where the term is express. In these circumstances, it is not amiss to consider the utility of the distinction between express and implied terms of the contract as a basis for determining when a contract term may affect tort liability.

24 In our view, using the express-implied distinction as a basis for determining whether there is a right to sue in tort poses a number of problems. The law has always treated express and implied contract terms as being equivalent in effect. Breach of an implied term is just as serious as breach of an express term. Moreover, it is difficult to distinguish between them in some cases. Implied terms may arise from custom, for example, or from the conduct of the parties. In some cases words and conduct intermingle. Why should parties who were so certain in their obligations that they did not take the trouble to spell them out find themselves able to sue in tort, while parties who put the same matters in writing cannot?

25 Nor is it evident to us that if parties to a contract choose to include an express term in the contract dealing with a particular duty relevant to the contract, they intended to oust the availability of tort remedies in respect of that duty. In such cases, the intention may more likely be:

26 (a) To make it clear that the parties understand particular contractual duties to exist as between them, rather than having the more uncertain situation of not knowing whether a court will imply a particular duty under the contract; and/or

27 (b) To prevent litigation (for breach of contract) in the event of disputes arising — the more certain the parties' respective rights and obligations (as is usually the case when those rights and obligations are set out in express contractual terms), the more likely it will be that disputes between the parties can be settled.

28 While the tort duty may be limited by the contractual terms so as to be no broader than the contract duty, there is no reason to suppose that merely by stipulating a duty in the contract, the parties intended to negate all possibility of suing in tort.

29 Indeed, a little further on in his reasons, our colleague appears to concede that the ouster of recourse to tort law must depend on more than the fact the contract has expressly dealt with the matter. He indicates at pp. 34-35 [p. 184] of his reasons that whether the parties will be held to have intended to oust tort remedies in favour of contract remedies will depend on the context, including:

30 (a) whether the contract is commercial or non-commercial;

31 (b) whether the parties were of equal bargaining power;

32 (c) whether the court is of the view that to find such an intention will lead to an unjust result in the court action.

33 Thus the question of whether a concurrent action in tort lies would depend not only on whether the contract expressly deals with the matter, but also on the elastic distinctions between commercial and non-commercial contracts, the court's perception of relative bargaining power, and finally, whether the court sees the result as just or unjust. We do not agree that parties contracting in a commercial context should be presumed to be more desirous of ousting the availability of tort remedies than parties contracting in a non-commercial context. If there are particular commercial relationships in which the parties wish remedies for disputes between them to be in contract only, then they may be expected to indicate this intention by including an express clause in the contract waiving the right to sue in tort. As for equality of bargaining power and the court's view of whether the result would be just or unjust, we fear they would introduce too great a measure of uncertainty. Parties should be able to predict in advance whether their remedies are confined to contract or whether they can sue concurrently in tort and contract. Finally, it

seems to us that Iacobucci J.'s test for determining when concurrent liability is precluded will be difficult to apply in situations where the express contractual term does not exactly overlap a tort duty. In the present case, the contractual term was identical to the negligent misrepresentation, but that is not often to be expected.

### *The Authorities*

34 The authorities, as we read them, do not support the conclusion that the express mention of a matter in the contract, and only its express mention in the contract, ousts any possibility of suing in tort. The opposing schools of thought on the concurrent liability issue have not been divided along such lines. Instead, the issue has been whether there should be concurrent liability where any term of a contract, either express *or* implied, deals with the same duty imposed by tort law. For example, in *Lister v. Romford Ice & Cold Storage Co.*, [1957] A.C. 555, [1957] 1 All E.R. 125 (H.L.), Viscount Simonds noted (at p. 573) [A.C.]:

It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term *express or implied* in a contract. [Emphasis added.]

35 Similarly in *Canadian Indemnity Co. v. Andrews & George Co.*, [1953] 1 S.C.R. 19, [1952] 4 D.L.R. 690, [1952] I.L.R. 1-089, Rand J. stated (at p. 26) [S.C.R.]:

Where a contract *expressly or by implication of fact* provides for a performance with care, as in the case of carriers, the general duty is clearly not displaced and the person injured or damaged in property may sue either in contract or tort. [Emphasis added.]

36 On the other side of the concurrent liability debate, Wilson J.A. (as she then was), arguing in favour of liability lying in contract only, stated at p. 408 [D.L.R.] in her dissenting opinion in the Ontario Court of Appeal decision of *Dominion Chain Co. v. Eastern Construction Co.* (1976), 12 O.R. (2d) 201, 1 C.P.C. 13, 68 D.L.R. (3d) 385, affirmed (*sub nom. Giffels Associates Ltd. v. Eastern Construction Co.*) [1978] 2 S.C.R. 1346, 4 C.C.L.T. 143, 5 C.P.C. 223, 84 D.L.R. (3d) 344 :

The borderline of contract and tort in my opinion exists where a contract *either expressly or impliedly* imposes on A a duty of care vis-à-vis B, the other party to the contract, to do the things undertaken by the contract without negligence and there is also coincidental with, but independent of, the contract of duty of care upon A in tort ... where the person to whom the duty is owed, the scope of the duty and the standard of care have all been *expressly or impliedly* agreed upon by the parties, it appears to me somewhat artificial to rely upon Lord Atkin's "neighbour" test to determine whether or not the duty is owed to the particular plaintiff and as to the requisite standard of care the defendant must attain. [Emphasis added.]

37 It is perhaps a source of some confusion that in the course of his judgment in *Central Trust Co. v. Rafuse*, supra, Le Dain J. stated (at p. 205) [S.C.R.]:

Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort.

38 In our view, this passage should not be read as predicating the availability of concurrent liability in contract and tort on whether the contractual term is express or implied. Le Dain J. is simply stating that tort liability lies where the contractual term is implied. He does not go on to state that tort liability is always excluded by an express contractual term. This happens only when the express contractual term negates the tort duty. Thus in his summary of the applicable rules, Le Dain J. refers to exclusion clauses — express contract terms that negate general liability — as the kind of contract clause that may oust tort liability.

39 Our colleague relies on a second passage from *Central Trust Co. v. Rafuse*, supra, at p. 205, for the proposition that an express contractual term always ousts tort liability:

2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of

care must be independent of the contract ... A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract.

Again, with respect, our understanding of the passage is different. In our view, Le Dain J.'s use of the words "created" and "depends" indicates the meaning of this passage is simply that for concurrent tort liability to be available there must be a duty of care in tort that would exist even in the absence of the specific contractual term which created the corresponding contractual obligation.

40 This interpretation of *Rafuse* accords with the view taken in other cases that concurrent liability in tort and contract is available where the contractual obligation in question arises from an express term of the contract. For example, in *Batty v. Metropolitan Property Realisations Ltd.*, [1978] 1 Q.B. 554, [1978] 2 All E.R. 445, the English Court of Appeal ruled that the plaintiffs were entitled to judgment against the defendant developers in either contract or tort where a house leased to the plaintiffs on a 999-year lease was gradually becoming uninhabitable due to instability of the land on which the house was built. The contractual obligation owed to the plaintiffs by the developers arose from an express warranty in the contract between the plaintiffs and the developers that the house had been built "in an efficient and workmanlike manner and of proper materials and so as to be fit for habitation ..." (p. 563) [Q.B.]. This contractual obligation in effect corresponded with a tort duty "to examine with reasonable care the land, which in this case would include adjoining land, in order to see whether the site was one on which a house fit for habitation could safely be built" (p. 567).

41 Nor do we see the reference by Le Dain J. in *Rafuse* to *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399 (C.A.), and other related English case law differentiating tort and contract, as supportive of a distinction between express and implied contractual terms. The issue in those cases was one of classifying the causes of action as *either* tort *or* contract for procedural purposes under the successive County Courts Acts. Indeed, they may be seen as resting on the assumption that, apart from statutory prescription, concurrent actions may lie.

### Summary

42 We conclude that neither principle, the authorities nor the needs of contracting parties, support the conclusion that dealing with a matter by an express contract term will, in itself, categorically exclude the right to sue in tort. The parties may by their contract limit the duty one owes to the other or waive the right to sue in tort. But subject to this, the right to sue concurrently in tort and contract remains.

43 In the case at bar, the contract did not limit the duty of care owed by Hydro to Checo. Nor did Checo waive its common law right to bring such tort actions as might be open to it. It follows that Checo was entitled to claim against Hydro in tort.

### Damages in Tort and Contract in this Case

44 The measure of damages in contract and for the tort of negligent misrepresentation are:

45 *Contract* : the plaintiff is to be put in the position it would have been in had the contract been performed as agreed.

46 *Tort* : the plaintiff is to be put in the position it would have been in had the misrepresentation not been made.

47 At trial the plaintiff relied primarily on fraudulent misrepresentation, with its claim in contract being in the alternative to the claim in tort. The apparent reason for this approach was that the plaintiff had calculated its damages in tort as exceeding the damages in contract. In situations of concurrent liability in tort and contract, however, it would seem anomalous to award a different level of damages for what is essentially the same wrong on the sole basis of the form of action chosen, though, of course, particular circumstances or policy may dictate such a course.

48 The trial judge found for the plaintiff in fraudulent misrepresentation, and seems at some points in his judgment to have accepted the argument of the plaintiff that but for the misrepresentation the plaintiff would not have entered into the contract with Hydro. Accordingly, Checo's damages were calculated on the basis of what Checo lost overall on the contract. The trial judge also awarded the plaintiff a 15 percent markup for overhead and profit. With respect, while including an amount for

overhead is appropriate where the damages are assessed as equalling the costs to the plaintiff of entering a contract it would not otherwise have entered, including as well something for profit is not appropriate. The trial judge's purported justification for this part of the damage award is not convincing. To fit this part of the award within a tort analysis, one would have to assume that but for the misrepresentation the plaintiff would have increased its bid by exactly the amount of the loss, plus overhead and profit (and would have been awarded the contract). This assumption contradicts the apparent assumption by the trial judge at other points of his judgment that Checo would not have entered the contract had it known the true state of affairs.

49 The trial judge did not assess damages for breach of contract, whether for failure to clear the right-of-way or other contractual breaches (i.e., claims related to the costs of returned conductor material and fire-fighting costs that Hydro failed to pay). Although the trial judge did not clearly state why he was not awarding damages for breach of contract regarding the conductor material and fire-fighting costs, this result seems to be consistent with an assumption that but for the misrepresentation the plaintiff would not have entered into the contract with Hydro. Once damages in tort are awarded on that basis (taking into account the plaintiff's overall loss on the project), to also award the plaintiff damages for breach of contract regarding part of the plaintiff's losses on the contract would be to allow the plaintiff double recovery.

50 The majority in the Court of Appeal not only substituted a finding of negligent misrepresentation for a finding of fraudulent misrepresentation, but also made an express finding regarding what the plaintiff would have done had the misrepresentation not been made; contrary to the trial judge's apparent assumption, the plaintiff would have entered the contract but at a higher price. As Hinkson J.A. put it, writing for the majority ([1990] 3 W.W.R. 690, 44 B.C.L.R. (2d) 145, 4 C.C.L.T. (2d) 161, 41 C.L.R. 1, at p. 158 [B.C.L.R.]):

The effect of [the] negligent misrepresentation was to induce the plaintiff to enter into a contract at a price less than it would have had it known the true facts.

Hinkson J.A. went on to find that the increase in Checo's bid had it known the true facts would have equalled the costs of the extra work made necessary by the improperly cleared worksite, plus a 15 percent margin for overhead and profit.

51 As for breach of contract, the majority of the Court of Appeal referred the case back to trial for assessment of whether there was a breach of contract, and if so what is the proper assessment of damages. This referral back to trial was not stated to be limited to consideration of breaches of contract other than the failure to clear the right-of-way.

52 In the situation of concurrency, the main reason to expect a difference between tort and contract damages is the exclusion of the bargain elements in standard tort compensation. In the terminology of L.L. Fuller and W.R. Purdue, as set out in their article, "[The Reliance Interest in Contract Damages](#)" (1936-7), 46 *Yale L.J.* 52 and 373, contract is normally concerned with "expectation" damages while tort is concerned with "reliance" damages. The denial of "expectation" or "loss of bargain" damages in a misrepresentation case like the present will occur when it is concluded, for example, that but for the misrepresentation, no contract would have been entered at all; this was the situation that the Court found in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3, [1991] 6 W.W.R. 385, 59 B.C.L.R. (2d) 129, 8 C.C.L.T. (2d) 225, 84 D.L.R. (4th) 291. The *Rainbow* assessment of damages can obviously lead to a different quantum of damages because this method frees the parties from the burden or benefit of the rest of their bargain. The assessment of damages in a *Rainbow* situation could be lower or higher than the contract damages depending on whether the contract was a good or bad bargain: see D.W. McLauchlan, "Assessment of Damages for Misrepresentations Inducing Contracts" (1987), *Otago L. Rev.* 370, at pp. 375-78. We note that a tendency towards similar damages in tort and contract can be identified even in *Rainbow* situations: see J. Blom, "Remedies in Tort and Contract: Where is the Difference?" in J. Berryman, ed., *Remedies: Issues and Perspectives* (1989) 395, at pp. 401-402.

53 This is not a case like *Rainbow*. Here the evidence at trial concerning Checo's desire to break into the B.C. market already provides solid support for the conclusion reached by the Court of Appeal. On the basis of that evidence, and in light of the absence in the trial judge's reasons of a clear conclusion as to what Checo would have done had the misrepresentation not been made, the Court of Appeal was in our view justified in making its own finding that Checo would have entered the contract in any event, albeit at a higher bid. This conclusion having been reached, one would expect that the quantum of damages in tort and contract would be similar because the elements of the bargain unrelated to the misrepresentation are reintroduced. This

means not giving the plaintiff compensation for any losses not related to the misrepresentation, but resulting from such factors as the plaintiff's own poor performance, or market or other forces that are a normal part of business transactions.

54 In tort, Checo is entitled to be compensated for all reasonably foreseeable loss caused by the tort. The Court of Appeal was of the view that Checo, had it known the true facts (i.e., had the tort not been committed) would have increased its bid by an amount equal to the cost of the extra work made necessary by the improperly cleared worksite plus profit and overhead. Such loss was not too remote, being reasonably foreseeable. But to compensate only for the direct costs of clearing is to suggest that the only tort was the failure to clear. The real fault is that Hydro *misrepresented* the situation and Checo may have relied on that representation in performing its other obligations under the contract. For example, having to devote its resources to that extra work might have prevented Checo from meeting its original schedule, thereby resulting in Checo incurring acceleration costs in order to meet the contract completion date. Such costs would also arguably be reasonably foreseeable. In our view, the matter should be referred back to the trial division for determination of whether any such indirect losses were the foreseeable results of the misrepresentation.

55 There remains the issue of assessment of damages for breach of contract. As implied above, it appears that the majority of the Court of Appeal intended to remit *all* breach of contract claims to trial, including the breach of contract claim related to the obligation of Hydro to have the worksite cleared by others. We agree that this is the most appropriate disposition with respect to the breach of contract claims. On the claim for breach of contract Checo is to be put in the position it would be in had the worksite been cleared properly, and is therefore to be reimbursed for all expenses incurred as a result of the breach of contract, whether expected or not, except, of course, to the extent that those expenses may have been so unexpected that they are too remote to be compensable for breach of contract. We note that in this respect the test for remoteness in contract may be of no practical difference from the test of reasonable foreseeability applicable in tort: see *Baud Corp., N.V. v. Brook*, [1979] 1 S.C.R. 633, [1978] 6 W.W.R. 301, 5 B.L.R. 225, 89 D.L.R. (3d) 1, at p. 673 [S.C.R.], and *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228, [1986] 3 W.W.R. 216, 1 B.C.L.R. (2d) 324, 26 D.L.R. (4th) 1, 36 C.C.L.T. 87, 33 B.L.R. 293, at pp. 243-44 [S.C.R.]. Viewed thus, the damages in contract would include not only the costs flowing directly from the improperly cleared worksite, but also consequent indirect costs such as acceleration costs due to delays in construction.

## Conclusion

56 We would dismiss the appeal, allow the cross-appeal in part and refer the question of damages in tort and contract to the trial division to be reassessed in accordance with the principles set forth in these reasons.

### *Iacobucci J. (dissenting in part) (Sopinka J. concurring):*

57 The narrow question raised by this appeal is what remedy should be available for pre-contractual representations made during the tendering process. This question also raises a more general and more important issue. In light of the decision of this Court in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 37 C.C.L.T. 117, 42 R.P.R. 161, 34 B.L.R. 187, 31 D.L.R. (4th) 481, can a plaintiff who is in a contractual relationship with the defendant sue the defendant in tort if the duty relied upon by the plaintiff in tort is also made a contractual duty by an express term of the contract?

## I. Facts

58 The appellant and respondent on the cross-appeal, B.C. Hydro and Power Authority, is a British Columbia Crown corporation. The respondent and appellant on the cross-appeal, BG Checo International Ltd., is a large corporation in the business of constructing electrical transmission lines and distribution systems. I will refer to the parties as "Hydro" and "Checo", respectively.

59 In November of 1982, Hydro called for tenders to erect transmission towers and to string transmission lines. In December, 1982, prior to submitting its tender for the contract, Checo's representative inspected the area by helicopter. He noted that the right-of-way had been partially cleared, and also noted evidence of ongoing clearing activity. The representative assumed that the right-of-way would be further cleared prior to the commencement of Checo's work. On January 2, 1983, Checo submitted its tender, and on February 15, 1983, Hydro accepted Checo's tender and the parties entered into a written contract. Checo

contracted to construct 130 towers and install insulators, hardware and conductors over 42 kilometres of right-of-way near Sechelt, British Columbia.

60 In fact, no further clearing of the right-of-way ever took place. The "dirty" condition of the right-of-way caused Checo a number of difficulties in completing its work. Checo sued Hydro seeking damages for negligent misrepresentation, or, in the alternative, for breach of contract.

61 The evidence at trial indicated that Hydro had contracted the clearing out to another company, and that, to Hydro's knowledge, the work was not done adequately. There was no direct discussion between the representatives of Checo and Hydro concerning this issue. There was evidence led at trial that the contract between the parties did not specify clearing standards with the same degree of detail as was present in similar contracts entered into by Hydro.

62 During the trial, Hydro tendered documents in evidence which Checo had unsuccessfully attempted to discover. These documents indicated that Hydro was aware of the problem with the clearing and of the impact that these problems would have on the successful tenderer. As a result, Checo amended its statement of claim to include a claim in fraud.

63 The trial judge found that Hydro had acted fraudulently in its dealings with Checo and awarded Checo \$2,591,580.56, being "the total loss suffered by [Checo] as a result of being fraudulently induced to enter into this contract." Hydro appealed to the Court of Appeal for British Columbia, which rejected the finding of fraud, but found that there had been a negligent misrepresentation which induced Checo to enter into the contract. The Court of Appeal awarded the sum of \$1,087,729.81, for the misrepresentation, and referred the question of breach of contract and damages flowing therefrom to the British Columbia Supreme Court. Checo's cross-appeal for punitive damages and for a higher scale of costs was dismissed: [1990] 3 W.W.R. 690, 44 B.C.L.R. (2d) 145, 4 C.C.L.T. (2d) 161, 41 C.L.R. 1 .

64 It will be helpful to set out the relevant provisions of the contract. The terms of the contract, No. HA-8071, are identical to the tender documents. The critical clauses are 2.03, 4.04 and 6.01.3. I have highlighted that portion of cl. 6.01.03 which Checo alleges founds the misrepresentation by Hydro:

### **2.03 Tenderer's Responsibility**

It shall be the Tenderer's responsibility to inform himself of all aspects of the Work and no claim will be considered at any time for reimbursement for any expenses incurred as a result of any misunderstanding in regard to the conditions of the Work.

Should any details necessary for a clear and comprehensive understanding be omitted or any error appear in the Tender Documents or should the Tenderer note facts or conditions which in any way conflict with the letter or spirit of the Tender Documents, it shall be the responsibility of the Tenderer to obtain clarifications before submitting his Tender. [There follows some technical details.]

Neither B.C. Hydro nor the Engineer shall be responsible for any instructions or information given to any Tenderer other than by the Purchasing Agent, in accordance with this Clause.

### **4.04 Inspection of Site and Sufficiency of Tender**

The Contractor shall inspect and examine the Site and its surroundings and shall satisfy himself before submitting his Tender as to the nature of the ground and sub-soil, the form and nature of the Site, the quantities and nature of work and materials necessary for completion of the Work, the means of access to the Site, the accommodation and facilities he may require, and in general shall himself obtain all necessary information as to risks, contingencies, and other circumstances which may influence or affect his Tender. Without limiting the generality of the foregoing, the Contractor shall satisfy himself of any special risks, contingencies, regulations, safety requirements, and other circumstances which may be encountered.



The Contractor shall be deemed to have satisfied himself before tendering as to the correctness and sufficiency of his Tender for the Work and of the prices stated in the Schedule of Prices which prices shall (except insofar as it is otherwise provided in the Contract) cover all his obligations under the Contract and all matters and things necessary for the proper execution of the Work.

### 6.01.03 Work Done by Others

*Clearing of the right-of-way and foundation installation has been carried out by others and will not form part of this Contract .*

Standing trees and brush have not been removed from the right-of-way in certain valleys and gully crossings. The Contractor shall be responsible for such further site preparation as required by Section 7.01. [Emphasis added.]

### 7.01.02 Preparation of the Site

The Contractor shall carry out any preparation of the Site, including removal of logs, stumps and boulders, as is necessary to perform his operations.

The Contractor shall ensure that the transmission line is protected from possible slides, washouts or other hazards resulting from his road construction, grading, benching, and other site preparation work and operations. Surface drainage shall be directed away from any structure foundations and guy anchors.

Any conditions resulting from the Contractor's work and which, in the opinion of the Engineer constitutes a hazard to the transmission line shall be corrected to the satisfaction of the Engineer.

## II. Judgments in the Courts Below

65

### A. Supreme Court of British Columbia (Vancouver Reg. No. C864116, June 10, 1988)

66 The trial began in November of 1987 and ended in April of 1988, taking 28 days in total. Cohen J. delivered his reasons on June 10, 1988. Checo's original claim was for breach of contract, or in the alternative, negligent misrepresentation. In the middle of the trial, Checo amended its statement of claim to advance a claim of fraudulent misrepresentation.

67 The trial judge found that Hydro knew and failed to disclose to Checo the problems with the clearing contractors, that the right-of-way was improperly cleared, and that merchantable logs, which Hydro intended to salvage, remained on the right-of-way. The trial judge also found that Hydro knew that the effect of the inadequate clearing would be to increase the costs of construction. He then turned to a consideration of the issue of fraud. Citing the principles set out in *K.R.M. Construction Ltd. v. British Columbia Railway Co.* (1981), 18 C.L.R. at 169 (B.C.S.C.) , at p. 169; (1982), [40 B.C.L.R. 1](#), [18 C.L.R. 159 at 277 \(B.C.C.A.\)](#) , at p. 277 [C.L.R.], Cohen J. was satisfied that Hydro was guilty of fraudulent misrepresentation.

68 It was significant to him that, in another contract for similar installations, Hydro included, in a paragraph "virtually identical" to s. 6.01.03, the words "logs and old logging slash will be on the right-of-way in some areas." Cohen J. concluded (at pp. 61-62):

... the decision to remove any reference in cl. 6.01.03 of [Checo's] contract to logs remaining on the right-of-way was deliberate. Foxall [an employee of Hydro] insisted that it was not necessary to include any words of warning in the [Checo's] contract because the existence of logs on the right-of-way would be obvious to a tenderer viewing the right-of-way. However, when I consider that words warning of logs remaining on the right-of-way were excluded when [Hydro's] clearing standards allowed for logs to be left on the right-of-way, a fact not disclosed in the tender documents, [Hydro] knew merchantable logs were left on the right-of-way, knew of problems with clearing contractors not clearing to specifications,

and knew of the delays and extra costs experienced by [another contractor] due to logs on the right-of-way obstructing construction activities, the deliberate omission of these words in the tender documents amounted, in my opinion, to a form of tender by ambush.

69 The trial judge held that Hydro had a duty to be accurate in the information that it gave in its tender, and it was not open to it to say that Checo should not have assumed that the right-of-way would be cleared further, or that Checo should have made inquiries. Here, the "ordinary meaning" of the words used in cl. 6.01.03 supported Checo's conclusion that the clearing was not yet complete. This representation in cl. 6.01.03 was a false one, and was a representation that Checo relied upon. Cohen J. found that Checo would not have contracted on the basis that it did in the absence of the representation, and held Hydro liable for the "actual damages directly flowing from [its] fraud" (p. 72).

70 Cohen J. did not consider Checo's claim in breach of contract. He declined to make an award of punitive damages.

### **B. Court of Appeal of British Columbia (1990), 44 B.C.L.R. (2d) 145**

71 Hydro appealed from the judgment of Cohen J. Checo cross-appealed seeking punitive damages and costs to be taxed on a higher scale.

72 The Court of Appeal considered the issues of fraudulent misrepresentation, negligent misrepresentation and breach of contract. Writing for the majority, Hinkson J.A. (Lambert, Toy and Cumming J.J.A. concurring) allowed Hydro's appeal on the issue of fraudulent misrepresentation. However, Hinkson J.A. found Hydro liable for negligent misrepresentation (which had not been considered in the judgment at trial). Hinkson J.A. remitted Checo's action for breach of contract back to the British Columbia Supreme Court. Hinkson J.A. dismissed Checo's cross-appeal. Southin J.A., writing for herself, dissented in the result. While she agreed with Hinkson J.A. on the questions of fraudulent misrepresentation and breach of contract, she would have held that Hydro was not liable for negligent misrepresentation.

73 In the result, Hydro's appeal was allowed in part, in that the Court of Appeal held unanimously that Hydro was not liable for fraudulent misrepresentation. However, the Court of Appeal awarded damages against Hydro for negligent misrepresentation, but reduced the trial judge's damage award to \$1,087,729.81. Checo's cross-appeal was dismissed.

#### **(1) Reasons of Hinkson J.A.**

74 Hinkson J.A. considered that the omission of the reference to logs and logging slash in cl. 6.01.03, left "the meaning of 'clearing' unqualified" (p. 153)[B.C.L.R.]. The majority of the Court held that the representation in cl. 6.01.03 as to clearing "meant that logs and slash would be cleared from the right-of-way" (p. 155), and that the state of the right-of-way in November, 1982, was not the state that the right-of-way would be in at the commencement of the contract. The majority concluded that "on the date of the contract [Hydro], while having represented that the right-of-way would have been cleared, knew that it had not been done" (p. 156), and held that this was, therefore, a misrepresentation.

75 Hinkson J.A. then turned to a consideration of the issue of negligent misrepresentation, which had not been considered by the trial judge. Hydro had a duty to advise Checo about the amount of clearing which would in fact be carried out. Hydro having failed to discharge this duty, it made a negligent misrepresentation, the effect of which "was to induce [Checo] to enter into a contract at a price less than it would have had it known the true facts" (p. 158). Hinkson J.A. held that Checo had established a claim for negligent misrepresentation based on *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), and *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

76 In considering whether there was also liability for fraudulent misrepresentation, as the trial judge had found, Hinkson J.A. traced the development of the law of the tort of deceit. He noted that although deceit, as it applies to corporations, is an evolving tort, fundamentally, "the plaintiff must establish an intention to deceive on the part of the defendant" (p. 161) and referred to the principles enunciated in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* (1988), [1989] 1 W.W.R. 673, 30 B.C.L.R. (2d) 273, 46 C.C.L.T. 112, 54 D.L.R. (4th) 43 (C.A.). On the facts of this case, the majority concluded that the

"evidence fell short of establishing the necessary basis for a finding of fraud" because there was no evidence of a dishonest intention (at pp. 161-62):

In the present case, a committee of 12 prepared the specifications. The evidence does not reveal that any members of the committee were dishonest in the preparation of the specifications for this contract. Rather, it is possible to conclude that they mistakenly and negligently believed that the requirement that a tenderer should take a view of the site would remedy any shortcomings in the specifications included in the terms of the contract.

Hydro's appeal was accordingly allowed on the issue of fraudulent misrepresentation.

77 On the question of damages, the majority held that Checo was not entitled to recover the entire loss it suffered as a result of performing the contract. The majority held that the decision of the Court of Appeal, affirming the trial judgment in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1990] 3 W.W.R. 413, 43 B.C.L.R. (2d) 1, 67 D.L.R. (4th) 348, affirmed on appeal to the Supreme Court of Canada, [1991] 3 S.C.R. 3, [1991] 6 W.W.R. 385, 59 B.C.L.R. (2d) 129, 8 C.C.L.T. (2d) 225, 84 D.L.R. (4th) 291, could be distinguished from the case at bar, on the grounds that in the present case it was clear that Checo "would have entered into a contract if it had known the true state of affairs but would have adjusted the price of doing the work to reflect that state of affairs" (pp. 163-64). The majority held that on the basis of the statement of claim and the evidence, the extra work attributable to an improperly cleared work-site cost Checo \$945,852.01. The majority allowed an additional 15 percent for overhead and profit, making a total damage award of \$1,087,729.81.

78 Hinkson J.A. ordered a new trial on the breach of contract issue (at p. 164):

... I would remit the action to the Supreme Court for determination as to whether or not a breach of contract occurred and, in the event that the defendant is found to have been in breach of contract, what damages flowed from such breach. As the parties led evidence at trial in respect of this issue and with respect to the claim of the plaintiff for damages asserted to flow from breach of contract, the trial judge will be in a position on the basis of the record at trial to determine the issue of breach of contract and to assess damages if he finds a breach of contract occurred. The question of whether further evidence should be permitted on this issue should be determined by the trial judge.

79 Checo's cross-appeal was dismissed, punitive damages being inappropriate in view of the conclusion of the majority that the trial judge's finding of fraud was in error.

## **(2) Dissenting Reasons of Southin J.A.**

80 Southin J.A. was in agreement with the majority on the issue of fraud, and the disposition of the cross-appeal, but would not have awarded damages for negligent misrepresentation.

81 With respect to the issue of fraudulent misstatement, Southin J.A. noted that, in her view, "because a conscious intention to deceive, i.e., mens rea, is a necessary ingredient of the tort of deceit, it follows that a corporation cannot be liable for this tort except upon the principle respondeat superior" (p. 183). In this context, Southin J.A. looked to evidence of the intent of Mr. Foxall, who was the Hydro employee in charge of the project. For there to have been a fraudulent misrepresentation, Foxall would have to be shown to have consciously intended to deceive Checo. Southin J.A. held that the trial judge had not asked himself the right questions and that there was no finding of the required fraudulent intent, and that therefore, the claim in fraud could not stand.

82 Southin J.A. then considered the issue of negligent misstatement. After reviewing the case law, she concluded on the facts of this case that cl. 6.01.03 did "not impart the information that between the date of the tender call and the date of commencement of work [Hydro would] clear the right-of-way to a standard thought suitable either by [Checo] or by a reasonable man" (pp. 200-201). Further, cls. 2.03 and 4.04 were evidence of Hydro's intention not to assume any duty to Checo (at p. 201): "In my opinion, by cls. 2.03 and 4.04, [Hydro] was declaring that it was not assuming any duty of care to [Checo]." Southin J.A. stated she was reinforced in her conclusion by the decision of the Alberta Court of Appeal in *Catre Industries Ltd. v. Alberta* (1989),

36 C.L.R. 169, 63 D.L.R. (4th) 74, 99 A.R. 321 (C.A.) , leave to appeal to the Supreme Court of Canada refused on March 8, 1990, [1990] 1 S.C.R. vi.

83 She did not agree with the majority that the measure of damages in this type of case is different depending on whether liability founds in contract or in tort.

84 As the trial judge had made no findings as to breach of contract, Southin J.A. agreed with Hinkson J.A. that there should be a new trial on the claim for breach of contract.

### **III. Issues**

85 I would characterize the issues raised by Hydro's appeal as follows:

86 (1) Can a pre-contractual representation which becomes a contractual term found liability in negligent misrepresentation?

87 (2) If the answer to the first question is in the affirmative, did the terms of the contract nonetheless operate to exclude Hydro's potential liability for any misrepresentations?

88 (3) If the terms of the contract did not exclude Hydro's potential liability for any misrepresentations, is Hydro liable for negligent misrepresentation?

89 (4) Was there a breach of contract?

90 I would characterize the issues raised by Checo's cross-appeal as follows:

91 (1) Should Hydro be liable for fraudulent misrepresentation?

92 (2) Did the Court of Appeal correctly assess Checo's damages for negligent misrepresentation?

### **IV. Analysis**

93 In the interests of simplicity and brevity, I will deal with the issues raised by the appeal and cross-appeal somewhat out of order. Because the issue of fraudulent misrepresentation can and should be resolved quickly, I will deal with it first. Then I will examine, following *Central Trust v. Rafuse* , supra, the scope of the right of a party to a contract to sue the other party in tort (the tort-contract concurrency problem). It will also be necessary for me to review the law of negligent misrepresentation (which was not at issue in *Central Trust v. Rafuse* ), in order to determine the applicability of the principles in *Central Trust v. Rafuse* to pre-contractual representations.

94 Because of my conclusions on these issues, it will not be necessary for me to decide whether there was a negligent misrepresentation, or whether the Court of Appeal's assessment of Checo's damages for negligent misrepresentation was correct. It will, however, be necessary for me to consider the issue of breach of contract.

#### **A. Fraudulent Misrepresentation**

95 The trial judge found Hydro liable in deceit. The Court of Appeal allowed Hydro's appeal on this issue. In argument before us, Checo submitted that the trial judge's ruling on the question of deceit should be upheld. At the hearing of the appeal, we indicated that we did not find it necessary to hear Hydro's response on the issue of deceit.

96 In my view, there was insufficient evidence to support a finding of deceit (i.e., of fraudulent intention, as discussed further in these reasons) against Hydro, and the Court of Appeal correctly intervened to reverse the trial judge on this point. As Hinkson J.A. noted (at pp. 161-62):

... a committee of 12 prepared the specifications. The evidence does not reveal that any members of the committee were dishonest in the preparation of the specifications for this contract. Rather, it is possible to conclude that they mistakenly

and negligently believed that the requirement that a tenderer should take a view of the site would remedy any shortcomings in the specifications included in the terms of the contract.

Consequently, Checo's cross-appeal on this point should be dismissed.

## B. Concurrent liability in tort and contract

### (1) Introduction

97 It was Hydro's submission on this appeal that it ought to be liable, if at all, in contract and not in tort. For the reasons which I will set out, I agree that in the circumstances of the case, while Hydro may be liable in contract for the representations which Checo complains of, Hydro cannot be liable in tort. Given the importance of the general issue of tort-contract concurrency, I propose to explore it in some detail.

98 As a general rule, the existence of a contract between two parties does not preclude the existence of a common law duty of care. Subject to the substantive and procedural differences that exist between an action in contract and an action in tort, both the duty of care and the liability may be concurrent in contract and tort. In such circumstances, it is for the plaintiff to select the cause of action most advantageous to him or her. That was the position adopted by Le Dain J. in *Central Trust v. Rafuse*, supra. At pp. 204-205 [S.C.R.], Le Dain J. said the following:

1. The common law duty of care that is created by a relationship of sufficient proximity, in accordance with the general principles affirmed by Lord Wilberforce in *Anns v. Merton London Borough Council*, is not confined to relationships that arise apart from contract. Although the relationships in *Donoghue v. Stevenson*, *Hedley Byrne* and *Anns* were all of a non-contractual nature and there was necessarily reference in the judgments to a duty of care that exists apart from or independently of contract, I find nothing in the statements of general principle in those cases to suggest that the principle was intended to be confined to relationships that arise apart from contract ... the question is whether there is a relationship of sufficient proximity, not how it arose. The principle of tortious liability is for reasons of public policy a general one.

99 Le Dain J.'s conclusion that a plaintiff is generally entitled to choose, as between contract and tort, the cause of action most favourable to him or her, was supported by a long line of Canadian and English authority, some of which I will consider below. *Central Trust v. Rafuse*, supra, has since met with wide acceptance, and has been applied by a number of provincial Courts of Appeal. See *University of Regina v. Pettick* (1991), 6 C.C.L.T. (2d) 1, 45 C.L.R. 1, 77 D.L.R. (4th) 615, 90 Sask. R. 241 (C.A.); *Fletcher v. Manitoba Public Insurance Corp.*, 68 O.R. (2d) 193, [1989] I.L.R. 1-2429, 36 C.C.L.I. 157, 58 D.L.R. (4th) 23 (C.A.); *Pittman v. Manufacturers Life Insurance Co.* (1990), 47 C.C.L.I. 25, 76 D.L.R. (4th) 320, [1991] I.L.R. 1-2708 (Nfld. C.A.); *Clark v. Naqvi* (1989), 63 D.L.R. (4th) 361, 99 N.B.R. (2d) 271, 250 A.P.R. 271 (C.A.), and *Catre Industries Ltd. v. Alberta*, supra.

100 In *Central Trust v. Rafuse*, supra, Le Dain J. recognized two situations in which, notwithstanding what would otherwise be a breach of the duty of care in tort, a plaintiff's ability to sue in tort will be limited by the terms of the contract. In one situation it is the *liability* in tort which is avoided or modified; in the other it is the *duty* in tort which is affected.

101 Le Dain J. recognized that liability in tort can be limited or excluded by the terms of a contract. A plaintiff will not be permitted to plead in tort in order to circumvent a contractual clause which excludes or limits the defendant's liability (at p. 206):

3. A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.

In this case, Hydro argues that the terms of the contract operated to exclude its liability for the conduct of which Checo complains. If Hydro were correct, then Checo would no more be able to recover in tort than in contract. As I will discuss below, I am of the opinion that the contract does not exclude Hydro's liability.

102 As mentioned, Le Dain J. also recognized that the defendant's duty in tort could be affected by the terms of the contract. If the duty of care alleged in tort is also defined by a specific term of the contract, then the plaintiff will be entitled only to

those remedies which may be available pursuant to the contract. The contractual relationship can bring the parties into sufficient proximity to give rise to a duty of care. However, no duty of care in tort can be concurrent with a duty of care created by an express term of the contract. In the words of Le Dain J. (at p. 205):

2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract ... A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract.

103 On the facts of *Central Trust v. Rafuse*, supra, Le Dain J. concluded that the defendant solicitors had concurrent duties of care in contract and in tort. The contract between the parties was a general retainer. Le Dain J. held that it was an implied term of the contract between solicitor and client that the solicitor perform his or her professional duties with "reasonable care, skill and knowledge" (p. 208). The duty of care imposed on a solicitor at common law was the same as, and concurrent with, that imposed as an implied term of the contract (at p. 210):

While the solicitor's duty of care has generally been stated ... as arising as an implied term of the contract or retainer, the same duty arises as a matter of common law from the relationship of proximity created by the retainer. In the absence of special terms in the contract determining the nature and scope of the duty of care in a particular case, the duties of care in contract and tort are the same.

104 Given the nature of a solicitor's duties in contract and in tort, and given the particular contractual relationship between the parties, Le Dain J. concluded that the duty of care of the solicitors ran concurrently in tort and contract. Moreover, there was no clause in the contract excluding or limiting the solicitors' liability which could affect the solicitors' liability in tort.

105 In *Central Trust v. Rafuse*, supra, it was not necessary for Le Dain J. to test the boundaries of the situations he described in which a plaintiff's right to recover in tort would be limited. As I mentioned, the contract before him had no clauses excluding or limiting the liability of the solicitors. Moreover, the contract contained no express terms creating specific obligations or duties which might have excluded the solicitors' duty of care in tort.

106 The facts of this case require me to do what it was not necessary for Le Dain J. to do in *Central Trust v. Rafuse*, supra: I must interpret and apply the principles to a contractual relationship in which there are exclusion or limitation of liability clauses which may exclude or limit liability in tort, as well as in contract, and in which there are clauses which may operate to exclude some parts of the duty of care in tort entirely. To interpret and apply the principles in *Central Trust v. Rafuse* in the circumstances of this case, it will be necessary for me to review the authorities governing concurrency of obligations in tort and contract. It will also be necessary for me to review the law governing clauses which exclude or limit liability.

## **(2) Concurrency of Tort and Contract**

107 The recent history of concurrency in tort and contract can be characterized as the development of a single regime of concurrency from two sets of rules governing concurrency in distinct circumstances. Until *Esso Petroleum Co. v. Mardon*, [1976] Q.B. 801, [1976] 2 All E.R. 5 (C.A.), there was one set of rules governing obligations in tort and contract for the so-called "status relationships" and another set of rules governing obligations in tort and contract for all other relationships. Since *Esso Petroleum*, supra, these two sets of rules have been assimilated into a single regime governing obligations in tort and contract for all relationships. The principles set out by Le Dain J. in *Central Trust v. Rafuse*, supra, are representative of that single regime. To understand better the principles articulated by Le Dain J. in *Central Trust v. Rafuse*, it will be helpful to review the process of development which preceded and informed the judgment of Le Dain J.

### **(a) The Two Strands of Concurrent Liability in Tort and Contract**

108 The modern conception of a distinct tort of negligence is relatively recent. It has been argued that the genesis of negligence is to be found in the long series of "running down" cases in the eighteenth and nineteenth centuries, as ever increasing numbers

of horses, carts and ships meant increasing numbers of accidents. See J.H. Baker, *An Introduction to English Legal History* (1979), at pp. 342-45. But it was not until the famous case of *Donoghue v. Stevenson*, supra, that a general tort of negligence was finally recognized.

109 Negligence was not, however, unknown to the law before *Donoghue v. Stevenson*, or even before such running down cases as *Leame v. Bray* (1803), 3 East. 593, 102 E.R. 724. Beginning in a much earlier time, negligence was actionable if the defendant's status imposed upon him or her a duty to take care in the exercise of his or her profession. Persons with such status included bailees and those who practised a "common calling", including those of innkeeper and common carrier. The liability of such persons arose independently of contract. To quote Baker, at pp. 277-78:

Many callings were, in any case, controlled by the common law or custom independently of contract; an innkeeper, for instance, was liable under the "custom of the realm" for his failure to look after a guest's goods or for refusing to accommodate a traveller ... similar duties could be imposed on professional men ... Another kind of status was that of bailee or custodian of property; it was held in 1487 that a shepherd having the custody of sheep was liable in *assumpsit* for failing to look after them, so that they were killed.

110 That a defendant who owed a duty to take care because of his or her status was liable in negligence even if there also existed a contract between the parties is confirmed by the judgment of Dallas C.J. in *Bretherton v. Wood* (1821), 3 Brod. & Bing. 54, 129 E.R. 1203 (Ex. Ch.), at p. 1206 E.R.:

This action is on the case [i.e., in negligence] against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it ...

*Nor is it material, whether redress might or might not have been had in an action of assumpsit [i.e., in contract]; that must depend on circumstances of which this Court has no knowledge; but, whether an action of assumpsit might or might not have been maintained, still this action on the case may be maintained.* The action of assumpsit, as applied to cases of this kind, is of modern use. The action on the case is as early as the existence of the custom or common law as to common carriers. [Emphasis added.]

111 There has been some debate as to the extent of these status relationships. See *Central Trust v. Rafuse*, supra, at pp. 176-78; C. French, "The Contract/Tort Dilemma" (1983), 5 Otago L. Rev. 236, at pp. 273-78; and C.H.S. Fifoot, *History and Sources of the Common Law* (1949), at pp. 157-59. On what French calls the "traditional view", status relationships included carriers, innkeepers, surgeons, apothecaries, attorneys, veterinary surgeons, smiths, and barbers, together with the relationships of bailor/bailee and master/servant (at pp. 274-78). Whatever the proper scope of the status relationships might have been, it is clear that they attracted concurrent liability in contract and in tort. As Tindal C.J. expressed it in *Boorman v. Brown* (1842), 3 Q.B. 511, 114 E.R. 603, at pp. 608-609 E.R., affirmed (1844), 11 Cl. & Fin. 1, 8 E.R. 1003 (H.L.):

That there is a large class of cases in which the foundation of the actions springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render: actions against common carriers, against ship owners on bills of lading, against bailees of different descriptions: and numerous other instances occur in which the action is brought in tort or contract at the election of the plaintiff ... The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort.

112 As the judgment of Tindal C.J. in *Boorman*, supra, indicates, the range of status relationships was seen in the nineteenth century as extensive (the profession at issue in *Boorman* was that of commodities broker). In fact, in the judgment of the House of Lords upholding the judgment of Tindal C.J., concurrency of tort and contract is stated as a general principle, without reference to status relationships at all (at pp. 1018-19 E.R., per Lord Campbell):

... wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may either recover in tort or in contract.

113 However, in the twentieth century, there was a noticeable trend towards limiting the range of the status relationships. In *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399 (C.A.), Slessor L.J. found that a broker did not exercise a "common calling" (at pp. 406-407):

In reference to the suggestion that a broker might be regarded as exercising a common calling in the same way as, for example, a carrier, in respect of whom it has been held that his duties to the public are imported so that a breach of these is necessarily a tort, I desire to add that no authority was cited to establish that a stockbroker is in such a position ... In my opinion a stockbroker does not exercise a "public calling" in the sense in which that term is used as applied to carriers and certain other occupations. In this case a personal relationship existed between the parties, and in my view the breach complained of was a breach of contract.

In *Groom v. Crocker*, [1939] 1 K.B. 194, [1938] 2 All E.R. 394, the Court of Appeal held that the profession of solicitor was not among the status relationships, as those of doctor, architect and stockbroker also were not (at p. 222 per Scott L.J.) [K.B.]:

A solicitor, as a professional man, is employed by a client just as much as a doctor, an architect, or a stockbroker, and the mutual rights and duties of the two are regulated entirely by the contract of employment ... The retainer when given puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the client's interest and carry out his instructions in the matters in which the retainer relates, by all proper means ... But in all these aspects the tie between the two is contractual. There is to-day no common-law duty similar to that which survives in the case of a bailee or carrier, and no action lies in tort for the breach of the above duties ...

The judgment of Diplock L.J. in *Bagot v. Stevens, Scanlan & Co.*, [1966] 1 Q.B. 197, [1964] 3 All E.R. 577, was to a similar effect. Diplock L.J. held that the relationship of architect and client was not a "status relationship" (at p. 206) [Q.B.]:

... I can see nothing in the relationship of architect and client which can be said to give rise to the kind of status obligation which arises from the origins of the common law in the case of master and servant, common carrier, innkeeper, bailor and bailee.

114 For those who were *not* in one of the status relationships, on the other hand, a different regime governed the tort liabilities of parties to a contract. For all those who were not in status relationships, an action in negligence lay only if the duty relied upon in negligence was "independent" of the duty imposed by contract. Before the causes of action were abolished by the *Judicature Act*, the principle was stated to be that if no cause of action remained if the allegation of a contract were struck out, then the action was founded on contract alone: *Williamson v. Allison* (1802), 2 East. 446, 102 E.R. 439. In *Legge v. Tucker* (1856), H. & N. 500, 156 E.R. 1298, all the judges were unanimously of the opinion that an action in tort would lie only if there was a duty existing apart from the contract. In the words of Pollock C.B. (at p. 1299 E.R.): "Where the foundation of the action is a contract, in whatever way the declaration is framed, it is an action of assumpsit; but where there is a duty ultra the contract, the plaintiff may declare in case." In the words of Watson B. (at p. 1299 E.R.): "the true question is, whether, if [the allegation of a contract] were struck out, any ground of action would remain ... There is no duty independently of the contract, and therefore it is an action of assumpsit." The judgment of Smith L.J. in *Turner v. Stallibrass*, [1898] 1 Q.B. 56 (C.A.), is to the same effect (at p. 58):

The rule of law on the subject, as I understand it, is that, if in order to make out a cause of action it is not necessary for the plaintiff to rely on a contract, the action is one founded on tort; but, on the other hand, if, in order successfully to maintain his action, it is necessary for him to rely upon and prove a contract, the action is one founded upon contract.

See also *Edwards v. Mallan*, [1908] 1 K.B. 1002 (C.A.), per Vaughan Williams L.J.

115 The "independent tort" requirement was applied and refined in more modern cases. In *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522 (H.L.), Viscount Finlay stated, at p. 548, that for an action in tort to lie in a contractual setting,



there must be "an independent tort unconnected with the performance of the contract". In this Court, Pigeon J. said in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769, 26 D.L.R. (3d) 699, at pp. 777-78 [S.C.R.], relying on *Elder, Dempster & Co.*, supra, that no action for negligent misrepresentation would lie in "any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as 'an independent tort' unconnected with the performance of that contract". In *Dominion Chain Co. v. Eastern Construction Co.* (1976), 12 O.R. (2d) 201, 1 C.P.C. 13, 68 D.L.R. (3d) 385 (C.A.), Wilson J.A. (as she then was), dissenting in part, held that no action in tort would lie where the acts complained of by the plaintiff were in relation to the "very matters covered by the contract" (at p. 408) [D.L.R.]:

... where the person to whom the duty is owed, the scope of the duty and the standard of care have all been expressly or impliedly agreed upon by the parties, it appears to me somewhat artificial to rely upon Lord Atkin's "neighbour" test [as set out in *Donoghue v. Stevenson*, supra] to determine whether or not the duty is owed to the particular plaintiff and as to the requisite standard of care the defendant must attain. In other words, it would appear that if the acts or omissions complained of by the plaintiff are in relation to the very matters covered by the contract, the essence of the plaintiff's action is breach of the contractual duty of care rather than breach of the general duty of care owed to one's "neighbour" in tort.

### **(b) The Emergence of a Single Theory of Concurrent Liability**

116 Since *Esso Petroleum*, supra, the law in England and in Canada has ceased to apply a rule of concurrency for status relationships different from that in other relationships, although in *Esso Petroleum* it was not clear that this was the case. In finding that an architect was concurrently liable in contract and in tort, Lord Denning M.R. relied on the decision of Tindal C.J. in *Boorman v. Brown*, supra, a case based on status. However, any ambiguity was resolved by the judgment of Megaw L.J. in *Batty v. Metropolitan Property Realisations Ltd.*, [1978] Q.B. 554, [1978] 2 All E.R. 445 (C.A.). Megaw L.J. held that the rule in *Esso Petroleum* was not limited to "common callings", but was a rule of general application (at p. 566) [Q.B.]:

The distinction to which I have referred which Mr. Brown seeks to make is this: that the right of a plaintiff who sues in contract, where the facts giving rise to the breach of contract would also constitute a breach of common law duty apart from contract, to have the judgment entered on both heads is limited to cases where the common law duty is owed by one who conducts a common calling and thus is under a special type of legal liability, and to cases where the duty is owed by a professional man in respect of his professional skill. Mr. Brown contends that, though there is no affirmative authority for limiting the right in that way, it ought to be treated as being so limited because there is no case in the English books, going back over many years, which shows that the right has been allowed, or possibly even claimed, in cases other than the special types of case to which he referred, and in particular the professional skill types of case. In *Esso Petroleum Co. Ltd. v. Mardon*, [1976] Q.B. 801 the right was held to arise in a case where the breach of duty was a breach of an expert in siting filling stations involving his professional skill. I see no reason, in logic or on practical grounds, for putting any such limitation on the scope of the right. It would, I think, be an undesirable development in the law if such an artificial distinction, for which no sound reason can be put forward, were to be held to exist.

117 More generally, in *Anns v. Merton London Borough Council*, [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.), Lord Wilberforce acknowledged that the duty of care in tort is now a general one, arising as a result of proximity, and not of the particular class of relationship between the parties (at p. 498) [All E.R.]:

Through the trilogy of cases in this House, *Donoghue v. Stevenson*, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* and *Home Office v. Dorset Yacht Co. Ltd.*, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship or proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise ... [footnotes omitted]

118 This trend towards a single theory of concurrent liability in tort and contract was recognized in Canada by La Forest J.A. (as he then was) in *New Brunswick Telephone Co. v. John Maryon International Ltd.* (1982), 43 N.B.R. (2d) 469, 141 D.L.R. (3d) 193, 24 C.C.L.T. 146 (C.A.). After an extensive review of the case law, La Forest J.A. concluded that an architect was concurrently liable in contract and in tort. La Forest J.A. based his conclusion on the concept of a general tort of negligence (at p. 520) [N.B.R.]: "while I could dispose of this case by simply adding the profession of structural engineer to the list of common callings and skilled professions, I prefer to base my judgment on the generalized tort of negligence".

119 In *Central Trust v. Rafuse*, supra, Le Dain J. also rejected any distinction between status relationships and other relationships in determining whether parties to a contract can also recover in tort. Instead, Le Dain J. found that a single rule applied to all relationships (at p. 205): "the question is whether there is a relationship of sufficient proximity, not how it arose." The rule of concurrency which Le Dain J. adopted was a compromise between two strands of authority.

120 In one strand of authority, that governing the status of relationships, any duty arising in tort had always been concurrent with duties arising under the contract: *Brown v. Boorman*, supra. In the other strand of authority, the duty in tort was only concurrent with the duty in contract if the negligence complained of was unconnected with the performance of the contract: *J. Nunes Diamonds*, supra. The compromise position adopted by Le Dain J. was that any duty arising in tort will be concurrent with duties arising under the contract, *unless the duty which the plaintiff seeks to rely on in tort is also a duty defined by an express term of the contract*. If the duty is defined by an express term of the contract, the plaintiff will be confined to whatever remedies are available in the law of contract (at p. 205):

... the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by express terms of the contract ... Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract ... The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.

121 In my opinion, the compromise struck by Le Dain J. is an appropriate one. If the parties to a contract choose to define a specific duty as an express term of the contract, then the consequences of a breach of that duty ought to be determined by the law of contract, not by tort law. Whether or not an implied term of a contract can define a duty of care in such a way that a plaintiff is confined to a remedy in contract is not at issue in this case. I leave that determination to another day. While the rule articulated by Le Dain J. is a rule of law which does not depend on the presumed or actual intention of the parties, the intention which can be inferred from the fact that the parties have made the duty an express term of the contract provides policy support for the rule. If a duty is an express term of the contract, it can be inferred that the parties wish the law of the contract to govern with respect to that duty. This is of particular significance given that the result of a breach of a contractual duty may be different from that of a breach of a duty in tort. As Wilson J.A. noted in *Dominion Chain Co.*, supra, a plaintiff's substantive rights may be different in contract and in tort (at p. 409):

His cause of action may arise later in tort resulting in a later expiry of the limitation period. His damage may be greater in quantum and different in kind if he sues in tort. On the other hand his action in contract may survive him or be the subject of a set-off or counterclaim, neither of which would be so if his action were framed in tort.

The fact that damages may be assessed differently in contract from in tort was recently affirmed by this Court in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3, [1991] 6 W.W.R. 385, 59 B.C.L.R. (2d) 129, 8 C.C.L.T. (2d) 225, 84 D.L.R. (4th) 291.

122 A further policy rationale for the rule advanced by Le Dain J. is that contracts have become, particularly in commercial contexts, increasingly complex. Commercial contracts allocate risks and fix the mutual duties and obligations of the parties. Where there is an express term creating a contractual duty, it is appropriate that the parties be held to the bargain which they have made. Tort duties are of "uncertain definition and scope": H. Johnson, "Contract and Tort: Orthodoxy Reasserted!" (1990), 9 Int'l Banking L. 306. Commercial parties ought to be able to fix their respective rights and obligations in a particular transaction

with certainty. Contractual certainty is a sine qua non without which reliance and the execution of obligations are seriously impaired. Moreover, without certainty, the transaction costs associated with a given commercial arrangement would most likely increase, perhaps drastically. In *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271, 35 R.P.R. 118, 16 D.L.R. (4th) 598, Wilson J. alluded to these considerations stating, at p. 282 [S.C.R.], that "much of the value of commercial contracts lies in their ability to produce certainty. Parties are enabled to regulate their relationship by means of words rather than by means of their understanding of what each other's actions are intended to imply."

123 However, I do not believe that the rule advanced by Le Dain J. that forecloses a claim in tort is absolute in all circumstances. In this respect, I would favour a contextual approach which takes into account the context in which the contract is made, and the position of the parties with respect to one another, in assessing whether a claim in tort is foreclosed by the terms of a contract. The policy reasons in favour of the rule advanced by Le Dain J. are strongest where the contractual context is commercial and the parties are of equal bargaining power. There was no question of unconscionability or inequality of bargaining power in *Central Trust v. Rafuse*, supra, as there is no such question in this case. If such issues, or others analogous to them, were to arise, however, a court should be wary not to exclude too rapidly a duty of care in tort on the basis of an express term of the contract, especially if the end result for the plaintiff would be a wrong without a remedy.

### (3) Contractual Terms Excluding or Limiting Liability or Duty

124 As noted above, contractual exclusion or limitation clauses can operate either to exclude or limit liability, or to limit the duty owed by one party to the other. In neither case will the plaintiff be permitted to use an action in tort to circumvent the limitation of liability or of duty in the contract. Terms going to duty are of particular importance where one party is alleging negligent misrepresentation, as Checo is in this case.

125 It is well-settled that a clause limiting liability in contract can, in appropriate circumstances, also have the effect of limiting liability in tort: see, for example, *Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.*, [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641, 34 B.L.R. 251, and *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, S.C.C., No. 21980, October 29, 1992 [reported [1993] 1 W.W.R. 1, 73 B.C.L.R. (2d) 1]. In the words of Scrutton L.J. in *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205 (C.A.), at p. 213:

... where the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort: *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, per Lord Cave, Lord Finlay and Lord Sumner. [footnotes omitted]

126 The rule that liability in tort cannot be used to circumvent a contractual limitation of liability is supported by recent Canadian authority, including *Central Trust v. Rafuse*, supra, itself. In *New Brunswick Telephone Co. v. John Maryon International Ltd.*, supra, La Forest J.A. stated that (at p. 506):

... the law of negligence will not be used to give a remedy to a person for a breach of contract for which he is absolved under the contract ... Parties are free to contract out liabilities, tortious or otherwise, and the courts should not interfere with their agreements.

The point was reiterated by Le Dain J. in *Central Trust v. Rafuse* (at p. 206):

3. A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.

See, on this question, *London Drugs Ltd.*, supra, where I deduce from this principle one of many reasons for permitting employees, in certain circumstances, to obtain directly the benefit of their employer's contractual limitation of liability clause so as to limit their liability for the breach of a common law duty of care. See also *Peters v. Parkway Mercury Sales Ltd.* (1975), 10 N.B.R. (2d) 703, 58 D.L.R. (3d) 128 (C.A.).

127 Contractual terms may also operate to limit the duty (as distinct from the liability ensuing from a breach of duty), tortious or otherwise, owed by one party to the other. To quote B.M. McLachlin and W.J. Wallace, *The Canadian Law of Architecture and Engineering* (1987), at p. 134:

... it may now be said that courts have come to accept the concurrency of obligations imposed by tort law and obligations imposed by contract. However, this is subject to an important limitation. Where the parties have defined their duties by contract, the court will not impose contrary obligations on them. A contract defining the parties' rights and responsibilities will be a factor limiting the scope of the duty in tort.

128 Clauses limiting the duty owed by one party to the other are often important in cases where negligent misrepresentation is alleged. Such disclaimers or "non-reliance clauses", as they are sometimes described, may be contractual or extra-contractual. It should not be forgotten that in the leading case, *Hedley Byrne*, supra, the defendant bank was found not liable because the representation had been accompanied by the following disclaimer: "CONFIDENTIAL. For your private use and without responsibility on the part of this bank or its officials." There was no contract between the parties. Lord Morris found that the effect of the disclaimer was to negate any duty of care which would otherwise have been owed by the defendant (at p. 504) [A.C.]:

... in my judgment, the bank in the present case, by the words which they employed, effectively disclaimed any assumption of a duty of care. They stated that they only responded to the inquiry on the basis that their reply was without responsibility. If the inquirers chose to receive and act upon the reply they cannot disregard the definite terms upon which it was given.

129 Disclaimers or "non-reliance clauses" may also be contractual. In *Carman Construction Ltd. v. Canadian Pacific Railway*, [1982] 1 S.C.R. 958, 18 B.L.R. 65, 136 D.L.R. (3d) 193, the defendant successfully raised a contractual disclaimer clause as a defence to an action for negligent misrepresentation. The relevant clause of the contract was in the following terms (at p. 961) [S.C.R.]:

3.1 It is hereby declared and agreed by the Contractor that this Agreement has been entered into by him on his own knowledge respecting the nature and conformation of the ground upon which the work is to be done, the location, character, quality and quantities of the material to be removed, the character of the equipment and facilities needed, the general and local conditions and all other matters which can in any way affect the work under this Agreement, and *the Contractor does not rely upon any information given or statement made to him in relation to the work by the Company*. [Emphasis added.]

Martland J. was careful to characterize the clause as a "non-reliance provision" negating the existence of a duty of care, as distinct from a clause limiting liability for the breach of a duty (at p. 973):

... I do not regard s. 3.1 as being a clause exempting from liability. It is what the Court of Appeal described as a non-reliance provision, the effect of which was to prevent liability arising on the part of C.P.R. in respect of statements made or information given by its employees.

130 To summarize, if the liability of a party to a contract is limited or excluded by a term of the contract, or if a contractual term limits or negates the duty owed by one party to the other (whether in contract or in tort), the other party to the contract may not use an action in tort to impose a wider liability on the first party than would be available under the contract.

### C. Negligent misrepresentation

131 Checo alleges that Hydro negligently misrepresented the state of the right-of-way. The majority of the British Columbia Court of Appeal agreed. In *Queen v. Cognos Inc.*, S.C.C., No. 22004, January 21, 1993, a case involving issues somewhat similar to those in the present appeal, I reviewed many aspects of the tort of negligent misrepresentation including the required elements for such an action. The specific question I should like to address in this case is: if the parties are in a contractual relationship, under what circumstances will it be open to one of the parties to allege that the other was guilty of negligent misrepresentation? In other words, when will the existence of a contract preclude a tort action for negligent misrepresentation?

132 The action for negligent misrepresentation was first recognized by the decision of the House of Lords in *Hedley Byrne*, supra. The ingredients of a negligent misrepresentation set out in that case remain good law today. To quote from the speech of Lord Morris (at pp. 502-503):

My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.

133 The rule in *Hedley Byrne*, supra, has been adopted in numerous Canadian cases, some of which will be discussed below. Although *Hedley Byrne* was considered revolutionary when it was decided, the case was in fact the culmination of a series of majority and dissenting judgments extending back into the last century. Like *Donoghue v. Stevenson*, supra, *Hedley Byrne* needs to be understood in its context. An understanding of this context is particularly important to assessing the role of negligent misrepresentation where the parties are in a contractual relationship.

134 Before *Hedley Byrne*, supra, it was settled law that a misrepresentation could give rise to damages only if it was fraudulent, or if the representation was a collateral warranty to a contract. An "innocent" misrepresentation (which included what would now, since *Hedley Byrne*, be characterized as a negligent misrepresentation) was not actionable in itself, but only if it formed part of a valid contract.

135 The leading case in fraudulent misrepresentation was *Derry v. Peek* (1889), 14 App. Cas. 337 (H.L.). In *Derry v. Peek*, the Court of Appeal held that a negligent misrepresentation — one made without due care as to its truth or falsehood — gave rise to an action in damages for deceit for anyone to whom the statement was directed and who relied on the statement to his or her detriment. The House of Lords rejected the suggestion that a false statement made negligently was actionable. In the words of Lord Herschell, "making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds" (p. 375). The House held that for an action in deceit or fraud to lie, the person making the statement must either know the statement to be false, or be reckless as to its truth or falsehood. This principle was reaffirmed by the House in *Nocton v. Lord Ashburton*, [1914] A.C. 932, where Viscount Haldane L.C. said this (at pp. 953-54): "It must now be taken to be settled that nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit."

136 Although actions on warranties were originally actions in tort, actions for breach of warranty had become, by the nineteenth century, actions in contract. See Baker, at pp. 293-95. The leading case of *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30 (H.L.), settled the rule that for a representation to be actionable as a warranty, it must have been made with promissory intent.

137 The appellants in *Heilbut, Symons*, were rubber merchants, who were promoting shares in what they represented was a rubber company. The respondent bought a large number of shares. The company turned out to be other than as it had been described, and the respondent brought an action in fraud and for breach of warranty. At trial, the jury found that the company had not been correctly represented by the appellants, but that the misrepresentation was not fraudulent. The jury did, however, find that the appellants had warranted that the company was a rubber company. The House of Lords allowed the appeal. In his speech, Lord Moulton held that no liability can flow from a representation which is not fraudulent, unless it is made with promissory intent (at p. 51):

It is my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made. In the present case the statement was made in answer to an inquiry for information. There is nothing which

can by any possibility be taken as evidence of an intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement. It is a representation as to a specific thing and nothing more.

138 Between *Derry v. Peek* and *Heilbut, Symons*, supra, it was settled that a negligent misrepresentation which was not made with promissory intent was not actionable, as it fell between deceit and warranty. To succeed, a plaintiff was required to prove fraud or a collateral warranty. As Lord Denning M.R. observed in *Esso Petroleum*, supra, at p. 13:

Ever since *Heilbut Symons & Co v Buckleton* we have had to contend with the law as laid down by the House of Lords that an innocent misrepresentation gives no right to damages. In order to escape from that rule, the pleader use to allege — I often did it myself — that the misrepresentation was fraudulent, or alternatively a collateral warranty. [footnote omitted]

139 *Heilbut, Symons* and *Derry v. Peek*, supra, were equally the law in Canada. The rule in *Derry v. Peek* that misrepresentations must be made with intent to deceive in order to be actionable in deceit was applied by this Court in *Devall v. Gorman, Clancey & Grindley Ltd.*, 58 S.C.R. 259, [1919] 1 W.W.R. 836, 45 D.L.R. 654. Similarly, in *Kinsman v. Kinsman* (1912), 22 O.W.R. 979, 3 O.W.N. 966, 7 D.L.R. 31 (Div. Ct.), Riddell J. noted at p. 968 that "Of course, fraud — fraudulent intent — must be proved in an action for deceit: *Derry v. Peek*." See also *Howse v. Quinnell Motors Ltd.*, [1952] 2 D.L.R. 425 (B.C.C.A.), and *Chapman v. Warren*, [1936] O.R. 145, [1936] 2 D.L.R. 157 (H.C.). The rule in *Heilbut, Symons* that a misrepresentation which falls short of being fraudulent is not actionable unless it is incorporated into a contract as a warranty was applied inter alia in *Gardner v. Merker* (1918), 43 O.L.R. 411, 44 D.L.R. 217 (C.A.); *Anderson v. Kennedy*, [1920] 1 W.W.R. 25, 13 Sask. L.R. 38, 50 D.L.R. 105 (C.A.); *Gilmour v. Trustee Co. of Winnipeg*, [1923] 3 W.W.R. 177, 33 Man. R. 351, [1923] 4 D.L.R. 344 (C.A.); *Thurston v. Streilen* (1950), 59 Man. R. 55, [1951] 4 D.L.R. 724 (K.B.); and in *Schlote v. Richardson*, [1951] O.R. 58, [1951] 2 D.L.R. 233 (H.C.).

140 It was against this backdrop that the House of Lords decided *Hedley Byrne*, supra. Through their bank, the appellants had obtained the opinion of the respondent merchant bankers as to the creditworthiness of E. Ltd. There was no contract between the appellants and the respondent. E. Ltd. subsequently went bankrupt, and it was found at trial that the respondent has been negligent in giving the opinion. Their Lordships, expressly distinguishing *Derry v. Peek*, supra, and implicitly distinguishing *Heilbut, Symons*, supra, held that a negligent misrepresentation may, even if not made with promissory intent, give rise to liability for damages. Lord Reid described those relationships in which a duty to take care in the making of representations will arise as follows (at p. 486):

... all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him. I say "ought to have known" because in questions of negligence we now apply the objective standard of what the reasonable man would have done.

141 In reaching this result, their Lordships relied on an alternate line of authority reaching back through the dissenting judgment of Denning L.J. in *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164, [1951] 1 All E.R. 426 (C.A.), and the decisions of the House of Lords in *Donoghue v. Stevenson*, supra, and *Nocton v. Lord Ashburton*, supra, to the nineteenth century decisions of *Cann v. Willson* (1888), 39 Ch. D. 39; *Heaven v. Pender* (1883), 11 Q.B.D. 503 (C.A.); and *George v. Skivington* (1869), L.R. 5 Exch. 1.

142 With the exception of *Nocton v. Lord Ashburton*, supra, the cases relied upon by their Lordships were all cases in which the relationship between the plaintiff and the defendant was not contractual, but the court (or the dissenting judge) nonetheless held that the defendant owed a duty of care to the plaintiff. That is, in each case, no contractual remedy was available to the plaintiff, but the action was allowed in tort. *Nocton v. Lord Ashburton* is the exception: in that case there was a contract between the plaintiff and the defendant (who was his solicitor). However, *Nocton v. Lord Ashburton* is readily distinguishable. In that case, an action for breach of contract was barred by the *Statute of Limitation*. Moreover, the plaintiff succeeded not in tort but for breach of fiduciary duty.

143 It was not clear from *Hedley Byrne*, supra, that an action for negligent misrepresentation would lie where the parties subsequently entered into a contract. In *Hedley Byrne*, and in the cases upon which it relied (with the exception of *Nocton v. Lord Ashburton*, supra) there was no contract between the parties. A dictum of Lord Reid in *Hedley Byrne* hinted that if the parties were in a contractual relationship, the proper remedy was an action for breach of warranty (at p. 483): "Where there is a contract there is no difficulty as regards the contracting parties: the question is whether there is a warranty." The cases decided immediately after *Hedley Byrne* held that an action for negligent misrepresentation was barred if the parties were in a contractual relationship: *Bagot v. Stevens Scanlan & Co.*, supra, and *Clark v. Kirby-Smith*, [1964] Ch. 506, [1964] 2 All E.R. 835. See also D.W. McLauchlan, "Pre-Contract Negligent Misrepresentation" (1977), 4 Otago L. Rev. 23.

144 However, it was settled by *Esso Petroleum*, supra, that the existence of a contract is not a bar to a remedy for negligent misrepresentation. In the words of Shaw L.J. (at p. 26):

It is difficult to see why, in principle, a right to claim damages for negligent misrepresentation which has arisen in favour of a party to a negotiation should not survive the event of the making of a contract as the outcome of that negotiation. It may, of course, be that the contract ultimately made either expressly or by implication shows that, once it has been entered into, the rights and liabilities of the parties are to be those and only those which have their origin in the contract itself.

For a list of Canadian cases applying *Esso Petroleum*, see *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15, 38 C.C.L.T. 51 (C.A.), at p. 59 [C.C.L.T.].

145 The principle that an action for negligent misrepresentation will survive the making of a contract between the parties was affirmed in this Court in *Carman Construction*, supra. Martland J., writing for the Court, held that the respondent was not liable on the basis of negligent misrepresentation because the contract that was made between the parties contained a "non-reliance provision" or disclaimer which had the effect that the respondent did not assume any duty of care. It is clear from Martland J.'s reasons that the fact that the alleged negligent misrepresentation had induced the contract would not have been a reason for disallowing the claim in negligence. The same proposition can be deduced from the recent decision of this Court in *Rainbow Industrial Caterers Ltd.*, supra. Although the narrow issue was the appropriate measure of damages where a plaintiff is induced to enter into a contract with the defendant by the defendant's negligent misrepresentation, both Sopinka J. (for the majority) and McLachlin J. (dissenting), agreed that damages for negligent misrepresentation could be awarded where the misrepresentation induces a contract.

146 It is clear that the fact that the parties are in a contractual relationship is not in itself a bar to an action in tort for negligent misrepresentation. As in other areas of negligence, the plaintiff may have the option of concurrent actions in tort and contract. However, concurrency must be viewed in light of the principles articulated above. Where a duty arising in tort is co-extensive with a duty created by an express term of the contract, the plaintiff will be limited to whatever remedies are available under the contract. Moreover, if the liability or duty of the defendant is excluded or limited by the terms of the contract, the plaintiff may not allege a wider liability in tort in order to circumvent the terms of the contract.

#### **D. Application of the Law to the Facts of this Case**

147 Checo alleges that Hydro negligently misrepresented the state of the right-of-way, and that Checo suffered damages as a result of this misrepresentation. In the alternative, Checo has alleged that Hydro was in breach of its contractual duties.

##### ***(1) The Claim for Negligent Misrepresentation***

148 I will assess Checo's claim in tort for negligent misrepresentation first. Because Checo and Hydro are in a contractual relationship, Checo's claim in tort immediately raises two issues. First, is there a specific contractual duty created by an express term of the contract which is co-extensive with the common law duty of care which Checo alleges Hydro has breached? If there is such a contractual duty, then Checo is precluded from bringing an action in tort against Hydro for breach of the common law duty of care. In such a case, Checo would be confined to whatever remedies are available under the law of contract. Second, if the answer to the first question is negative, is Hydro's liability or duty in tort limited or excluded by the terms of the contract?

*(a) Is there a Contractual Duty Excluding a Common Law Duty of Care?*

149 The question whether there is a contractual duty defined by an express term of the contract which would operate to exclude the common law duty of care upon which Checo relies in its action for negligent misrepresentation is shortly answered: there is such a duty. Checo bases its claim for negligent misrepresentation on the alleged representation made in cl. 6.01.03 of the tender documents. Clause 6.01.03 of the tender documents was incorporated verbatim as an express term (also numbered 6.01.03) of the contract between Hydro and Checo after Hydro accepted Checo's tender. On Checo's interpretation of cl. 6.01.03 of the tender documents, it is a representation as to the state of the right-of-way. If cl. 6.01.03 of the tender documents is such a representation (and I am of the opinion that it is, as I will discuss below), then cl. 6.01.03 of the contract is an express warranty as to the state of the right-of-way. Whatever duty is imposed in tort on Hydro by the clause in the tender documents is co-extensive with the duty imposed in contract by the express clause in the contract. In consequence, subject to any overriding considerations arising from the context in which the transaction occurred, Checo is limited to whatever remedies may be available to it in contract for Hydro's breach of cl. 6.01.03 of the contract. Checo cannot rely on a breach of Hydro of any duty created by cl. 6.01.03 of the tender documents to found an action in tort.

150 As I indicated, context is important in assessing whether a claim in tort is foreclosed by the terms of the contract. This transaction occurred in a commercial context. The parties are both large corporations, and there is no allegation or indication of any inequality of bargaining power or unconscionability. I would also note that the contract which was concluded by the parties was included as part of the tender documents. That is, Checo knew when it was preparing its bid, that if its bid were accepted, the representation as to the condition of the right-of-way would be a term of the contract. Checo knew, or ought to have known, that disputes as to the condition of the right-of-way would potentially be governed by the contract. Knowing this, Checo decided to make a bid, hoping that its bid would be accepted. I would conclude that an assessment of the context strengthens my initial conclusion that Checo should be limited to any remedies which might be available to it under the contract.

*(b) Is Hydro's Liability or Duty Limited or Excluded?*

151 In light of my answer to the first question, it is unnecessary for the purposes of this appeal to consider whether Hydro's liability or duty in tort is limited or excluded by a term of the contract. Simply put, Checo's claim in tort is barred by the contract. However, I shall proceed at this stage to consider the effect of cls. 2.03 and 4.04 of the tender documents, which were incorporated into the contract, on Checo's rights under the contract.

152 In argument before this Court, Hydro submitted that cls. 2.03 and 4.04 operated to exempt Hydro from contractual liability for its representations. The representation relied upon by Checo is contained in cl. 6.01.03, which is in the following language:

**6.01.03 Work Done by Others**

Clearing of the right-of-way and foundation installation has been carried out by others and will not form part of this Contract.

153 The two clauses which Hydro argues exclude its liability are as follows:

**2.03 Tenderer's Responsibility**

It shall be the Tenderer's responsibility to inform himself of all aspects of the Work and no claim will be considered at any time for reimbursement for any expenses incurred as a result of any misunderstanding in regard to the conditions of the Work. Should any details necessary for a clear and comprehensive understanding be omitted or any error appear in the Tender Documents or should the Tenderer note facts or conditions which in any way conflict with the letter or spirit of the Tender Documents, it shall be the responsibility of the Tenderer to obtain clarifications before submitting his Tender ...

Neither B.C. Hydro nor the Engineer shall be responsible for any instructions or information given to any Tenderer other than by the Purchasing Agent, in accordance with this Clause.



#### 4.04 Inspection of Site and Sufficiency of Tender

The Contractor shall inspect and examine the Site and its surroundings and shall satisfy himself before submitting his Tender as to the nature of the ground and sub-soil, the form and nature of the Site, the quantities and nature of work and materials necessary for completion of the Work, the means of access to the Site, the accommodation and facilities he may require, and in general shall himself obtain all necessary information as to risks, contingencies, and other circumstances which may influence or affect his Tender. Without limiting the generality of the foregoing, the Contractor shall satisfy himself of any special risks, contingencies, regulations, safety requirements, and other circumstances which may be encountered.

The Contractor shall be deemed to have satisfied himself before tendering as to the correctness and sufficiency of his Tender for the Work and of the prices stated in the Schedule of Prices which prices shall (except insofar as it is otherwise provided in the Contract) cover all his obligations under the Contract and all matters and things necessary for the proper execution of the Work.

154 Clause 6.01.03 is a representation that the site would be cleared as of the date of the contract. It is an express contractual warranty as to the state of the right-of-way. The trial judge found that, in all the circumstances, "clearing" meant the right-of-way would be clear of logs and debris. Cohen J. stated (at p. 67):

Kosty acknowledged that tenderers rely on information contained in the tender documents and the defendant intended that the plaintiff would prepare its bid based on the representations contained in the tender documents. Clause 6.01.03 does not define the word "clearing" and the tender documents do not contain the defendant's clearing standards or clearing contracts. In my opinion, based on what they observed and their past experience, the natural and ordinary meaning to be given to the word "clearing" in clause 6.01.03 was the one understood by Lemieux and Campeau, that the right-of-way would be free of logs and debris. I accept the evidence of Lemieux and Campeau, who I found to be honest and forthright, that they formed an honest belief in December 1982, after reading the tender documents and viewing the right-of-way, that clearing was not yet complete.

The trial judge also found as a fact that the right-of-way was incompletely and improperly cleared as of the date of the contract. In my opinion, cls. 4.04 and 2.03 do not limit or exclude Hydro's liability flowing from cl. 6.01.03 of the contract and of the tender documents. Clause 6.01.03 is a specific provision which is not displaced by cls. 4.04 and 2.03.

155 Clauses 2.03 and 4.04 do not operate to limit Hydro's liability in contract for the representation relied on. Clause 4.04 required Checo to inspect the contract "Site", and specified that the contract price would cover all Checo's obligations under the contract. "Site" is defined by cl. 4.01 of the contract as "the land upon which the Work *is to be done* [by the Contractor — Checo ] and any area or areas adjacent thereto used in connection with the Work and, unless the context otherwise requires, shall include all materials, supplies, tools, equipment and structures thereon" [emphasis added]. The representation relied on by Checo, however, is that clearing of the right-of-way "*has been carried out by others* and will not form part of this Contract" [emphasis added]. The ordinary meaning of the emphasized words suggest that the "Site" referred to in cl. 4.04 of the contract does not encompass the right-of-way, which is the subject matter of the representation at issue. Thus, cl. 4.04 is not relevant to Checo's action in tort or to its action for breach of contract.

156 The key phrase in cl. 2.03 is, "should the Tenderer note facts or conditions which in any way conflict with the letter or spirit of the Tender Documents, it shall be the responsibility of the Tenderer to obtain clarifications before submitting his Tender." The representation made in cl. 6.01.03 was that the right-of-way would be cleared as of the date of the contract. Accordingly, although Checo did note the "dirty" condition of the right-of-way at the time it was carrying out the inspection mandated by cl. 2.03, the condition of the "Site" was not in conflict with the representation that the right-of-way would be cleared as of the date of the contract, and Checo's obligation under cl. 2.03 to obtain clarification from Hydro on this point was not triggered. Moreover, the well-known principles governing the interpretation of contractual exclusion and limitation of liability clauses suggest that neither cl. 2.03 nor cl. 4.04 is sufficiently clear to limit or exclude Hydro's liability in contract for the representation relied on.

157 I would accordingly conclude that there is no clause in the contract or in the tender documents which serves either to limit or exclude Hydro's liability for the representation contained in cl. 6.01.03.

***(2) The Claim for Breach of Contract***

158 I have found that it was an express term of the contract that the right-of-way would be cleared. As found by the trial judge, the right-of-way was not cleared. Therefore, Hydro breached the contract. I have also found that there is no exclusion or limitation clause that would affect Hydro's liability in contract. Given that he found Hydro liable for fraudulent misrepresentation, the trial judge did not consider the question of damages for breach of contract. I would return the matter to trial on the question of damages for the breach of contract.

159 At the original trial, Checo also claimed damages for breach of contract for items which would appear to be unconnected with the failure to clear the right-of-way. As the trial judge did not consider the issue of breach of contract, there are no findings of fact with respect to these items. Accordingly, if Checo establishes at the new trial that Hydro breached its contract in any other respect, unconnected with the failure to clear the right-of-way, and that Checo suffered damages therefrom, Checo is entitled to recover damages for these items in accordance with the applicable law of damages.

**Disposition**

160 I would accordingly allow Hydro's appeal in part and dismiss Checo's cross-appeal. I would order a new trial on the issue of breach of contract. I have found that Hydro breached the contract in that the right-of-way was not properly cleared. Damages for this breach should be assessed at the new trial. In addition, Checo is entitled to recover for any breaches of the contract unconnected with the condition of the right-of-way which it may establish at the new trial.

161 Under the circumstances, each party should bear its own costs, here and in the courts below.

*Appeal dismissed; cross-appeal allowed.*

Footnotes

\* Stevenson J. took no part in the judgment.

TAB 2

1984 CarswellOnt 869  
Supreme Court of Canada

Consumers Distributing Co. v. Seiko Time Canada Ltd.

1984 CarswellOnt 801, 1984 CarswellOnt 869, [1984] 1 S.C.R. 583, [1984] S.C.J. No. 27, 10 D.L.R. (4th) 161, 1 C.P.R. (3d) 1, 26 A.C.W.S. (2d) 106, 29 C.C.L.T. 296, 29 C.C.L.I. 296, 3 C.I.P.R. 223, 54 N.R. 161, J.E. 84-533

**CONSUMERS DISTRIBUTING CO. v. SEIKO TIME CANADA LTD. et al.**

Laskin C.J.C. \*, Dickson, Estey, McIntyre and Chouinard JJ.

Heard: November 28, 1983

Judgment: June 21, 1984

Docket: 16970

Counsel: *B. Zarnett* and *J. Wiesenfeld*, for appellant-defendant.

*J.M. Roland, Q.C.*, and *B.G. Morgan*, for respondent-plaintiff.

Subject: Intellectual Property; Torts; Property

**Headnote**

Trade Marks --- Passing off and unfair competition — Grey market goods

Passing off — Classic form and "extended action" generally considered — Sales network with authorized distributors and dealers — Identical watches under original trade-mark lawfully acquired from "diverter" — distributor, being sold by vendor company outside authorized network — Plaintiffs being authorized distributors — Unauthorized vendors unable to furnish manufacturer's guarantee and servicing facilities — Interlocutory injunction requiring unauthorized vendor to post notice of warning of non-applicability of manufacturer's "international guarantee" — Injunction not challenged on appeal — Permanent injunction, forbidding unauthorized vendor to advertise or sell product, contested before Supreme Court of Canada — Limits of tort of passing-off examined — Broader implications of injunction complained of, considered unacceptable — Injunction discharged and appeal allowed.

Seiko watches are marketed around the world through a network of authorized distributors and dealers. The vendor company lawfully acquired Seiko watches from a "diverter", an authorized distributor outside Canada; and, though not themselves authorized dealers, marketed them. The manufacturer's guarantee, packaged with each watch, was seemingly not validly extended to purchasers who acquired those watches from the vendor, for it lacked the validating stamp of an authorized dealer. Neither that guarantee, nor the servicing facilities available through the Seiko organization, were recognized by the plaintiffs, the authorized Canadian distributors, as extending to watches thus marketed by the vendor.

The plaintiffs obtained two injunctions against the vendor, upon the footing of an "extended version" of the tort of passing-off. The former, an interlocutory injunction, required the vendor to post notices, advising potential customers that it was not an authorized dealer, and that in consequence the manufacturer's "international guarantee" did not apply and would not be honoured by the plaintiffs in respect of watches acquired from the vendor. That injunction was complied with, and not objected to by the present appeal.

The other injunction, a permanent one affirmed in the Ontario Court of Appeal, forbade the vendor to sell or advertise Seiko watches in Canada; and it was against that injunction that the present appeal was taken to the Supreme Court of Canada: argument being confined solely to the issue of the tort of passing off, and the proper limits of that tort. The plaintiffs contended that their "product" was a composite one, including not only the watch, but its point-of-sale service, instruction booklet, duly validated manufacturer's guarantee, and after-sales servicing facilities; and that in selling the watches simpliciter as "Seiko watches" the vendor was generating confusion in the marketplace and damaging the plaintiffs' commercial goodwill. It was this argument which persuaded the learned trial Judge to grant the injunction now complained of, and upon which issue was now joined.

**Held:**

The appeal should be allowed, and the permanent injunction discharged. The vendor had contended that after issuance of the interlocutory injunction, and the posting by the vendor of notices compliant therewith, no further confusion or potential deception in the marketplace was discernible, and that accordingly the requirements of the tort of passing off were absent. Certainly, that tort in its classic form could not be perceived upon the present facts, and while it had been strenuously argued that the tort should be extended, such contentions must be cautiously approached, with due regard to the public's interest in free competition in the open market. The extension here contended for by the respondents, and acknowledged in the Courts below, would have startling and impolitic results, restraining the public's existing option to purchase Seiko watches unsupported by any attendant maker's warranty, and effectively establishing a monopoly equivalent to that normally acquired under the [Patent Act \(Canada\)](#), and unlimited, moreover, in duration.

The vendor had been selling exactly the same watch, from the same source, as the plaintiffs, and the case could not convincingly be brought within the ambit of the classic tort of passing off simply by pointing to features unique to the plaintiff's merchandizing techniques. To accede to that would, indeed, create at common law an indefinite and impolitic monopoly, and recognize, in substance, a right to entail and control the sale of personal property, however legitimately acquired, where another person in the position of the seller was also marketing the identical item of personal property. Such a principle is foreign to our law, and would conduce ultimately to unacceptable restraints on trade and free competition. Furthermore, the requirement of the tort of passing off, that the vendor's activity be likely to confuse the minds of the public, had here been entirely dispelled by the vendor's compliance with the interlocutory injunction, and the display of the notices required thereby.

The "extended version" of passing off, as developed in some Courts, will be found to require at least a potential deception or confusion of the public, or to appropriate the proprietary interest of another in business goodwill. Such circumstances were signally absent in the present case, when once the interlocutory injunction had been obeyed.

Additionally, it was by no means certain in law that the plaintiffs were obliged to honour the manufacturer's warranty. Conceivably, once insulated from competition, they might discontinue their (arguably gratuitous) honouring of that warranty. If free to disregard the manufacturer's warranty in this way, the plaintiffs could not be heard to complain of the vendor's inability to honour its terms.

In substance, the manufacturer had already benefited from the Court's issuance of the interlocutory injunction, having thereby been freed in reality, if not necessarily in strict legal theory, from the warranty costs in respect of sales through the diverter. It should not be accorded the further benefit of the monopoly which would substantially arise, should this injunction be allowed to stand. The order complained of should accordingly be discharged.

APPEAL from a judgment of the Ontario Court of Appeal (1981), 34 O.R. (2d) 481, 60 C.P.R. (2d) 222, 128 D.L.R. (3d) 767, dismissing an appeal from a judgment of Holland J. (1980), 29 O.R. (2d) 221, 11 B.L.R. 149, 50 C.P.R. (2d) 147, 112 D.L.R. (3d) 500 (H.C.).

**The judgment of the Court was delivered by *Estey J.*:**

1 The respondent instituted an action in the Supreme Court of Ontario to restrain the defendant-appellant from marketing Seiko watches in Canada, at least for so long as the appellant is not an authorized dealer of the respondent. The Seiko watch is a quartz watch manufactured by, or on behalf of, K. Hattori & Company Limited in Japan and marketed by Hattori around the world through a distribution system consisting of authorized distributors and, in turn, their authorized dealers. In Canada the authorized distributor is the respondent whose parent company, Seiko Time Corporation performs a like role in the Seiko distribution system in some or all of the United States. Seiko Time Corporation, in turn, is a wholly owned subsidiary of Hattori. Thus the respondent is owned and controlled by Hattori through Hattori's American distributor. Hattori is the registered owner of the trade mark "Seiko" with reference to the wares "watches, clocks, time recorders, switching means, and parts thereof". The trade mark was renewed on 30 June 1976, after the respondent had been appointed as an authorized distributor by Hattori for Canada (by letter of 23 June 1975). The letter from Hattori appointed its sub-subsidiary the

... exclusive dealer of "SEIKO" watches and clocks in Canada, and as such has the sole right to distribute "SEIKO" watches and clocks in Canada to authorized dealers and to appoint such dealers in Canada.

Hattori did not appoint the respondent a registered user of the trade mark under the [Trade Marks Act, R.S.C. 1970, c. T-10, s. 37](#), nor is Hattori, the owner of the trade marks, one of the plaintiffs in this action. The respondent, of course, has not appointed the appellant, Consumers Distributing Company Limited, as an authorized Seiko dealer in Canada.

2 Some time in 1978, the appellant began to import Seiko watches and sell them in the retail market. These watches had been obtained lawfully from a source outside Canada, which, according to the record, is an authorized distributor of Hattori but who was selling Seiko watches outside the authorized distribution network, that is to say, to others, such as the appellant, who were not authorized Seiko dealers. The record refers to this distributor as a "diverter". The watches, it is agreed, originate with Hattori or its authorized manufacturer and supplier in Japan, and reach the appellant in the original packaging, along with a warranty issued in the name of Hattori, and a user's booklet. In short, these watches are identical with the Seiko products distributed by the respondent.

3 The warranty, packaged in the individual containers in which the watches reach the appellant, is described in the record as a warranty for the distribution and sale of Seiko watches in the United States. The guarantee reads:

Your SEIKO quartz watch is guaranteed for one year from the date of purchase.

The warranty document goes on to notify the purchaser that repair service is available only "at SEIKO Service Centers listed on the following page". One of the Service Centers so listed is:

4

Canada 285 YORKLAND BOULEVARD, WILLOWDALE,

ONTARIO M2J 1S8

Tel: (416) 496-2221 — TELEX: 06-966801

CABLE: TORSEIKO TORONTO

This is apparently the address of the respondent's place of business.

5 It is relevant to note that the certificate of guarantee accompanying each watch as received by the respondent was issued under the name of Hattori and provides as follows:

We certify that your SEIKO watch was manufactured by the SEIKO industrial group, and is guaranteed for one year from the date of purchase. Within that period, repair service is available without charge against defects in materials and workmanship, excluding damage caused by accidents or lack of care. If your SEIKO watch needs servicing, please take it or send it to the nearest authorized SEIKO service center or agent, stating date of purchase and nature of service required.

The certificate then concludes with the following notice:

IMPORTANT

.....

2. This certificate is not valid unless properly filled out by the dealer.

The warning is differently phrased in the instructions contained in the booklet received by the appellant with the watches in question (and passed along to the retail purchasers). It is said to be guarantee form 101, which is a Hattori form for use in the United States. This warranty reads as follows:

To qualify for service under the warranty, present your watch together with the warranty repair coupon, page 13 of this booklet, properly filled in by the authorized SEIKO dealer from whom the watch was originally purchased, or other proof of date of purchase, to any member of the SEIKO Worldwide Service Network.

The repair arrangements are, according to the evidence at trial, available at the service center only if the booklet is completed by an authorized dealer at the time of sale. The repair centers are told by the respondent to reject other watches. The record indicates that, apart from watches sold in Canada, there is no certain way for the respondent to determine whether the watch was actually sold by an authorized dealer somewhere in the world. The respondent bears the cost of servicing the warranty for watches sold in Canada. The respondent apparently has the right to reimbursement from Hattori for the cost of service of watches sold by authorized dealers elsewhere, but in practice has not exercised this right. The record is silent as to whether the respondent has sought reimbursement from Hattori for the performance of the guarantee in respect of Seiko watches sold by the appellant, or others, who were not authorized Seiko dealers.

6 In the result it is clear that, while the source of the diverted watches sold at retail in Canada by the appellant is not revealed, the uncontested evidence is that these watches came from within the Seiko worldwide distribution system through a vendor outside of Canada, that the watches are genuine Seiko watches produced by Hattori or its suppliers, and that the appellant is not an authorized Seiko dealer appointed by the respondent for the sale of Seiko watches in Canada.

7 Proceedings were instituted by the respondent in January 1979 wherein the respondent sought two forms of injunction as follows:

- (a) an interlocutory and a permanent injunction restraining the Defendant from acquiring, advertising and selling "Seiko" watches;
- (b) in the alternative, an interlocutory and a permanent injunction restraining the Defendant from holding itself out as an authorized dealer of the Plaintiff by advertising and selling "Seiko" watches as internationally guaranteed;

An interlocutory injunction was issued in the month of February 1979, and modified in the month of March, whereunder the appellant, until trial or other final disposition of the action:

- (a) was restrained from holding itself out as an authorized dealer of the respondent by advertising and selling Seiko watches as internationally guaranteed;
- (b) was ordered to post a permanent notice in all showroom catalogues and on counters where the appellant displayed Seiko watches, as well as in any future advertising for those purposes, to the effect that the defendant was not an authorized dealer, that the Seiko watches sold by the appellant had not been purchased from the respondent and were not internationally guaranteed by the respondent; and,
- (c) was ordered not to issue or distribute any Seiko warranty booklets. (This provision does not appear in the permanent injunction issued after trial.)

The actual form of notice directed in the amended injunction to be posted by the appellant was as follows:

Consumers Distributing is not one of the 'authorized dealers' appointed by Seiko Time Canada Ltd. to market Seiko watches in Canada. The Seiko watches sold by Consumers Distributing consist of models although similar to those distributed in Canada by Seiko Time Canada Ltd. or by Seiko distributors in other parts of the world are not purchased from Seiko Time Canada Ltd. and are not 'internationally guaranteed' by Seiko Time Canada Ltd. which has refused to honour any form of Seiko guarantee accompanying our Seiko watches.

8 The matter proceeded to trial in April 1980 and evidence was then taken as to the effect in the market place of the sale of Seiko watches by the appellant on the business of the respondent, and of the confusion occasioned by the respondent's activities, both within the respondent's distribution network and amongst the buying public at large. There was no evidence of any confusion amongst the members of the buying public after compliance began on 31 March 1979 by the appellant with the interlocutory injunction set out above which commenced on 31 March 1979.

9 At the opening of trial [reported (1980), [29 O.R. \(2d\) 221](#), [11 B.L.R. 149](#), [50 C.P.R. \(2d\) 147](#), [112 D.L.R. \(3d\) 500 \(H.C.\)](#)], the appellant took the position that it was agreeable to the interlocutory interim injunction being made permanent. The appellant further abandoned any argument that watches sold by the appellant would qualify for servicing within the warranty period by the respondent so long as the warranty repair coupon on p. 13 of the warranty booklet was duly completed by showing "other proof of date of purchase". Judgment at trial was granted in favour of the respondent as follows:

10 1. A permanent injunction was ordered restraining the appellant from:

... holding itself out as an authorized Seiko dealer of the Plaintiff by advertising and selling 'Seiko' watches as internationally guaranteed

[p. 223 O.R.]

11 2. The appellant was permanently enjoined from:

... advertising or selling "Seiko" watches in Canada

[p. 222 O.R.]

12 3. Damages in the amount of \$5,000 were awarded to the respondent.

13 On appeal to the Court of Appeal, the appellant took no appeal against the injunction described in para. 1 above or from the award of damages, confining the appeal entirely to the injunction described in para. 2 above.

14 The Court of Appeal judgment [reported (1981), [34 O.R. \(2d\) 481](#), [60 C.P.R. \(2d\) 222](#), [128 D.L.R. \(3d\) 767](#)] was given by endorsement on the record:

Appeal dismissed with costs for the reasons given by the trial judge and in particular the conclusion he reached that the product marketed by the plaintiff was not simply a watch alone. We are satisfied that in this case an injunction merely in the terms of para. 1 of the judgment would allow the appellant to continue trading on the good will of the plaintiff and would permit a deception of the public.

15 While the statement of claim framed the action on the basis of false representation, or holding out by the appellant that it is an authorized dealer of the respondent, as well as passing off contrary to the [Trade Marks Act, s. 7\(c\)](#) and contrary to the Combines Investigation Act, R.S.C. 1970, c. C-23, s. 36(i)(a) and (c), the position taken by the respondent in this Court has been confined entirely to the action in tort of passing off. The respondent puts its position both on the basis of the classic action in passing off, as well as in the modern variation of that action, sometimes referred to in the cases as the "extended version" of the doctrine of passing off. In taking this position, the respondent relies upon a series of findings by the learned trial Judge to the general effect (and particulars shall be mentioned later) that the Seiko watch, as marketed by the respondent, is a composite or packaged product consisting of four elements: 1. the watch; 2. the point of sale service and instruction booklet; 3. the warranty properly filled out by an authorized dealer; and, 4. the after sale service.

16 Consequently, the trial Judge concluded that, by marketing the bare watch without the other three elements, the appellant was creating confusion in the market place and damage to the goodwill, which the respondent had built up on the sale of its complete or composite product through its extensive distribution and service network. The trial Judge found that the appellant, on the other hand, was not advertising or selling this product, but was simply selling the bare watch with the result, "[T]hat confusion in the eyes of the public is likely ... ." The basis of the plaintiff-respondent's success at trial is the finding that the respondent established goodwill in connection with the Seiko watch by reason of the sale and distribution of that product in the manner outlined above. The respondent did so by means of service centers, sales training programs, the appointment of "only fine jewellery stores or large department stores" as authorized dealers, and the expenditure of "a substantial amount of its money annually for national advertising and has financially aided its authorized dealers in local advertising undertaken by the dealers". The respondent's success is indicated in the financial statements in the record. On the other hand, the trial Judge found that the



appellant had no point of sale or adjustment service for its customers, no repair facilities, and carried a small line of only eleven models of the Seiko watch as against 250 models carried by authorized dealers. The learned trial Judge went on to find that:

It was this product with all its components which developed the reputation of Seiko in Canada and the goodwill which thereby arose between the plaintiff, its dealers and the consuming public.

[p. 230 O.R.] In contrast to the product so marketed by the respondent, the learned trial Judge found:

The defendant is not advertising or selling this product as the defendant has no sales personnel knowledgeable about this watch, has no point-of-sale service, cannot deliver a valid warranty, and offers no after-sale service. I find that the product advertised and sold by the defendant is a different product. The defendant is not an authorized dealer and cannot complete the warranty booklet. That confusion in the eyes of the public is likely, is clear. Accepting the fact that the very watch and warranty booklet being sold and distributed by the defendant are of those of K. Hattori, the plaintiff's product is nonetheless a different product because of the various items comprised in the plaintiff's product.

[pp. 230-31 O.R.] Earlier in his judgment, the learned trial Judge had found:

Persons acquiring Seiko watches from Consumers could well believe that they were buying the 'product' offered by an authorized Seiko dealer and that Seiko Time Canada had so authorized Consumers.

[p. 228 O.R.]

17 The judgment at trial strays somewhat from this theme, as regards the right to use the word "Seiko", when the Court observes [at p. 240 O.R.]:

This plaintiff has established to my satisfaction that it has business or goodwill in the use of the name 'Seiko' as developed through its marketing practices which is worthy of protection even though it does not own this name. It is nonetheless one of a class entitled to make use of the distinctive name 'Seiko' as descriptive of its product and this is a valuable part of the goodwill which has been generated to the plaintiff by the method of marketing which it has employed.

It was the marketing technique or scheme which, in the end, appears to have given rise to the recognition of the right in the respondent which was to be protected by the injunction which issued. The judgment concluded [at p. 239 O.R.]:

In the present case I find:

(1) by holding out, as it has in its catalogue and stores, that the watches being advertised or sold by it are Seiko watches (i.e., including all the components which I have found have become attached to that name) the defendant is misrepresenting the product it is selling to the consuming public; ...

18 The respondent is, of course, not a registered user nor an assignee of the trade mark, Seiko, and the distribution of a trade marked product lawfully acquired is not, by itself, prohibited under the [Trade Marks Act of Canada](#), or indeed at common law. In passing, it should also be observed that the finding as to the four elements in the respondent's product appears to be based upon a duplication between the warranty and the after-sales service, elements 3 and 4. The after-sales service is provided during warranty without charge unless the watch is known by the respondent's staff to have been sold outside the authorized distribution system. Thereafter, service is presumably based on normal charge for service. There seems to be no valid distinction between the warranty properly filled out and the after-sales service. Indeed, if Hattori assumed the cost of the performance of the warranty issued at the time of the initial sale of the watch by Hattori, no issue would have arisen here, except possibly the question of a right accruing by reason of the point of sale activity by the respondent's authorized dealer. It is difficult to find the origin of such a right in law, and indeed, none was advanced by the respondent.

19 The time which concerns us, in the analysis of the marketing practices of the parties to this appeal, divides itself into two periods. The first period commences with the beginning of sales by the appellant of Seiko watches, by catalogue and in the stores of the appellant, and ends with the issuance of the interlocutory injunction on 14th February 1979, or at the latest, 20th

March 1979 when it was revised. The second period continues thereafter up to and including the trial. It is not contested by the appellant that the Seiko watches, complete with warranty and packaging, all as received from the unknown distributor, were sold to the public in the first period without any notice that the warranty included in the box with the watch and issued over the name of Hattori, may not be enforceable in Canada, and that it sold these watches to the public in Canada without any notice that the appellant was not an authorized dealer of the respondent or of Hattori. The appellant conceded at trial that the injunction claimed in the statement of claim, para. 16(b) (and described above as the first injunction in the judgment at trial), whereby the appellant was permanently enjoined and restrained from "... holding itself out as an authorized Seiko dealer of the Plaintiff by advertising and selling 'Seiko' watches as internationally guaranteed;" should continue permanently. Neither has the appellant appealed from the award of \$5,000 damages, relating, as that award apparently did, to the sale of these watches during period one.

20 In this Court, the appellant argued that no evidence was introduced at trial to show that, after the injunctions of February and March 1979, any confusion was created in the market place by the conduct of the appellant in selling the bare Seiko watch in the manner permitted under the interim injunction. The respondent did not direct this Court to anything in the record which might be described as evidence to the contrary. Counsel for the appellant asserted that this submission was made in the Court of Appeal below. That Court may have been responding to that argument when it stated:

... an injunction merely in the terms of para. 1 of the judgment would allow the appellant to continue trading on the good will of the plaintiff and would permit a deception of the public.

This conclusion, however, is entirely unsupported in the evidence.

21 What, then, is the issue now presented by this appeal? It is said by the appellant that the only complaint made by the respondent, which is supported by evidence, is that Seiko watches were presented for sale to the Canadian public, under circumstances wherein that public was aware that these watches were not supported by an international guarantee by the respondent, and that the appellant was not an authorized dealer of the respondent. The respondent contends, nonetheless, that sales, even in these circumstances, do indeed result in confusion or deception of the public, and accordingly, argues that the unlimited injunction, prohibiting sales of Seiko watches by the appellant under any circumstances or conditions, is a valid exercise of the authority of the Court, under the doctrine of 'passing off'.

22 From a factual viewpoint, the position advanced by the respondent, if it should be adopted, would have the following consequences:

1. The Canadian public would be deprived of the right, or option, to purchase the Seiko watch, a product of Hattori of Japan, on the alternative basis that the watch would be unsupported by the maker's warranty; and,
2. A monopoly would be effectively established by the application of the doctrine of passing off in these circumstances, equivalent to that normally authorized by the issuance of a patent of invention under the [Patent Act, R.S.C. 1970, c. P-4](#), except that here the monopoly would be for an unlimited term.

These startling results themselves call for an examination of the principles of tort law to determine whether or not there is indeed, in these circumstances, room for the application of the doctrine of passing off, sometimes referred to as a branch of injurious falsehood. The common law principles relating to commerce and trade generally proceed on the basis of a recognition of perceived benefits to the community from free and fair competition. This is variously illustrated in the older authorities, for example, in [Nordenfelt v. Maxim Nordenfelt Guns & Ammunition \[1894\] A.C. 535, \[1891-94\] All E.R. Rep. 1 \(H.L.\)](#), per Lord Macnaghten, at p. 565:

The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void.

Later, in [A.G. of Australia v. Adelaide S.S. Cos., \[1913\] A.C. 781 at 794 \[1911-1913\] All E.R. Rep. 1120 \(P.C.\)](#), Lord Parker of Waddington, discussing this same principle, stated:

Monopolies and contracts in restraint of trade have this in common, that they both, if enforced, involve a derogation from the common law right in virtue of which any member of the community may exercise any trade or business he pleases and in such manner as he thinks best in his own interests.

23 There are well known and important exceptions to this general rule where the law countenances, and indeed sometimes imposes, restrictions on this right to free competition and trade, including restrictions imposed by purchasers of goodwill upon vendors, deceitful trade practices calculated to injure others, defamation of trade and profession, improper or unfair use of trade information of a former employee, the protection of trade secrets, monopolies granted by patent including letters patent on inventions, and statutory monopolies or regulated trades and professions. Any expansion of the common law principles to curtail the freedom to compete in the open market should be cautiously approached. This must be the path of prudence in this age of the active legislative branch where the community's trade policies are under almost continuous review. This by no means calls for judicial abdication of the role of adjusting the common law principles relating to proper trade practices to the ever-changing characteristics and techniques of commerce. Reticence to curtail this general rule, however, is found even in *Vennootschap (E.W.B.) v. J. Townend & Sons (Hull) Ltd.*, [1979] A.C. 731, [1979] 2 All E.R. 927 at 933 (sub nom. *Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd.*), [1979] F.S.R. 397, [1980] R.P.C. 31 (H.L.) where Lord Diplock stated:

... but in an economic system which has relied on competition to keep down prices and to improve products there may be practical reasons why it should have been the policy of the common law not to run the risk of hampering competition by providing civil remedies to everyone competing in the market who has suffered damage to his business or goodwill in consequence of inaccurate statements of whatever kind that may be made by rival traders about their own wares. The market in which the action for passing off originated was no place for the mealy mouthed: advertisements are not on affidavit; exaggerated claims by a trader about the quality of his wares, assertions that they are better than those of his rivals, even though he knows this to be untrue, have been permitted by the common law as venial 'puffing' which gives no cause of action to a competitor even though he can show that he has suffered actual damage in his business as a result.

In the most recent edition of Salmond on the Law of Torts (17th ed., 1977) at pp. 400-01, the learned author discusses passing off in these terms:

149. *Injurious Falsehood: Passing Off.*

To sell merchandise or carry on business under such a name, mark, description, or otherwise in such a manner as to mislead the public into believing that the merchandise or business is that of another person is a wrong actionable at the suit of that other person. This form of injury is commonly, though awkwardly, termed that of passing off one's goods or business as the goods or business of another and is the most important example of the wrong of injurious falsehood, though it is so far governed by special rules of its own that it is advisable to treat it separately. *The gist of the conception of passing off is that the goods are in effect telling a falsehood about themselves*, are saying something about themselves which is calculated to mislead. The law on this matter is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders. Normally the defendant seeks to acquire this benefit by passing off his goods as and for the goods of the plaintiff ...

(The underlining is mine.) At p. 403, the learned author examines the basis for the concept of passing off:

The courts have wavered between two conceptions of a passing-off action — as a remedy for the invasion of a quasi-proprietary right in a trade name or trade mark, and as a remedy, analogous to the action on the case for deceit, for invasion of the personal right not to be injured by fraudulent competition. The true basis of the action is that the passing off injures the right of property in the plaintiff, that right of property being his right to the goodwill of his business.

He concludes, at p. 404:

Indeed, it seems that the essence of the tort lies in the misrepresentation that the goods in question are those of another; ...

24 The role played by the tort of passing off in the common law has undoubtedly expanded to take into account the changing commercial realities in the present-day community. The simple wrong of selling one's goods deceitfully as those of another is not now the core of the action. It is the protection of the community from the consequential damage of unfair competition or unfair trading. Professor Fleming, in his work the Law of Torts (6th ed., 1983) reviews this development (at p. 674):

The scope of the tort has been increasingly expanded to reach practices of 'unfair trading' far beyond the simple, old-fashioned passing-off, consisting of an actual sale of goods accompanied by a misrepresentation as to their origin, calculated to mislead the purchaser and divert business from the plaintiff to the defendant.

The learned author later resumes the discussion (at p. 676):

But not all harmful competition is unfair or unlawful. Most important, *the countervailing public interest in free competition* often demands priority: most prominently in the claim to use one's own surname honestly in business even at the cost of some confusion with a competitor, and in the use open to all of generic and descriptive, as distinct from fanciful, terms unless they have acquired a so-called secondary meaning by exclusive association with the plaintiff.

(The underlining is mine.)

25 The learned author of Prosser, The Law of Torts (4th ed., 1971) also discusses passing off as a species of unfair competition, at pp. 957-58:

One large area of unfair competition is what may be called for lack of a better generic name false marketing, which used to be called "passing off," and still quite often goes by that designation. It consists of the making of some false representation to the public, or to third persons, likely to induce them to believe that the goods or services of another are those of the plaintiff. This may be done, for example, by counterfeiting or imitating the plaintiff's trade mark or trade name, his wrappers, labels or containers, his vehicles, the badges or uniforms of his employees, or the appearance of his place of business. The test laid down in such cases has been whether the resemblance is so great as to deceive the ordinary customer acting with the caution usually exercised in such transactions, so that he may mistake one for the other. The older rule was that there must be proof of a fraudulent intent, or conscious deception, before there could be any liability, and this is still occasionally repeated; but the whole trend of the later cases is to hold that it is enough, at least for purposes of injunctive relief, that the defendant's conduct results in a false representation, which is likely to cause confusion or deception, even though he has no such intention.

26 It is difficult, on first blush, to bring the conduct of the appellant within the concept of passing off. The appellant is selling precisely the same watch, coming from the same source, as the respondent. The watch is protected by a guarantee not in the respondent's name but in the name of the maker, Hattori. The quality of the product must have some bearing on the respondent's success and consequent development of business and goodwill in the trade. The watches sold in each branch of the trade, of course, were only and always those of Hattori. The respondent purports to bring itself within the classic definition of the doctrine by associating with the watch features which are unique to the selling technique employed by the respondent. The respondent is able to do this, so the argument goes, because of its contractual relationship with the supplier of Seiko watches, Hattori, which in turn supplies the respondent with the power of limiting the manufacturer's warranty to watches sold by dealers authorized by the respondent. Axiomatically, the appellant and persons (such as Woolco and K-Mart) who, according to the evidence, carry on a like business, are unable to merchandise the watches in this manner, as they are not authorized dealers. The problem facing the respondent is that the logical extension of this proposal grants to a vendor in the position of the respondent, a monopoly on the sale in Canada of a product to the same extent as it would enjoy if the product were subject to a patent of invention issued to the respondent under the [Patent Act of Canada](#). A second cul-de-sac into which such a submission necessarily leads is that the common law, in its personal property sector, would thereby be recognizing a right to entail and control the sale of personal property, however legitimately acquired, where another person, in the position of the vendor, was also marketing the identical item of personal property. Such a principle is foreign to our law. This right to control resale would, it follows, flow not only to the respondent and all others upon whom the manufacturer wishes to bestow this protection, but to the manufacturer Hattori who,

on terms presumably satisfactory to itself, released these watches into the distribution stream which eventually carried them to the appellant. Ironically, the manufacturer, with the profits from its sale of these watches in its pocket, could then, if this is the law, restrain the appellant from reselling these watches. A third consequence would be an inevitable collision between such a result, on one hand, and the common law doctrine with respect to restraint of trade and free competition, on the other hand.

27 The style of marketing employed by the respondent might, indeed, have produced market good will in the respondent in relation to its establishment, and in the business and undertaking carried on by its authorized dealers. Efficiency, organization and energy no doubt will always, when coupled with what the record describes as an essentially good and sound product, produce a competitive edge, sometimes referred to as goodwill. Here, that commercial truism, if permitted, would run away with the principle of passing off. The appellant, put in its worst light, is offering to the Canadian public the alternative of buying a genuine Seiko watch unsupported by a manufacturer's warranty. Presumably, the appellant is able to offer a watch in such condition at a lower price than some or all of the authorized Seiko dealers, and this is one possible source of anxiety on the part of the respondent. That is not to say that the respondent would not have a legitimate trade interest in stifling this competition because of the inconvenience, if not added cost, arising in the respondent's business at its repair depots. There, the respondent, according to the record, has received for repair under a claimed warranty right, "spurious" watches, that is, Seiko watches which had been sold outside the Seiko distribution network. No doubt there is some cost in rejecting these applications for service. There is, however, no evidence on the record that any such activity occurred during what we have referred to above as the second period when the interim injunction was extant. Nor is any argument made that the respondent cannot recover such warranty service costs from Hattori.

28 If anything further need be said to distinguish the commercial activity of the appellant from that condemned by the rule in passing off, attention should be drawn to the fact that the passing off rule is founded upon the tort of deceit, and while the original requirement of an intent to deceive died out in the mid-1800s, there remains the requirement, at the very least, that confusion in the minds of the public be a likely consequence by reason of the sale, or proffering for sale, by the defendant of a product not that of the plaintiff's making, under the guise or implication that it was the plaintiff's product or the equivalent. See: [Millington v. Fox \(1838\)](#), 3 Myl. & Cr. 338 at 352, 40 E.R. 956 (Ch. Div.); [Perry v. Truefitt \(1842\)](#), 6 Beav. 66 at 68, 49 E.R. 749 at 750 (Rolls Ct.); [Cellular Clothing Co. v. Maxton & Murray](#), [1899] A.C. 326 at 334 (H.L.). Here, nothing of that nature is present. Indeed, once the interim injunction commenced to operate, it is difficult to understand how the watch-buying public would purchase a watch from the appellant and leave their premises with the idea that Hattori, or its agent the respondent, or its agents the authorized dealers, would somehow service the watch. Indeed, the injunction was designed by the respondent and adopted by the Court below for that very purpose. The article of commerce sold by the contending parties hence is identical. The peripherals of presentation of the product to the public, in some circumstances, might support some exclusive rights in the market as against others seeking to supply the same product to the market, but in the circumstances of this case, no support in the law for such relief has been exposed.

29 A moment should be devoted to a discussion of the other element said to distinguish the "product" of the respondent from that of the appellant, and I refer to "point of sale service". This had to do with the help offered by the jeweller, as an authorized dealer of the respondent, in adjusting the bracelet and in informing the purchaser as to the workings of the watch. There is nothing in the record to indicate that this service was of any commercial value, but in the circumstances, a Court should perhaps incline in favour of the plaintiff (here respondent) without emphasis on the onus of demonstration. On the other hand, if this minimal service were deleted from the 'package' offered by the respondent, then it is a simple question as to whether sale of a watch with a warranty and sale of the same watch without a warranty is a different product, or whether it is one and the same product. If one were to elevate the point of sale service to the level of being an element of a product, then a quasi-monopolistic protection under the doctrine of passing off would arise in one who adopts any merchandising style, or in the modern vernacular "gimmick", which had theretofore not been adopted in his neighbourhood by a competitor when selling a 'name-brand' product. No case drawn to our attention extends the passing off umbrella to those limits. I therefore conclude that the classic action of passing off is not here available to the respondent.

30 But the respondent goes on to urge that the circumstances here demonstrated fall within a doctrine referred to in argument, and, indeed, in some of the literature on the subject, as the "extended action" in passing off. This doctrine is said to have evolved

from the progressive discussions of the action for passing off in three cases in the United Kingdom: *Spalding A.G. & Bros. v. A.W. Gamage Ltd.* (1915), 84 L.J. Ch. 449, 32 R.P.C. 273 (H.L.); *Bollinger (J.) v. Costa Brava Wine Co. (No. 3)*, [1960] Ch. 262, [1959] 3 All E.R. 800 (sub nom. *Bollinger (J.) v. Costa Brava Wine Co. (No. 1)*), [1960] R.P.C. 16, and *Bollinger (J.) v. Costa Brava Wine Co. (No. 4)*, [1961] 1 W.L.R. 277, [1961] 1 All E.R. 561 (sub nom. *Bollinger (J.) v. Costa Brava Wine Co. (No. 2)*), [1961] R.P.C. 116 (Ch. Div.); and *Warnink (Vennootschap)*, supra.

31 In the *Spalding* case, supra, the House of Lords considered a course of commercial conduct by a defendant in the marketing of a discontinued product of the plaintiff (soccer balls), as the 'improved' product recently brought to the market by the plaintiff. The defendant thereafter sought to rectify any harm done by its first advertisement by a second advertisement, which made reference to a description of the discarded balls using terms which the Court found had been long associated by the public with the plaintiff's product. Lord Parker of Waddington discussed the tort of passing off as follows (p. 284):

A cannot, without infringing the rights of B, represent goods which are not B's goods or B's goods of a particular class or quality to be B's goods or B's goods of that particular class or quality. The wrong for which relief is sought in a passing-off action consists in every case of a representation of this nature.

My Lords, the basis of a passing-off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made.

and then described the test to determine the presence of the tort of passing off on the same page as, "... whether the defendant's use of such mark, name, or get-up is calculated to deceive." It should be added at this point that "calculated to deceive" means, in the words of Lord Diplock, that such deception or confusion is a "reasonably foreseeable consequence" of the conduct in question. See *Warnink* at pp. 932-33 [All E.R.].

32 On the facts of that case the trial Judge and the House of Lords concluded that the acts of the defendant were "hardly consistent with fair or honest trade" and concluded:

There is nothing in the subsequent advertisements pointing to a desire on the part of the Defendants to undo the harm they had done by their first advertisements. Indeed, I am not sure that the subsequent advertisements are not so framed as to strengthen a belief induced by the first ...

advertisements.

33 This is hardly the situation here. The corrective measure was designed by the plaintiff-respondent and adopted by the Court on the interlocutory application of the respondent to enable the buyer to ascertain precisely the terms of the offered sale; and to protect the respondent's trade pending the disposition of the action. The soccer balls had been discarded by the plaintiff-manufacturer as waste material and excluded from public sale. Here the manufacturer had placed the watches in question in the market stream just as was done by the manufacturer with the watches sold to the public by the respondent.

34 The principles of passing off were said to have been further expanded or modernized in the United Kingdom in the decision of *Danckwerts J. in Bollinger v. Costa Brava Wine Co. (No. 1)*, supra, where the issue was whether plaintiffs associated with the marketing of champagne produced in the district of France bearing that name could obtain an injunction prohibiting the marketing in the United Kingdom of a Spanish wine said to have similar characteristics, under the name "Spanish Champagne". Unlike the *Spalding* case, the defendant was not faced with an allegation of marketing the discarded goods of the plaintiff under a deceptive description indicating to the buying public that the goods were regular products of the plaintiff. Moreover, the defendant did not represent that the goods were identical with, or the same as, the goods which the plaintiff was marketing in the U.K. In *Bollinger (No. 1)*, the defendant advised the public that the wine came not from France but from Spain. The key issue was whether the defendant could arrogate to its wine the word "Champagne", and thereby succeed to any benefits which had accrued to the plaintiff by reason of the word "Champagne", having become known in the market as associated with wine produced by the plaintiffs from grapes grown in the District of Champagne in France. In meeting this issue, *Danckwerts J.* discussed the inclusion of the concept of unfair competition in the action of passing off (at p. 805):

The well-established action for "passing off" involves the use of a name or get-up which is calculated to cause confusion with the goods of a particular rival trader, and I think that it would be fair to say that the law in this respect has been concerned with unfair competition between traders rather than with the deception of the public which may be caused by the defendant's conduct, for the right of action known as a "passing-off action" is not an action brought by the member of the public who is deceived but by the trader whose trade is likely to suffer from the deception practised on the public but who is not himself deceived at all.

35 As to the immediate issue of the right in the plaintiffs to prevent the defendant from using the geographic name, which had been used without any special right or grant in law by the plaintiff, the Court in finding for the plaintiff stated (at pp. 810-11):

There seems to be no reason why such licence should be given to a person, competing in trade, who seeks to attach to his product a name or description with which it has no natural association so as to make use of the reputation and goodwill which has been gained by a product genuinely indicated by the name or description. In my view, it ought not to matter that the persons truly entitled to describe their goods by the name and description are a class producing goods in a certain locality, and not merely one individual. The description is part of their goodwill and a right of property. I do not believe that the law of passing off, which arose to prevent unfair trading, is so limited in scope.

Danckwerts J. found the plaintiff had developed a goodwill or reputation in the market by associating its product with the region of origin. Deliberate employment of this name by another trader for the purpose of enhancing the trade operations of such other trader was, in the Court's view, the appropriation of another's right of property, namely his goodwill. This term goodwill is used in the sense that the word was used by Lord Macnaghten in [Inland Revenue Commrs. v. Muller & Co.'s Margarine Ltd.](#), [1901] A.C. 217 at 223 [1900-1903] All E.R. Rep. 413 (H.L.): "It is the attractive force which brings in custom." In reaching this result, the Court in [Bollinger](#) relied upon [Draper v. Trist](#), [1939] 3 All E.R. 513 (C.A.) where Lord Goddard stated at p. 526:

In passing-off cases, however, the true basis of the action is that the passing off by the defendant of his goods as the goods of the plaintiff injures the right of property in the plaintiff, that right of property being his right to the goodwill of his business.

36 That extension of the action of passing off, if it is an extension, does not reach the circumstances of this appeal. In [Bollinger](#), the defendant did not pass off his goods as those of the plaintiff, but directed attention unfairly to his goods by associating them with those of the plaintiff, by the deliberate use of a name which had become associated in the market with the goods of the plaintiff. The desired impression on the mind of the wine-buying public was that the product of the defendant was of the same standard of quality and acceptance as the wine of the plaintiff. Here, the appellant sold the watches of Hattori under the Hattori trade mark, Seiko, to which the respondent had no more right in law than did the appellant. Had the appellant attempted to sell these watches after removing the Seiko trade mark, other rights would be offended and causes of action against the appellant would arise in someone but, perhaps, not including the respondent. The better analogy here would be to the buyer of a Chevrolet from an authorized dealer or source, who then sells the car without any status of dealership from the manufacturer. Assuming title to the car was lawfully acquired and that no misrepresentation of the condition of the vehicle and the right of warranty was made, would a duly authorized dealer of the manufacturer, or the manufacturer itself, or anyone else, have recourse to injunction to prevent such a sale of the Chevrolet? Clearly not, and the answer is the same whether the car be new or used. See [Morris Motors Ltd. v. Lilley](#), [1959] 3 All E.R. 737, [1959] 1 W.L.R. 1184. Different considerations might apply where the action may be founded in trade mark legislation. No authorities were advanced by the respondent where such restriction on disposition of personal property was upheld.

37 On the return of the action for trial, the plaintiff succeeded on the finding by the Court that the use of the name "Spanish Champagne" was intended "to attract the goodwill connected with the reputation of the plaintiff's 'Champagne' to the Spanish product": [1961] 1 All E.R. 561 at 568.

38 The respondent, and indeed some of the textwriters, find the true version of the "extended passing off" doctrine in the more recent judgments of the House of Lords in [Warnink](#). On the facts, it is essentially the same as [Bollinger](#), substituting spirits and sherry for champagne, and substituting Netherland suppliers for the role played by the wine producers of the District of

Champagne. The case is useful here, not for its facts or the disposition, but for its discussion of the pathology of the tort of passing off. Indeed, on the facts, it is clearly against the essential position taken by the respondent, for the Court found that anyone truly producing the drink, long established in the United Kingdom market by the Netherland producers and sold under the name Advocaat, could market his product under the name Advocaat. The defendant marketed his product under that name, but it was not made from the same ingredients as the product which the Netherland suppliers had long marketed in the United Kingdom under that name. What was forbidden was the marketing of any other drink under the name Advocaat, or any other name incorporating it such as that used by the defendant "Old English Advocaat". By analogy, the appellant here could market, under the name Seiko, watches made by Seiko and (barring patent and trade mark considerations) other makers of Seiko watches would not be able to invoke the Warnink judgment. Indeed, Diplock L.J. started with the proposition that the plaintiff had no cause of action "for passing off in its classic form" (p. 930 [All E.R.]) because it could not be shown that a purchaser of the defendant's product "supposed or would be likely to suppose it to be goods supplied" (p. 930) by the plaintiff. But His Lordship went on to consider the broader application of the action and commented (at p. 931):

Unfair trading as a wrong actionable at the suit of other traders who thereby suffer loss of business or goodwill may take a variety of forms, to some of which separate labels have become attached in English law. Conspiracy to injure a person in his trade or business is one, slander of goods another, but most protean is that which is generally and nowadays, perhaps misleadingly, described as 'passing off'. The forms that unfair trading takes will alter with the ways in which trade is carried on and business reputation and goodwill acquired.

39 All this apparently started with Spalding, which Diplock L.J. considered as having established:

... five characteristics which must be present in order to create a valid cause of action for passing off: (1) a misrepresentation (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.

(p. 932-33)

40 To the same effect are the comments of Lord Fraser (at pp. 943-44):

It is essential for the plaintiff in a passing-off action to show at least the following facts: (1) that his business consists of, or includes, selling in England a class of goods to which the particular trade name applies; (2) that the class of goods is clearly defined, and that in the minds of the public, or a section of the public, in England, the trade name distinguishes that class from other similar goods; (3) that because of the reputation of the goods there is goodwill attached to the name; (4) that he, the plaintiff, as a member of the class of those who sell the goods, is the owner of goodwill in England which is of substantial value; (5) that he has suffered, or is really likely to suffer, substantial damage to his property in the goodwill by reason of the defendants selling goods which are falsely described by the trade name to which the goodwill is attached.

In both reasons for judgment, it is damage to goodwill gained through the "reputation of the type of product" (per Lord Diplock at p. 937) by reason of its "recognizable and distinctive qualities".

41 Only a moment's consideration is required to recognize that none of this "extended doctrine" has even a remote connection to the conduct complained of here. The watches are not, in the words of Lord Fraser, "falsely described" (p. 944) by the appellant. Indeed, they are sold under the original, and only, trade mark. Both parties, as vendors, gave the retail buyer a form of guarantee issued by a third party, Hattori. In each case, the buyer faced the enforcement of a guarantee to which the vendor was not a party. There is nothing before us to indicate that the respondent gave the buyer a legally enforceable assurance that its policy of recognition of Hattori's guarantee would continue through each guarantee period. Likewise there is nothing to show, in a legal sense (albeit hopelessly impractical), that Hattori's guarantee was not enforceable by any purchaser. There is nothing to show that Hattori was able to recoup, through the respondent's price to the authorized dealer, the cost of the service of the warranty. Nor is there any evidence that Hattori had or had not done so when making the sale of the watches in question to the appellant's



supplier, wherever and whenever that transaction took place. Finally, there is nothing in the record obliging either Hattori or the respondent to service the warranty issued to the retail purchaser over the name of Hattori.

42 Another practical consideration is the trade name on all the watches, "Seiko". These watches were inseparable from the Seiko trade mark in respect of which neither the respondent nor the appellant could acquire any rights. The trade mark itself distinguished the product from all others, and the "goodwill" likewise attached to the trade mark by reason of the inherent quality of the product. The respondent could not acquire a right (which could accrue under Warnink) to prohibit the sale of identical products by others. Can the principles of passing off, either classic or extended, be stretched further by the point of sale activities of the respondent or by the voluntary assumption of the performance of the Hattori covenant of guarantee? This has become academic with the issuance, pending trial, of the interim injunction. The purchaser who buys from the appellant is left to his own devices should his watch require service during the warranty period. A purchaser might attempt to enforce the Hattori guarantee or attempt to obtain repair services elsewhere. That is the assumed risk of the purchaser, undertaken in full knowledge of the salient facts. Without a price benefit, it is difficult to see why a purchaser would take this risk. In any case, it is a transaction which cannot be interrupted by any action in passing off, classic or extended.

43 The transaction on which this appeal rests should be examined from one additional viewpoint. The record does not contain any contract between Hattori and the respondent with respect to performance of the international warranty. If the respondent is not, in law, bound to perform the Hattori covenant to repair, what assurance is there that, once insulated from any competition by the continuance of the interlocutory injunction, the respondent would continue to honour the Hattori guarantee until the expiration of the successive warranties which commence with each retail sale? This situation exists so long as the respondent honours the Hattori warranty only because it is a wholly owned subsidiary of Hattori. That consideration would, of course, end if Hattori decided to dispose of its interest in the respondent. In any case, if the respondent's performance of the guarantee is gratuitous, what cognizance should the Court take of its complaint that the appellant does not do likewise?

44 On the other hand, if Hattori has secured a covenant from its distributors to perform its warranty in exchange for a price reduction or other consideration, then the remedy lies with Hattori to enforce the covenant against the appellant through the diverter-distributor. If Hattori failed to protect itself in this, or any other way, it would be surprising to find that the law would come to its aid by affording a parallel remedy through Hattori's wholly owned subsidiary, the respondent. Indeed, if such a recourse exists, Hattori would then be selling watches to the diverter, without price discount but with the diverter's covenant to perform the guarantee, and thus would recover a greater profit than Hattori would realize on the sales to its distributor, the respondent. With this profit in hand, Hattori, if the respondent's submissions carry the day, could then block the sale of such watches by the diverter's purchasers, and thereby keep its distributors and authorized dealers satisfied. The record is silent as to whether such a price differential exists in the Hattori distribution structure.

45 Either way, nothing supports the extension of a remedy in the field of passing off to the respondent. Hattori launched these watches into world commerce with a warranty attached in its own name. Hattori has already benefited from the law by the Court making permanent the interlocutory injunction because, in the result, Hattori is thereby freed from the obligation to perform, at least through Canadian facilities, its guarantee to repair during the warranty period. As a practical matter, because of the cost of enforcement relative to the probable cost of repairs to these watches, Hattori is freed of most, if not all, of the warranty cost in respect of sales through the diverter. The Courts, in the circumstances of this case, should leave to the retail purchaser and Hattori the settlement of the question as to who is responsible for the performance of the warranty. It is a long jump from there to the judicial recognition of a monopoly in the marketing of these watches in a vendor in the authorized distribution chain, particularly in the absence of trade mark or patent considerations.

46 The Warnink elements of passing off, at minimum, require an initial misrepresentation calculated to injure the business or goodwill of a trader in the same market, or which may be a reasonably foreseeable consequence, and which causes damage to the other trader. I am unable to find in this record any misrepresentation during the second period, which is essential to found a right in the respondent to enjoin the appellant generally from the selling of Seiko watches in any manner whatsoever. It must be remembered that the second injunction, and the only one under appeal, is expressed in these terms: the defendant (appellant) is "hereby permanently enjoined and restrained from advertising or selling 'Seiko' watches in Canada". To grant such an injunction, a Court must conclude that the seller of personal property identified by a registered trade mark owned by a

third party may not do so, if someone else is selling that property in some different mode, or with some different characteristic such as here, a 1-year warranty to repair. For the reasons already mentioned above, I find no such right in our law.

47 I do not want to leave this subject, dealing as it does with the marketing of manufactured goods identified by a registered trade mark, without stating that nothing was advanced herein by the respondent with reference to any rights flowing to it by way of a trade mark registered in the name of Hattori under the [Trade Marks Act, s. 37](#). Indeed, Hattori would be a requisite plaintiff if any such claim were made. Perhaps the respondent, if it held an appointment as a registered user of the registered trade mark, registered under the [Trade Marks Act](#), would have the requisite status. See Fox, *The Canadian Law of Copyright and Industrial Designs* (2nd ed., 1967), pp. 440-41. Neither condition here exists. We therefore are not confronted with the situation before the Exchequer Court in [Remington Rand Ltd. v. Transworld Metal Co.](#), [1960] Ex. C.R. 463, 32 C.P.R. 99.

48 For these reasons, I therefore would allow the appeal and direct that the order issued at trial be amended by the deletion therefrom of para. 2. The interlocutory injunction, granted on the 14th of February 1979, included an order to the appellant not to issue or distribute any Seiko warranty booklets. This provision did not subsequently appear in the permanent injunction issued after trial. The respondent apparently did not seek the restoration of this aspect of the injunction. This seems to be a proper result because it was Hattori, and not the respondent, who issued the guarantee, and Canadian purchasers should be left with their chances of forcing Hattori to perform this obligation. The appellant shall have its costs here and in the Court of Appeal, but shall have no costs with reference to the counterclaim. I would not vary the order as to the cost at trial because it is not entirely clear that the appellant gave, before the commencement of trial, the consent and undertaking with reference to the continuance of the interlocutory injunction which would have made the prosecution of the action through to judgment at trial unnecessary.

*Appeal allowed.*

#### Footnotes

- \* The Chief Justice did not take part in the judgment.

TAB 3

2022 FC 1212, 2022 CF 1212

Federal Court

Moushoom v. Canada (Attorney General)

2022 CarswellNat 3324, 2022 CarswellNat 3323, 2022 FC 1212, 2022 CF 1212, 2022 A.C.W.S. 3566

**XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE (Plaintiffs) and THE ATTORNEY GENERAL OF CANADA (Defendant)**

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON (Plaintiffs) and THE ATTORNEY GENERAL OF CANADA (Defendant)

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT  
(Plaintiffs) and THE ATTORNEY GENERAL OF CANADA (Defendant)

Ann Marie McDonald J.

Heard: August 17, 2022

Judgment: August 18, 2022

Docket: T-402-19, T-141-20, T-1120-21

Counsel: David Sterns, Mohsen Seddigh, Robert Kugler, for Plaintiffs, Xavier Moushoom, Jeremy Meawasige (by his litigation guardian, Jonavon Joseph Meawasige), Jonavon Joseph Meawasige, and Zacheus Joseph Trout

D. Geoffrey Cowper, Q.C., Dianne G. Corbiere, Peter N. Mantas, for Plaintiffs, Assembly of First Nations, Ashley Dawn Louise Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson by his Litigation Guardian, Carolyn Buffalo, Carolyn Buffalo, and Dick Eugene Jackson also known as Richard Jackson

Jeff Orenstein, for Respondent

Jonathan Tarlton, for Defendant

Subject: Civil Practice and Procedure; Public

**Headnote**

Aboriginal and indigenous law --- Practice and procedure — Representative or class actions — Miscellaneous  
First Nations' children were harmed by discriminatory provision of child and family services and essential services and parties reached Final Settlement Agreement (FSA) in class action — Court approved Notice Plan to provide class members with detailed information relating to FSA but prior to plan receiving court approval, law firm CLG, who had no involvement in proceedings, put information on two websites about "settlement" and invited class members to "Join this Class Action" — Websites offered contingency fee retainers and requested that class members provide personal information — Plaintiffs brought motion for interim and interlocutory orders that no legal professionals other than class counsel appointed by court, plaintiff Assembly of First Nations (AFN), or court-appointed administrator publish communication to class members relating to proceedings without court's approval and that CLG's website and any other such websites containing communications to class members relating to these proceedings be removed — Motion granted — Relief sought fell within court's jurisdiction to manage its own proceedings and under Rule 385(1)(a) court was permitted to give any directions that were necessary for the just, most expeditious and least expensive outcome of proceeding — First Nations individuals had been exploited and re-traumatized in prior class action settlements and current process had been designed to minimize risk of re-traumatization — Lawyers were not required to successfully submit claim and no individualized assessment requiring narrative-form explanation of harm was needed to establish entitlement to compensation and assistance in claims was being funded by Canada — Involvement of lawyers foreign to FSA and First Nations communities raised serious risk of re-traumatization and revictimization and might dissuade

some class members from engaging with process — It was vital that details of proposed FSA were sensitively and accurately communicated to class members — Until Notice Plan had been communicated to class members, allowing non-class legal counsel to provide information on proposed FSA in manner that was outside court's purview posed serious risk to proceedings — There was serious issue to be tried considering history of predatory activity on First Nations class action settlements as class members would suffer irreparable harm if Notice Plan was not communicated in culturally sensitive and trauma-informed manner — Balance of convenience favoured granting relief — It was just and equitable in circumstances to exercise court's jurisdiction and grant injunctive relief sought against non-parties.

APPLICATION for injunctions.

***Ann Marie McDonald J.:***

## **INTERIM ORDER AND REASONS**

- 1 On this Motion, filed August 15, 2022, the Plaintiffs seek an interim Order against non-parties as follows:
  - (i) an interim and interlocutory Order that no legal professionals, other than class counsel appointed by this Court, the Plaintiff Assembly of First Nations [AFN], or the Court-appointed administrator, Deloitte LLP, publish a communication to class members relating to these class proceedings without the Court's prior approval obtained on motion made on notice to the parties in these class proceedings; and
  - (ii) an interim and interlocutory Order that the websites of the Consumer Law Group [CLG] and any other such websites containing communications to class members relating to these class proceedings be removed upon service of the Court's Order herein, pending the disposition by the Court of the Plaintiffs' Motion for relief in the week of November 21, 2022, unless such communications are approved by the Court on motion made on notice to the parties in these class proceedings.
- 2 In support of their Motion, the Plaintiffs filed the following Affidavits:
  - a. Affidavit of Janice Ciavaglia affirmed on August 15, 2022;
  - b. Affidavits of Wenxin Yu affirmed on August 15, 2022;
  - c. Affidavit of Kenneth Dennis Brady Dixon sworn on August 11, 2022; and
  - d. Affidavit of Kim Blanchette sworn on August 15, 2022.
- 3 CLG was served with the Motion and filed an Affidavit of Andrea Grass sworn on August 16, 2022. CLG also filed a letter dated August 16, 2022, agreeing to the interim Order.

### **I. Background**

- 4 By way of brief background, the underlying class proceedings relate to harms caused by the discriminatory provision of child and family services and essential services to First Nations' children. The class members are children and young adults who have experienced homelessness, substance misuse, disabilities, and encounters with the criminal justice system. The First Nations class members are described by AFN as "some of the most vulnerable individuals in Canadian society".
- 5 The parties reached a Final Settlement Agreement (FSA) on June 30, 2022, which, if approved by the Court, will provide \$20 billion in compensation to the class members. The Court approval hearing for the FSA is scheduled for September 19, 2022.
- 6 In advance of the FSA approval hearing, the Court approved the Notice Plan developed by class counsel to provide class members with detailed information relating to the FSA. This Notice is expected to be published by August 19, 2022.
- 7 In the meantime, and prior to the FSA receiving Court approval, CLG, who are not class counsel and who have had no involvement in these proceedings, put information on two websites about the "settlement" and invited class members to "Join

this Class Action". Their websites offer contingency fee retainers and request that class members provide personal information - including information about "damages or symptoms experienced".

8 The Plaintiffs assert the CLG website communications contain misleading information about the class action, the potential settlement agreement, and the prospective claims process. On the CLG websites, there is no reference to or identification of class counsel. Further, the Plaintiffs allege the solicitation of retainer agreements and the request for information about damages or symptoms from class members is exploitative, re-traumatizing, and contrary to the various safeguards built into the FSA and the Notice Plan.

9 At the hearing of this Motion, legal counsel for CLG confirmed the information relating to these class proceedings has been removed from their websites. A hearing to determine the extent to which non-class counsel may communicate and engage with class members regarding the claims process is set for November 21, 2022. In advance of that hearing, CLG advised the Court that it does not object to the interim Order sought by the Plaintiffs.

## II. Issue

10 The only issue is whether the Court should exercise its discretion and grant the interim Order.

## III. Analysis

11 The relief sought by the Plaintiffs falls within the Court's plenary jurisdiction to manage its own proceedings (*Dugré v Canada (Attorney General)*, 2021 FCA 8 at para 20).

12 Furthermore, as noted in *Federal Courts Rules*, SOR/98-106, Rule 385(1)(a):

Unless the Court directs otherwise, a case management judge or a prothonotary assigned under paragraph 383(c) shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding and may

(a) give any directions or make any orders that are necessary for the just, most expeditious and least expensive outcome of the proceeding;

Sauf directives contraires de la Cour, le juge responsable de la gestion de l'instance ou le protonotaire visé à l'alinéa 383c) tranche toutes les questions qui sont soulevées avant l'instruction de l'instance à gestion spéciale et peut:

a) donner toute directive ou rendre toute ordonnance nécessaires pour permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible;

13 The Affidavit of Janice Ciavaglia, the Chief Executive Officer of the AFN, speaks to how First Nations individuals have been exploited and re-traumatized in other class action settlements, such as the Indian Residential Schools Settlement Agreement (IRSSA). She states as follows at paragraphs 15 and 17 of her Affidavit:

15. The AFN and its class counsel have gone to great lengths to ensure that the claims process for this proposed settlement will minimize the risk of re-traumatization to complainants, be as accessible as possible and will not require lawyers to successfully submit a claim. There is no individualized assessment that requires a narrative-form explanation of the claimant's circumstances or the harm suffered in order to establish an entitlement to compensation. Any additional compensation amounts are based upon objective factors. The settlement is designed in accordance with the lessons learned from the IRSSA compensation process, which were documented in a report from the National Centre for Truth and Reconciliation...

.....

17. Thus, the Parties to the proposed settlement agreement negotiated a crucial component through the appointment of "navigators" which are to be funded by Canada. Navigators will offer community-based, culturally competent support in order to assist claims members fill out the required documentation and submit a complete claim. This service will not cost anything to the Claimants and no portion of their compensation award will be affected. The involvement of lawyers foreign

to the settlement and First Nations communities, acting as "form fillers" is unacceptable to the AFN and raises a serious risk of re-traumatization and revictimization. It may also dissuade some class members from engaging with the claims process at all, as a result of First Nations individuals' past experiences and the legacy of the IRSSA implementation process.

14 The issues that arose in other First Nations class action settlements are discussed in more detail in *Fontaine Estate v Canada*, [2014] MJ No 159 and *Fontaine v Canada (Attorney General)*, 2016 ONSC 5359.

15 With respect to accuracy and reliability of the information on the CLG website, the Affidavit of Kenneth Dennis Brady Dixon is telling. Mr. Dixon is First Nations and states he was aware of the class proceedings and had contacted class counsel to discuss the case. However, when he saw the CLG advertisement, he believed this was how the compensation was being provided and that he needed to sign the CLG retainer in order to claim compensation. When his brother told him the retainer stated CLG would charge 25% of the compensation, he contacted class counsel again, only then learning that CLG was not associated with the class action.

16 The Notice Plan provides as follows:

...The plan is designed to notify the class members of certification and the settlement approval hearing in a trauma-informed and culturally sensitive manner, and to provide them with the opportunity to see, read, or hear the notice of certification and settlement approval hearing, understand their rights, and respond if they so choose...

The notice plan seeks a proportionate, multi-faceted, culturally appropriate, relevant and trauma-informed approach to notice dissemination... [Footnotes omitted.]

17 In keeping with the objectives of the Notice Plan, it is vital that the details of the proposed FSA are sensitively and accurately communicated to the members of the class. This will allow class members to make informed decisions about their rights and the claims process. Importantly, class members will be advised that they will not need to retain legal counsel in order to advance a claim.

18 Therefore, until the Notice Plan has been communicated to class members, allowing non-class legal counsel to provide information on the proposed FSA in a manner that is outside the Court's purview poses a serious risk to the class proceedings.

19 Based upon the foregoing and considering the applicable legal test from *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (as cited in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 25 [*Equustek*]), I am satisfied that:

- a. there is a serious issue to be tried considering the history of predatory activity on First Nations class action settlements;
- b. the class members will suffer irreparable harm if the Notice Plan is not communicated in a culturally sensitive and trauma-informed manner; and
- c. the balance of convenience favours granting the relief.

20 Accordingly, in my view, it is just and equitable in the circumstances to exercise the Court's jurisdiction and grant the injunctive relief sought against non-parties (*Equustek* at para 28).

#### IV. Conclusion

21 The Plaintiffs' Motion is granted.

#### INTERIM ORDER IN T-402-19, T-141-20, AND T-1120-21

*THIS COURT ORDERS that:*

1. no legal professionals, other than class counsel appointed by this Court, the Plaintiff, Assembly of First Nations, or the Court-appointed administrator, Deloitte LLP, shall publish a communication to class members relating to these class proceedings without the Court's prior approval obtained on motion made on notice to the parties in these class proceedings; and

2. the websites of the Consumer Law Group and any other such websites containing communications to class members relating to these class proceedings shall be removed upon service of this Order, pending the disposition by the Court of the Plaintiffs' Motion for relief in the week of November 21, 2022, unless such communications are approved by the Court on motion made on notice to the parties in these class proceedings.

*Application granted.*

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**End of Document**

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TAB 4

2018 SCC 5, 2018 CSC 5  
Supreme Court of Canada

R. v. Canadian Broadcasting Corp.

2018 CarswellAlta 206, 2018 CarswellAlta 207, 2018 SCC 5, 2018 CSC 5, [2018] 1 S.C.R. 196, [2018] 1 R.C.S. 196, [2018] 2 W.W.R. 431, [2018] A.W.L.D. 832, [2018] A.W.L.D. 861, 11 C.P.C. (8th) 221, 144 W.C.B. (2d) 163, 287 A.C.W.S. (3d) 745, 358 C.C.C. (3d) 143, 417 D.L.R. (4th) 587, 44 C.R. (7th) 1, 63 Alta. L.R. (6th) 1

**Canadian Broadcasting Corporation (Appellant) and Her Majesty The Queen (Respondent) and CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Postmedia Network Inc., Vice Studio Canada Inc., Aboriginal Peoples Television Network and AD IDEM/Canadian Media Lawyers Association (Interveners)**

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe JJ.

Heard: November 1, 2017  
Judgment: February 9, 2018  
Docket: 37360

Proceedings: reversing *R. v. Canadian Broadcasting Corp.* (2016), [2017] 3 W.W.R. 413, 2016 ABCA 326, 2016 CarswellAlta 2034, 43 Alta. L.R. (6th) 213, 404 D.L.R. (4th) 318, 93 C.P.C. (7th) 269, [2016] A.J. No. 1085, Frans Slatter J.A., J.D. Bruce McDonald J.A., Sheila Greckol J.A. (Alta. C.A.); reversing *R. v. Canadian Broadcasting Corp.* (2016), [2016] A.J. No. 336, 2016 ABQB 204, 2016 CarswellAlta 620, 37 Alta. L.R. (6th) 299, [2016] 9 W.W.R. 613, 86 C.P.C. (7th) 373, Peter Michalyszyn J. (Alta. Q.B.)

Counsel: Frederick S. Kozak, Q.C., Sean Ward, Tess Layton, Sean Moreman, for Appellant  
Iwona Kuklicz, Julie Snowdon, for Respondent  
Iain A.C. MacKinnon, for Interveners

Subject: Civil Practice and Procedure; Criminal

**Headnote**

Remedies --- Injunctions — Availability of injunctions — Mandatory injunctions — Threshold test — Strength of applicant's case

Accused was charged with first degree murder of person under age of 18 — Upon Crown's request, mandatory ban prohibiting publication, broadcast or transmission in any way of any information that could identify victim was ordered pursuant to [s. 486.4\(2.2\) of Criminal Code](#) — Before publication ban was issued, defendant broadcaster posted information revealing identity of victim on its website — Because defendant would not remove victim's identifying information from its website, Crown sought order citing defendant in criminal contempt of publication ban and interlocutory injunction directing removal of information from defendant's website — Chambers judge dismissed Crown's application — Majority of Court of Appeal allowed Crown's appeal and granted injunction — Defendant appealed — Appeal allowed — On application for mandatory interlocutory injunction, appropriate criterion for assessing strength of applicant's case at first stage of test was not whether there was serious issue to be tried, but rather whether applicant had shown strong prima facie case — It was not for Court of Appeal to re-cast Crown's case as civil application for interlocutory injunction pending permanent injunction — Crown was bound to show strong prima facie case of criminal contempt of court — There was nothing in chambers judge's reasons or in reasons of majority of Court of Appeal which established that chambers judge, in refusing interlocutory injunction, committed any errors justifying appellate intervention.

Judges and courts --- Contempt of court — Practice and procedure — General principles

Accused was charged with first degree murder of person under age of 18 — Upon Crown's request, mandatory ban prohibiting publication, broadcast or transmission in any way of any information that could identify victim was ordered pursuant to s. 486.4(2.2) of Criminal Code — Before publication ban was issued, defendant broadcaster posted information revealing identity of victim on its website — Because defendant would not remove victim's identifying information from its website, Crown sought order citing defendant in criminal contempt of publication ban and interlocutory injunction directing removal of information from defendant's website — Chambers judge dismissed Crown's application — Majority of Court of Appeal allowed Crown's appeal and granted injunction — Defendant appealed — Appeal allowed — On application for mandatory interlocutory injunction, appropriate criterion for assessing strength of applicant's case at first stage of test was not whether there was serious issue to be tried, but rather whether applicant had shown strong prima facie case — It was not for Court of Appeal to re-cast Crown's case as civil application for interlocutory injunction pending permanent injunction — Crown was bound to show strong prima facie case of criminal contempt of court — There was nothing in chambers judge's reasons or in reasons of majority of Court of Appeal which established that chambers judge, in refusing interlocutory injunction, committed any errors justifying appellate intervention.

Réparations --- Injonctions — Disponibilité des injonctions — Injonctions mandatoires — Critère d'application — Solidité de la preuve du demandeur

Accusé a été inculpé du meurtre au premier degré d'une personne âgée de moins de 18 ans — À la demande du ministère public, une interdiction mandatoire de publier ou de diffuser de quelque façon que ce soit tout renseignement permettant d'identifier la victime a été délivrée en vertu de l'art. 486.4(2.2) du Code criminel — Avant la délivrance de l'interdiction de publication, le radiodiffuseur défendeur a affiché sur son site Web des renseignements qui révélaient l'identité de la victime — Compte tenu du refus du défendeur de retirer ces renseignements de son site Web, le ministère public a sollicité une assignation pour outrage criminel contre le défendeur pour violation de l'interdiction en question ainsi qu'une injonction interlocutoire exigeant que les renseignements identifiant la victime soient retirés du site Web du défendeur — Juge siégeant en son cabinet a rejeté la demande du ministère public — Juges majoritaires de la Cour d'appel ont accueilli l'appel et accordé l'injonction interlocutoire — Défendeur a formé un pourvoi — Pourvoi accueilli — Lorsqu'il s'agit d'examiner une demande d'injonction interlocutoire mandatoire, le critère approprié pour juger de la solidité de la preuve du demandeur à la première étape du test applicable n'est pas celui de l'existence d'une question sérieuse à juger, mais plutôt celui de savoir si le demandeur a établi une forte apparence de droit — Il n'appartenait pas à la Cour d'appel de reformuler la thèse du ministère public comme s'il s'agissait d'une demande d'injonction interlocutoire au civil en attendant qu'une injonction permanente soit accordée — Ministère public était tenu d'établir une forte apparence de droit quant à l'existence d'un outrage criminel au tribunal — Rien dans les motifs du juge siégeant en son cabinet, ni d'ailleurs dans les motifs des juges majoritaires de la Cour d'appel, ne laissait croire que le juge siégeant en son cabinet a commis une erreur justifiant une intervention en appel lorsqu'il a rejeté la demande d'injonction interlocutoire.

Juges et tribunaux --- Outrage au tribunal — Procédure — Principes généraux

Accusé a été inculpé du meurtre au premier degré d'une personne âgée de moins de 18 ans — À la demande du ministère public, une interdiction mandatoire de publier ou de diffuser de quelque façon que ce soit tout renseignement permettant d'identifier la victime a été délivrée en vertu de l'art. 486.4(2.2) du Code criminel — Avant la délivrance de l'interdiction de publication, le radiodiffuseur défendeur a affiché sur son site Web des renseignements qui révélaient l'identité de la victime — Compte tenu du refus du défendeur de retirer ces renseignements de son site Web, le ministère public a sollicité une assignation pour outrage criminel contre le défendeur pour violation de l'interdiction en question ainsi qu'une injonction interlocutoire exigeant que les renseignements identifiant la victime soient retirés du site Web du défendeur — Juge siégeant en son cabinet a rejeté la demande du ministère public — Juges majoritaires de la Cour d'appel ont accueilli l'appel et accordé l'injonction interlocutoire — Défendeur a formé un pourvoi — Pourvoi accueilli — Lorsqu'il s'agit d'examiner une demande d'injonction interlocutoire mandatoire, le critère approprié pour juger de la solidité de la preuve du demandeur à la première étape du test applicable n'est pas celui de l'existence d'une question sérieuse à juger, mais plutôt celui de savoir si le demandeur a établi une forte apparence de droit — Il n'appartenait pas à la Cour d'appel de reformuler la thèse du ministère public comme s'il s'agissait d'une demande d'injonction interlocutoire au civil en attendant qu'une injonction permanente soit accordée — Ministère public était tenu d'établir une forte apparence de droit quant à l'existence d'un outrage criminel au tribunal — Rien dans les motifs du juge siégeant en son cabinet, ni d'ailleurs dans les motifs des juges majoritaires de la Cour d'appel, ne laissait croire que le

juge siégeant en son cabinet a commis une erreur justifiant une intervention en appel lorsqu'il a rejeté la demande d'injonction interlocutoire.

The accused was charged with the first degree murder of a person under the age of 18. Upon the Crown's request, a mandatory ban prohibiting the publication, broadcast or transmission in any way of any information that could identify the victim was ordered pursuant to [s. 486.4\(2.2\) of the Criminal Code](#). Before the publication ban was issued, the defendant broadcaster posted information revealing the identity of the victim on its website. Because the defendant would not remove the victim's identifying information from its website, the Crown sought an order citing the defendant in criminal contempt of the publication ban and an interlocutory injunction directing removal of the information from the defendant's website. The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction and dismissed its application. The majority of the Court of Appeal allowed the Crown's appeal and granted the injunction. The defendant appealed.

**Held:** The appeal was allowed.

Per Brown J. (McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Rowe JJ. concurring): On an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the test was not whether there was a serious issue to be tried but rather whether the applicant had shown a strong prima facie case. The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction further demand an extensive review of the merits at the interlocutory stage. Upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

It was unnecessary to apply the "clearest of cases" threshold as this was not a case of "pure" speech, comprising the expression of the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself. In this appeal the chambers judge correctly identified a "tangible, immediate utility" to the defendant's posting of the identifying information, being the "public's interest" in the defendant's right to express that information, and in freedom of the press.

It was not for the Court of Appeal to re-cast the Crown's case as a civil application for an interlocutory injunction pending a permanent injunction. The Crown's originating notice disclosed only a single basis for seeking the remedy of an injunction, the defendant's alleged criminal contempt of court. The originating notice in this case, and the sequencing therein of the relief sought, belied its putatively hybrid character. Each prayer for relief did not launch an independent proceeding, rather, both related to the alleged criminal contempt. The Crown was bound to show a strong prima facie case of criminal contempt of court. There was nothing in the chambers judge's reasons or in the reasons of the majority of the Court of Appeal which established that the chambers judge, in refusing the interlocutory injunction, committed any errors justifying appellate intervention. The majority of the Court of Appeal conceded that "either position was arguable" which was, in substance, an acknowledgment that the Crown had not shown a strong prima facie case of criminal contempt.

L'accusé a été inculpé du meurtre au premier degré d'une personne âgée de moins de 18 ans. À la demande du ministère public, une interdiction mandatoire de publier ou de diffuser de quelque façon que ce soit tout renseignement permettant d'identifier la victime a été délivrée en vertu de l'art. 486.4(2.2) du Code criminel. Avant la délivrance de l'interdiction de publication, le radiodiffuseur défendeur a affiché sur son site Web des renseignements qui révélaient l'identité de la victime. Compte tenu du refus du défendeur de retirer ces renseignements de son site Web, le ministère public a sollicité une assignation pour outrage criminel contre le défendeur pour violation de l'interdiction en question ainsi qu'une injonction interlocutoire exigeant que les renseignements identifiant la victime soient retirés du site Web du défendeur. Le juge siégeant en son cabinet a conclu que le ministère public n'avait pas satisfait aux exigences relatives à l'injonction interlocutoire mandatoire et a rejeté sa demande. Les juges majoritaires de la Cour d'appel ont accueilli l'appel et accordé l'injonction interlocutoire mandatoire. Le défendeur a formé un pourvoi.

**Arrêt:** Le pourvoi a été accueilli.

Brown, J. (McLachlin, J.C.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Rowe, JJ., souscrivant à son opinion) : Lorsqu'il s'agit d'examiner une demande d'injonction interlocutoire mandatoire, le critère approprié pour juger de la solidité de la preuve du demandeur à la première étape du test applicable n'est pas celui de l'existence d'une question sérieuse à juger, mais plutôt celui de savoir si le demandeur a établi une forte apparence de droit. Les conséquences potentiellement sérieuses pour un défendeur du prononcé d'une injonction interlocutoire mandatoire exigent en outre un examen approfondi sur le fond à l'étape interlocutoire. Lors de l'examen préliminaire de la preuve, le juge des requêtes doit être convaincu qu'il y a une forte

chance au regard du droit et de la preuve présentée qu'au procès, le demandeur réussira ultimement à prouver les allégations énoncées dans l'acte introductif d'instance.

Il n'était pas nécessaire d'appliquer le seuil du cas parmi « les plus manifestes » puisqu'il ne s'agissait pas, en l'espèce, d'une question de liberté d'expression « seulement », ce qui comprend celle de la personne qui s'exprime en dehors du contexte commercial, lorsque le discours en cause n'a pas d'utilité concrète et directe à part la liberté d'expression elle-même. Dans le présent dossier, le juge siégeant en son cabinet a correctement discerné une « utilité concrète et directe » à ce que le défendeur diffuse l'information permettant d'établir l'identité de la victime, soit « l'intérêt public » à ce que le défendeur ait le droit d'exprimer la teneur de ces renseignements, et la liberté de la presse.

Il n'appartenait pas à la Cour d'appel de reformuler la thèse du ministère public comme s'il s'agissait d'une demande d'injonction interlocutoire au civil en attendant qu'une injonction permanente soit accordée. La demande introductive d'instance du ministère public n'indiquait qu'un motif pour lequel il voulait obtenir cette réparation, soit l'outrage criminel au tribunal reproché au défendeur. L'avis introductif d'instance et l'ordre dans lequel les réparations y étaient demandées ne permettaient pas de conclure qu'il pouvait avoir un caractère théoriquement hybride. Chaque demande de réparation ne donnait pas lieu à une instance distincte; elles étaient plutôt toutes les deux liées à l'outrage criminel reproché. Le ministère public était tenu d'établir une forte apparence de droit quant à l'existence d'un outrage criminel au tribunal.

Rien dans les motifs du juge siégeant en son cabinet, ni d'ailleurs dans les motifs des juges majoritaires de la Cour d'appel, ne laissait croire que le juge siégeant en son cabinet a commis une erreur justifiant une intervention en appel lorsqu'il a rejeté la demande d'injonction interlocutoire. Les juges majoritaires de la Cour d'appel ont reconnu que « les deux thèses sont défendables », ce qui constituait essentiellement une reconnaissance que le ministère public n'avait pas établi une forte apparence de droit quant à l'existence d'un outrage criminel.

APPEAL by defendant from judgment reported at *R. v. Canadian Broadcasting Corp.* (2016), 2016 ABCA 326, 2016 CarswellAlta 2034, [2016] A.J. No. 1085, 93 C.P.C. (7th) 269, 404 D.L.R. (4th) 318, 43 Alta. L.R. (6th) 213, [2017] 3 W.W.R. 413 (Alta. C.A.), allowing Crown's appeal and granting mandatory interlocutory injunction.

POURVOI formé par le défendeur à l'encontre d'un jugement publié à *R. v. Canadian Broadcasting Corp.* (2016), 2016 ABCA 326, 2016 CarswellAlta 2034, [2016] A.J. No. 1085, 93 C.P.C. (7th) 269, 404 D.L.R. (4th) 318, 43 Alta. L.R. (6th) 213, [2017] 3 W.W.R. 413 (Alta. C.A.), ayant accueilli l'appel interjeté par le ministère public et accordé une injonction interlocutoire mandatoire.

**Brown J. :**

## I. Introduction

1 The background leading to this appeal was summarized in the reasons of the chambers judge:<sup>1</sup>

On March 5, 2016, [the accused], was charged with the first degree murder of D.H., a person under the age of 18 ("the victim"). On March 15, 2016 the Crown requested and a judge ordered a mandatory ban under s. 486.4(2.2) of the Criminal Code, R.S.C., 1985, c. C-46. The order prohibits the publication, broadcast or transmission in any way of information that could identify the victim.

As of March 16, 2016, two articles which pre-existed the publication ban, and which identified the victim by name and photograph ("the articles"), continued to exist on the CBC Edmonton website.

In response to a March 16, 2016 Edmonton Police Service inquiry, a senior digital producer with CBC Edmonton advised that no future stories would contain the victim's identifying information.

On March 18, 2016, however, the pre-publication ban articles remained on the website, unaltered.

One of the articles contains some evidence that the victim's identity appears already in wide circulation, by way of social media, but also by reason of the fact the victim attended school and lived in a smaller Alberta community where the murder is alleged to have occurred.

2 Because CBC would not remove from its website the victim's identifying information published prior to the order granting a publication ban, the Crown filed an Originating Notice seeking an order citing CBC in criminal contempt of the publication ban, and an interlocutory injunction<sup>2</sup> directing removal of that information from CBC's website. As the terms of that Originating Notice are important to my proposed disposition of this appeal, I reproduce them here, in relevant part:<sup>3</sup>

TAKE NOTICE that an Application will be made by the Attorney General of Alberta on behalf of her Majesty the Queen before the presiding Justice of the Court of Queen's Bench, ... for an Order citing [CBC] in criminal contempt of court.

AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case.

RELIEF SOUGHT:

1. That [CBC] be cited in criminal contempt of court.
2. That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case.
3. That an appropriate sentence be imposed against [CBC].
4. Any such further order appropriate that this Honourable Court deems.

3 The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed its application. On appeal, the Court of Appeal divided on whether the Crown was entitled to a mandatory interlocutory injunction. While the majority allowed the appeal and granted the injunction, Greckol J.A., in dissent, would have dismissed the appeal, finding that the majority applied incorrect legal principles to the Crown's application.<sup>4</sup>

4 For the reasons that follow, I would allow the appeal. In my respectful view, the chambers judge applied the correct legal test in deciding the Crown's application, and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

## II. Legislative Provisions

5 Sections 486.4(2.1) and 486.4(2.2) of the *Criminal Code*,<sup>5</sup> taken together, provide that a presiding judge or justice shall make an order, upon application by the victim or the prosecutor, for a publication ban in cases involving offences against victims under the age of 18 years. Specifically, the Crown or the victim is entitled to an order "directing that any information that could identify the victim *shall not be published* in any document or broadcast *or transmitted* in any way".

## III. Judicial History

### A. The Chambers Judge's Reasons

6 Acceding to the parties' submissions, the chambers judge applied a modified version of the tripartite test for an interlocutory injunction stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*.<sup>6</sup> This required the Crown to prove (1) a strong *prima facie* case for finding CBC in criminal contempt; (2) that the Crown would suffer irreparable harm were the injunction refused; and (3) that the balance of convenience favoured granting the injunction.

7 As to the requirement of a strong *prima facie* case, the Crown had argued for a "broad interpretation" of s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ted]", such that it would catch web-based articles posted *prior* to the publication ban.<sup>7</sup> The chambers judge, however, concluded that the case authorities did not support such an interpretation. In these circumstances, and applying the test for criminal contempt stated in *U.N.A. v. Alberta (Attorney General)*,<sup>8</sup> he found that the Crown could not

"likely succeed" in proving beyond a reasonable doubt that CBC, by leaving the victim's identifying information on its website after the publication ban had been issued, was in "open and public defiance" of that order.<sup>9</sup>

8 Regarding the requirement of irreparable harm, the Crown had argued such harm would be suffered by the administration of justice, since the ongoing display of the victim's identifying information on CBC's website would deter others from seeking assistance or remedies. The chambers judge declined to so find, however, noting that the underlying policy objective of protecting a victim's anonymity loses significance where the victim is deceased. And, in assessing balance of convenience, the chambers judge determined that the compromising of CBC's freedom of expression, and of the public's interest in that expression, outweighed any harm to the administration of justice that would result from leaving the two impugned articles on CBC's website.

### ***B. The Court of Appeal***

9 At the Court of Appeal, the majority (Slatter and McDonald JJ.A.) reversed the chambers judge's decision and granted the mandatory interlocutory injunction sought by the Crown. The chambers judge, it held, had erred by characterizing this matter as requiring the Crown to demonstrate a strong *prima facie* case of criminal contempt. Rather, the Originating Notice, "[w]hile essentially civil in nature, ... has a 'hybrid' aspect to it"<sup>10</sup>, in that it seeks both a citation for criminal contempt *and* the removal of the victim's identifying information from CBC's website. The request for the interlocutory injunction, the majority explained, is "tied back" to the latter request for an order removing the identifying information, and not to the request for a criminal contempt citation.<sup>11</sup> The issue, therefore, was "whether the Crown has demonstrated a strong *prima facie* case entitling it to a mandatory order directing removal of the identifying material from the website".<sup>12</sup>

10 As to whether or not s. 486.4(2.1)'s reference to identifying information that is "published" is (as the Crown contends) met by the ongoing appearance of such information on a website after it is first posted, the majority conceded that "either position is arguable".<sup>13</sup> That said, the majority viewed the Crown as having a strong *prima facie* case for a mandatory interlocutory injunction, since, if "published" is construed as a continuous activity, CBC is arguably wilfully disobeying the publication ban. Further, such disobedience is harmful to the integrity of the administration of justice, and contrary to Parliament's direction that such orders are to be mandatory.<sup>14</sup> Finally, the balance of convenience did not favour CBC, since the publication ban must be presumed to be constitutional at this stage of the proceedings, and freedom of expression would not, in any case, be a defence against the contempt charge.

11 Justice Greckol would have dismissed the appeal. In her view, the majority's characterization of the relief sought in the Originating Notice as "hybrid" was misplaced, since the Crown's application for an interlocutory injunction was brought in respect of the sought-after citation for criminal contempt. The chambers judge asked the right question (being, whether the Crown could show a strong *prima facie* case of criminal contempt), and his exercise of discretion to refuse an injunction was entitled to deference. And here, where the proscriptions against "publish[ing]" and "transmitt[ing]" may reasonably bear two meanings, one capturing the impugned articles and one not, no strong *prima facie* case of criminal contempt could be shown. Further, and even allowing that open defiance of a facially valid court order may amount to irreparable harm to the administration of justice, the ambit of s. 486.4's proscriptions is an unsettled question. And, as the victim in this case is deceased, the privacy of the victim is not vulnerable to harm. Finally, and even if the pertinent provisions of the *Criminal Code* are presumed constitutional, the chambers judge was entitled to consider freedom of expression in assessing the balance of convenience.

## **IV. Analysis**

### ***A. What Is the Applicable Framework for Granting a Mandatory Interlocutory Injunction?***

12 In *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*.<sup>15</sup> and then again in *RJR — MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*<sup>16</sup> At the first stage,

the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious.<sup>17</sup> The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused.<sup>18</sup> Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.<sup>19</sup>

13 This general framework is, however, just that — general. (Indeed, in *RJR — MacDonald* the Court identified two exceptions which may call for "an extensive review of the merits" at the first stage of the analysis.<sup>20</sup>) In this case, the parties have at every level of court agreed that, where a *mandatory* interlocutory injunction is sought, the appropriate inquiry at the first stage of the *RJR — MacDonald* test is into whether the applicants have shown a strong *prima facie* case. I note that this heightened threshold was not applied by this Court in upholding such an injunction in *Google Inc. v. Equustek Solutions Inc.*<sup>21</sup> In *Google*, however, the appellant did not argue that the first stage of the *RJR — MacDonald* test should be modified. Rather, the appellant agreed that only a "serious issue to be tried" needed to be shown and therefore the Court was not asked to consider whether a heightened threshold should apply.<sup>22</sup> By contrast, in this case, the application by the courts below of a heightened threshold raises for the first time the question of just what threshold ought to be applied at the first stage where the applicant seeks a mandatory interlocutory injunction.

14 Canadian courts have, since *RJR — MacDonald*, been divided on this question. In Alberta, Nova Scotia and Ontario, for example, the applicant must establish a strong *prima facie* case.<sup>23</sup> Conversely, other courts have applied the less searching "serious issue to be tried" threshold.<sup>24</sup>

15 In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel.<sup>25</sup> Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial".<sup>26</sup> The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR — MacDonald* as "extensive review of the merits" at the interlocutory stage.<sup>27</sup>

16 A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions.<sup>28</sup> While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR — MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take ... positive actions".<sup>29</sup> For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the ... injunction are likely to be".<sup>30</sup> In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something.



17 This brings me to just what is entailed by showing a "strong *prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success";<sup>31</sup> a "strong and clear" or "unusually strong and clear" case;<sup>32</sup> that he or she is "clearly right" or "clearly in the right";<sup>33</sup> that he or she enjoys a "high probability" or "great likelihood of success";<sup>34</sup> a "high degree of assurance" of success;<sup>35</sup> a "significant prospect" of success;<sup>36</sup> or "almost certain" success.<sup>37</sup> Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

18 In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR — MacDonald* test, which proceeds as follows:

- (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
- (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
- (3) The applicant must show that the balance of convenience favours granting the injunction.

### ***B. Does the Liberty Net "Rarest and Clearest of Cases" Test Apply in These Circumstances?***

19 CBC argues that, on an application for an interlocutory injunction where a media organization's right to free expression is at stake, the application judge should apply the test stated in *Canada (Human Rights Commission) v. Canadian Liberty Net*.<sup>38</sup> This would entail the applicant showing "the rarest and clearest of cases"<sup>39</sup>, such that the conduct complained of would be impossible to defend.

20 In *Liberty Net*, the Court explained that the *RJR — MacDonald* tripartite test is not appropriately applied to cases of "pure" speech, comprising the expression of "the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself".<sup>40</sup> This appeal does not present such a case. The reason the Court gave in *Liberty Net* for not applying the *RJR — MacDonald* test to "pure" speech was that the defendant in such cases "has no tangible or measurable interest [also described as a 'tangible, immediate utility'] *other than the expression itself*".<sup>41</sup> Where discriminatory hate speech or other potentially low-value speech is at issue (as was the case in *Liberty Net*), the *RJR — MacDonald* test would "stac[k] the cards" against the defendant at the second and third stages.<sup>42</sup> In this appeal, however, the chambers judge correctly identified a "tangible, immediate utility" to CBC's posting of the identifying information, being the "public's interest" in CBC's right to express that information, and in freedom of the press.<sup>43</sup> Because CBC does not therefore face the same disadvantage as defendants face at the second and third stages of the *RJR — MacDonald* test in cases of low- to no-value speech, it is unnecessary to apply the "clearest of cases" threshold, and I would not do so.

### ***C. What Strong Prima Facie Case Must the Crown Show?***

21 As I have already canvassed, in this case, the majority at the Court of Appeal, in reversing the chambers judge, reasoned that he had mischaracterized the basis for which the Crown had sought the injunction. Specifically, the majority said that the Originating Notice, properly read, was "hybrid"<sup>44</sup>, such that the application for the injunction did not "relate directly"<sup>45</sup> to the criminal contempt citation, but to the direction sought that CBC remove the victim's identifying information from its website. The identical wording shared by part of the Originating Notice's preamble ("AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case") and the part of the Originating Notice which sought an injunction ("That [CBC]

be directed to remove any information from their website that could identify the complainant in the [subject] case") was said to demonstrate "that the request for an interim injunction is tied back ... to ... the removal of the objectionable postings".<sup>46</sup> The "strong *prima facie* case" which the Crown was bound to show, then, was *not* one of criminal contempt, but rather of an "entitl[ement] ... to a mandatory order directing removal of the identifying material from the website".<sup>47</sup>

22 In dissent, Greckol J.A. saw the matter differently. "A literal reading of the Originating Notice", she said, "shows that the Crown brought an application for criminal contempt and sought an interim injunction *in that proceeding*".<sup>48</sup> This was in her view confirmed by the record which reveals that the Crown had proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt.

23 For two reasons, I agree with Greckol J.A. First, the Originating Notice itself, and the sequencing therein of the relief sought, belies its putatively hybrid character. It begins by giving notice ("TAKE NOTICE") of an "an [a]pplication ... for an Order citing [CBC] in criminal contempt of court". That notice is immediately followed by a *further* notice ("AND FURTHER TAKE NOTICE") of an "application ... for an interim injunction, directing that [CBC] remove any information from [its] website that could identify the complainant in the [subject] case".<sup>49</sup> The text "AND FURTHER TAKE NOTICE" makes plain that the two applications are linked, such that the latter is tied *not* to the mere placement by CBC of the victim's identifying information on its website, but to the sought-after criminal contempt citation. In other words, each prayer for relief does not launch an independent proceeding; rather, both relate to the alleged criminal contempt.

24 The second reason goes to the fundamental nature of an injunction and its relation to a cause of action. [Rule 3.8\(1\) of the Alberta Rules of Court](#)<sup>50</sup> requires that an originating application state *both* "the claim and the basis for it", *and* "the remedy sought". In other words, an applicant must record both "a basis" *and* "[a] remedy". An injunction is generally "*a remedy ancillary to a cause of action*".<sup>51</sup> And here, the Crown's Originating Notice discloses only a single basis for seeking that remedy: CBC's alleged criminal contempt of court. As I have already noted, this is consistent with how the Crown framed its case at the courts below.

25 The majority's conclusion at the Court of Appeal that the basis for the injunction is an "entitl[ement] ... to a mandatory order directing removal of the identifying material from the website"<sup>52</sup>, therefore, simply begs the question: what, precisely, is the source in law of that entitlement? An injunction is not a cause of action, in the sense of containing its own authorizing force. It is, I repeat, a remedy. This is undoubtedly why, before both the chambers judge and the Court of Appeal, the Crown framed the matter as an application for an interlocutory injunction in the proceedings for a criminal contempt citation.<sup>53</sup> And, on that point, I respectfully endorse Greckol J.A.'s conclusion that it was not for the Court of Appeal to re-cast the Crown's case as a civil application for an interlocutory injunction pending a permanent injunction. The Crown was bound to show a strong *prima facie* case of criminal contempt of court.

26 I add this. It is implicit in the foregoing analysis that, in some circumstances, an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct. The delineation of those circumstances, however, I would not decide here. To be clear, the disposition of this appeal should not be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters, or that — even had the Crown been able to show in this case a strong *prima facie* case of criminal contempt — an injunction would have been available.

#### ***D. Is the Crown Entitled to a Mandatory Interlocutory Injunction?***

27 The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. In *Metropolitan Stores*,<sup>54</sup> the Court endorsed this statement of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*<sup>55</sup> about the circumstances in which that exercise of discretion may be set aside. Appellate intervention is justified only where the chambers judge proceeded "on a misunderstanding of the law or of the evidence before him", where an inference "can be demonstrated to be wrong by further evidence that has [since] become available", where there has been a change of circumstances, or where the "decision to grant or refuse the

injunction is so aberrant that it must be set aside on the ground that no reasonable judge ... could have reached it".<sup>56</sup> This principle was recently affirmed in *Google*.<sup>57</sup>

28 In this case, and as I have explained, the first stage of the modified *RJR — MacDonald* test required the Crown to satisfy the chambers judge that there was a strong likelihood on the law and the evidence presented that it would be successful in proving CBC's guilt of criminal contempt of court. This is not an easy burden to discharge and, as I shall explain, the Crown has failed to do so here.

29 In *United Nurses of Alberta*, McLachlin J. (as she then was) described the elements of criminal contempt of court in these terms:

To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt.<sup>58</sup>

30 As to the *actus reus* — that is, as to whether the Crown could demonstrate a strong *prima facie* case that CBC "defied or disobeyed [the publication ban] in a public way"<sup>59</sup> by leaving the victim's identifying information on its website — the chambers judge rejected the Crown's submission that s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ed]" should be "broad[ly]" interpreted.<sup>60</sup> In his view, the meaning of that text was not so obvious that the Crown could "likely succeed at trial" in showing that s. 486.4(2.1) would capture the impugned articles on CBC's website, since they had been posted *prior* to the issuance of a publication ban. In other words, and as CBC argued before the chambers judge, the statutory text might also be reasonably taken as prohibiting only publication which occurred for the first time *after* a publication ban.

31 Significantly, the majority at the Court of Appeal conceded that "either position is arguable".<sup>61</sup> In my respectful view, that was, in substance, an acknowledgment that the Crown had not shown a strong *prima facie* case of criminal contempt. Before us, the Crown urged this Court to infer that the majority nevertheless "leaned" towards the Crown's preferred interpretation of "publish[ed]" when it stated that to see the matter otherwise would "significantly limit the scope of many legal rights and obligations that depend on making information available to third parties [and] [i]f publishing is a continuous activity, then it is also arguable that [CBC] is wilfully disobeying the court order".<sup>62</sup> But, even allowing that this may be so, the Crown's burden was not to show a case for criminal contempt that "leans" one way or another, but rather a case, based on the law and evidence presented, that has a *strong likelihood* of success at trial. And, again with respect, I see nothing in the chambers judge's reasons or, for that matter, in the majority reasons which persuades me that the chambers judge, in refusing the interlocutory injunction sought here, committed any of the errors described in *Hadmor* as justifying appellate intervention.

32 My finding on this point is determinative, and obviates the need to consider *mens rea*, or the other two stages of the *RJR — MacDonald* test.

## V. Conclusion

33 I would allow this appeal.

*Appeal allowed.*

*Pourvoi accueilli.*

## Footnotes

1 2016 ABQB 204, [2016] 9 W.W.R. 613 (Alta. Q.B.), at paras. 2-6 (emphasis added).

2 The Crown's Originating Notice uses the term "interim injunction". In substance, however, the Crown's application was for an interlocutory injunction. (See R.J. Sharpe, *Injunctions and Specific Performance* (4th ed. 2012), at paras. 2.15 and 2.55.)

- 3 A.R., at pp. 39-40.
- 4 [2016 ABCA 326](#), [404 D.L.R. \(4th\) 318](#) (Alta. C.A.).
- 5 [R.S.C. 1985, c. C-46](#).
- 6 [\[1994\] 1 S.C.R. 311](#) (S.C.C.).
- 7 Chambers judge's reasons, at para. 26.
- 8 [\[1992\] 1 S.C.R. 901](#) (S.C.C.), at p. 933.
- 9 Chambers judge's reasons, at para. 34.
- 10 para. 5.
- 11 para. 6.
- 12 para. 7.
- 13 para. 10.
- 14 para. 11.
- 15 [\[1987\] 1 S.C.R. 110](#) (S.C.C.).
- 16 [\[1975\] A.C. 396](#) (U.K. H.L.).
- 17 *RJR — MacDonald*, at pp. 334-35.
- 18 *RJR — MacDonald*, at pp. 334 and 348.
- 19 *RJR — MacDonald*, at p. 334.
- 20 pp. 338-39.
- 21 [2017 SCC 34](#) (S.C.C.), [\[2017\] 1 S.C.R. 824](#).
- 22 *Google*, at paras. 25-27.
- 23 *Medical Laboratory Consultants Inc. v. Calgary Health Region*, [2005 ABCA 97](#), [19 C.C.L.I. \(4th\) 161](#) (Alta. C.A.), at para. 4; *Modry v. Alberta Health Services*, [2015 ABCA 265](#), [388 D.L.R. \(4th\) 352](#) (Alta. C.A.), at para. 40; *Conway v. Zinkhofer*, [2006 ABCA 74](#) (Alta. C.A.), at paras. 28-29; *D.E. & Son Fisheries Ltd. v. Goreham*, [2004 NSCA 53](#), [223 N.S.R. \(2d\) 1](#) (N.S. C.A.), at para. 10; *Amec E & C Services Ltd. v. Whitman Benn & Associates Ltd.*, [2003 NSSC 112](#), [214 N.S.R. \(2d\) 369](#) (N.S. S.C.), at para. 20, *aff'd* [2003 NSCA 126](#), [219 N.S.R. \(2d\) 126](#) (N.S. C.A.); and *Cytrynbaum v. Look Communications Inc.*, [2013 ONCA 455](#), [307 O.A.C. 152](#) (Ont. C.A.), at para. 54.
- 24 *Sawridge Band v. R.*, [2004 FCA 16](#), [\[2004\] 3 F.C.R. 274](#) (F.C.A.), at para. 45; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, [2015 FCA 104](#), [130 C.P.R. \(4th\) 414](#) (F.C.A.), at paras. 1 and 22-25; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership*, [2011 SKCA 120](#), [341 D.L.R. \(4th\) 407](#) (Sask. C.A.), at para. 42; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, [2011 SKCA 43](#), [\[2012\] 3 W.W.R. 293](#) (Sask. C.A.), at paras. 16-17; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture & Environment)*, [2006 PESCAD 11](#), [256 Nfld. & P.E.I.R. 277](#) (P.E.I. C.A.), at para. 65.
- 25 *Injunctions and Specific Performance*, at paras. 1.510, 1.530 and 2.640.

- 26 *Injunctions and Specific Performance*, at para. 2.640.
- 27 *RJR — MacDonald*, at pp. 338-39.
- 28 *Injunctions and Specific Performance*, at paras. 1.530 and 1.540. See also *Potash*, at paras. 43-44.
- 29 *Potash*, at para. 44; see also *Injunctions and Specific Performance*, at para. 1.540.
- 30 *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405 (Jamaica P.C.), at para. 20.
- 31 *H&R Block Canada Inc. v. Inisoft Corp. (Ontario)* [2009 CarswellOnt 4261 (Ont. S.C.J. [Commercial List])], 2009 CanLII 37911, at para. 24.
- 32 *Fradenburgh v. Ontario Lottery & Gaming Corp.*, 2010 ONSC 5387 (Ont. S.C.J.), at para. 14; *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Gen. Div.), at paras. 49 and 52 (citing *Shepherd Homes Ltd. v. Sandham*, [1970] 3 All E.R. 402 (Eng. Ch. Div.), at p. 409).
- 33 *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.* [2002 CarswellOnt 3653 (Ont. S.C.J.)], 2002 CanLII 34862, at para. 9; *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793 (Ont. S.C.J.), at para. 12.
- 34 *Quality Pallets & Recycling Inc. v. Canadian Pacific Railway* [2007 CarswellOnt 2477 (Ont. S.C.J.)], 2007 CanLII 13712, at para. 16.
- 35 *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.* [2002 CarswellOnt 4165 (Ont. S.C.J.)], 2002 CanLII 26148, at para. 16.
- 36 *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720 (Ont. Gen. Div.), at para. 11.
- 37 *Barton-Reid*, at paras. 9, 12 and 17. (See, generally, M. A. Vermette, "A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions" in T. L. Archibald and R. S. Echlin eds., *Annual Review of Civil Litigation, 2011* (2011) 367, at pp. 378-79.)
- 38 [1998] 1 S.C.R. 626 (S.C.C.).
- 39 *Liberty Net*, at para. 49.
- 40 paras. 47 and 49.
- 41 para. 47 (emphasis in original).
- 42 para. 47.
- 43 Chambers judge's reasons, at para. 59.
- 44 para. 5.
- 45 para. 6.
- 46 C.A. reasons, at para. 6.
- 47 C.A. reasons, at para. 7.
- 48 C.A. reasons, at para. 23 (emphasis added).
- 49 A.R., at p. 39.
- 50 Alta. Reg. 124/2010.

- 51 *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.), at p. 930 (emphasis added).
- 52 C.A. reasons, at para. 7.
- 53 C.A. reasons, at paras. 25-26; chambers judge's reasons, at para. 7.
- 54 pp. 154-55.
- 55 [1982] 1 All E.R. 1042 (U.K. H.L.), at p. 1046.
- 56 See also *British Columbia (Attorney General) v. Wale* (1986), [1987] 2 W.W.R. 331 (B.C. C.A.), aff'd [1991] 1 S.C.R. 62 (S.C.C.); *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177 (Alta. C.A.); *Musqueam Indian Band v. Canada*, 2008 FCA 214, 378 N.R. 335 (F.C.A.), at para. 37, leave to appeal refused, [2008] 3 S.C.R. viii (note) (S.C.C.).
- 57 para. 22.
- 58 p. 933 (emphasis added).
- 59 Chambers judge's reasons, at para. 12.
- 60 para. 33.
- 61 C.A. reasons, at para. 10.
- 62 C.A. reasons, at para. 10; Transcript, at pp. 65 and 70-71.
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TAB 5

1994 CarswellQue 120  
Supreme Court of Canada

RJR — MacDonald Inc. v. Canada (Attorney General)

1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] 1 S.C.R. 311, [1994] A.C.S.  
No. 17, [1994] S.C.J. No. 17, 111 D.L.R. (4th) 385, 164 N.R. 1, 46 A.C.W.S. (3d) 40,  
54 C.P.R. (3d) 114, 5 W.D.C.P. (2d) 136, 60 Q.A.C. 241, J.E. 94-423, EYB 1994-28671

**RJR — MacDonald Inc., Applicant v. The Attorney General of Canada, Respondent and  
The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of  
Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and  
Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief**

Imperial Tobacco Ltd., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec,  
Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on  
Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Judgment: October 4, 1993

Judgment: March 3, 1994

Docket: 23460, 23490

Proceedings: Applications for Interlocutory Relief

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*Claude Joyal* and *Yves Leboeuf*, for the respondent.

*W. Ian C. Binnie, Q.C.*, and *Colin Baxter*, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the  
Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

Subject: Constitutional; Intellectual Property; Civil Practice and Procedure; Public; Property

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Courts --- Jurisdiction — Supreme Court of Canada

Applicants challenging constitutional validity of tobacco products legislation — Interlocutory applications to stay  
implementation of regulations pending final decision on validity of legislation — Purpose of rule to facilitate bringing cases  
before court for effectual execution and working of Act — Court having power to grant stay of execution and make any order  
necessary to preserve matters between parties pending resolution — Power to grant relief broad enough to permit court to hear  
applications — Jurisdiction existing whether applicants sought suspension or exemption from regulation — [Supreme Court  
Act, R.S.C. 1985, c. S-26, s. 65.1](#) — Rules of the Supreme Court, SOR/83-74, Rule 27.

Appeal --- Stay pending appeal — Applicants challenging constitutional validity of tobacco products legislation

Substantial expense required to alter packaging to comply with legislation — Interlocutory applications to stay implementation  
of regulations pending final decision on validity of legislation — Public interest in health of such compelling importance that  
balance of convenience weighed in favour of respondent — Not offset by irreparable harm applicants might suffer — Irreparable  
harm refers to nature of harm rather than magnitude — Quantifiable financial loss may be irreparable if it is unclear that such  
loss is recoverable.



The [Tobacco Products Control Act, R.S.C. 1985, c. 14 \(4th Supp.\)](#), regulates the advertisement of tobacco products and the health warnings which must be placed upon them. The applicants challenged the constitutional validity of the Act on the grounds that it was ultra vires and invalid as it was in violation of the [Canadian Charter of Rights and Freedoms](#). The applicants were successful at first instance.

The Court of Appeal allowed the respondent's appeal finding that the Act was not ultra vires and that, although the Act infringed [s. 2 of the Charter](#), it was justified under [s. 1](#). Leave to appeal the judgment was granted by the Supreme Court of Canada.

Amendments to the regulations made pursuant to the Act were passed and stipulated that larger, more prominent health warnings had to be placed on all tobacco products packets and that the warnings could not be attributed to Health and Welfare Canada. The packaging changes had to be in effect within one year. The applicants contended that compliance with the new regulations would require redesign of all its packaging, that the changes would take close to a year to effect at a cost of about \$30 million and that the expenses would be irrecoverable if the legislation was found invalid.

The applicants brought motions for stays that would, in effect, release them from the obligation to comply with the new packaging requirements until the disposition on the main action. A preliminary question was raised as to the court's jurisdiction to grant the relief requested.

*Held*, the applications should be dismissed.

The powers of the court to grant relief in this kind of proceeding are contained in [s. 65.1 of the Supreme Court Act](#) and Rule 27 of the Rules of the Supreme Court of Canada. In interpreting the rule, regard should be had to its purpose which is to facilitate the bringing of cases before the court for the effectual execution and working of the Act. To achieve its purpose, the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the court's process by a third party or freezing the judicial proceeding which is the subject-matter of the judgment in appeal. The adoption of [s. 65.1](#) in 1992 was not intended to limit the court's powers under Rule 27. The purpose of the amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the court. [Section 65.1](#) should, therefore, be interpreted to confer the same broad powers that are included in Rule 27.

Regardless of whether the applicants' requests for relief were for suspension of the regulation or exemption from it, the court had jurisdiction to grant the relief requested. Finally, if jurisdiction under [s. 65.1](#) of the Act and Rule 27 did not exist, the court would be prepared to find jurisdiction in [s. 24\(1\) of the Charter](#). [The Charter](#) remedy should not be defeated due to a deficiency in the ancillary procedural powers of the court to preserve the rights of the parties pending a final resolution of constitutional rights.

The applicants were entitled to relief only if they could satisfy the requirements that: (1) there was a serious constitutional issue to be determined; (2) compliance with the new regulations would cause irreparable harm; (3) the balance of convenience, taking into account the public interest, favoured retaining the status quo until the court had disposed of the legal issues. Generally, the same principles should be applied whether the remedy sought is an injunction or a stay. The requirement that there was a serious constitutional issue to be determined is less stringent than the need to demonstrate a strong prima facie case and is appropriate to be used in [Charter](#) cases.

The three-part American Cyanamid test should be applied to applications for interlocutory injunctions and stays in both private law and [Charter](#) cases. At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court granted leave is a relevant and weighty consideration. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action or when the constitutionality of a challenged statute can be determined as a pure question of law.

At the second stage, the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. Irreparable refers to the nature of the harm rather than its magnitude. In [Charter](#) cases, even quantifiable financial loss may be considered irreparable so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving [Charter](#) rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. The public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, it should be assumed that the legislation actually has such an effect. In order to overcome the assumed benefit, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit. The observations of the lower courts and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law. The expenditures which the new regulations require would impose irreparable harm on the applicants if the motions were denied but the main actions were successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and the harm which the parties contend they suffer, the nature of the legislation under attack and where the public interest lies. Although the losses which the applicants would suffer are significant and may be irreparable, they are strictly financial in nature and would not affect the long-term viability of the applicants. Although on the face of the matter the case appeared to be an exemption case as there are only three tobacco producing companies operating in Canada, the application really was in the nature of a suspension case. The result of the motions would therefore affect the whole of the Canadian tobacco producing industry. It is appropriate to classify the applications as suspension cases and therefore ones in which the public interest normally carries greater weight in favour of compliance with existing legislation. The government passed the regulations with the intention of protecting public health and thereby furthering the public good. It was for the applicant to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The applicants made no attempt to argue public interest in the continued application of current packaging requirements. The only possible public interest was that smokers would not have to pay increased prices on cigarettes. Therefore, any public interest in maintaining the current price of tobacco products could not carry much weight. The balance of the inconvenience weighs in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied.

*Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832* (1987), 38 D.L.R. (4th) 321, [1987] 1 S.C.R. 110, 87 C.L.L.C. 14,015, 18 C.P.C. (2d) 273, [1987] 3 W.W.R. 1, 46 Man. R. (2d) 241, 73 N.R. 341; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 apld;

*Labatt Breweries of Canada Ltd. v. A.-G. Can.*, [1980] 1 S.C.R. 594, 14 C.P.C. 170, 27 N.R. 542; *Trieiger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143, 66 O.R. (2d) 273, 12 A.C.W.S. (3d) 249; *Tremblay v. Daigle* (1989), 62 D.L.R. (4th) 634, [1989] 2 S.C.R. 530, 11 C.H.R.R. D/165, 27 Q.A.C. 81, 102 N.R. 81, 17 A.C.W.S. (3d) 880; *Canada (Attorney-General) v. Fishing Vessel Owners' Assn. of B.C.*, [1985] 1 F.C. 791, 61 N.R. 128, 32 A.C.W.S. (2d) 96 consd;

#### Cases referred to:

*RJR-Macdonald Inc. v. Canada (Attorney-General)* (1991), 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, [1991] R.J.Q. 2260, 28 A.C.W.S. (3d) 178; revd 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, [1993] R.J.Q. 375, 53 Q.A.C. 79, 38 A.C.W.S. (3d) 55; leave to appeal to S.C.C. granted 104 D.L.R. (4th) vi, 50 C.P.R. (3d) v, 50 Q.A.C. 249n;

*R. v. Crown Zellerbach Canada Ltd.* (1988), 49 D.L.R. (4th) 161, 40 C.C.C. (3d) 289, [1988] 1 S.C.R. 401, 3 C.E.L.R. (N.S.) 1, [1988] 3 W.W.R. 386, 25 B.C.L.R. (2d) 145, 84 N.R. 1, 4 W.C.B. (2d) 7;

*Quebec (Attorney-General) v. Canada (Attorney-General)* (1978), 87 D.L.R. (3d) 708, 41 C.C.C. (2d) 489, [1978] 2 S.C.R. 135, 20 N.R. 243;

*Labatt Breweries of Canada Ltd. v. A.-G. Can.* (1978), 84 D.L.R. (3d) 61, 36 C.P.R. (2d) 163; revd 104 D.L.R. (3d) 646, 45 C.P.R. (2d) 69, 47 C.C.C. (2d) 310, [1980] 1 F.C. 241, 26 N.R. 617 [revd 110 D.L.R. (3d) 594, 49 C.P.R. (2d) 179, 52 C.C.C. (2d) 433, [1980] 1 S.C.R. 914, 9 B.L.R. 181, 30 N.R. 496];

*Battle Creek Toasted Cornflake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127;

*Laboratoire Pentagone Ltee v. Parke, Davis & Co.*, [1968] 2 S.C.R. 269;

*Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 26 D.L.R. (3d) 287, [1972] 2 O.R. 619;

*Bear Island Foundation v. Ontario*, [1990] 4 C.N.L.R. 3, 70 O.R. (2d) 574, 18 A.C.W.S. (3d) 204;

*N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294;

*Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392, 14 C.P.R. (3d) 145, 57 O.R. (2d) 746, 3 A.C.W.S. (3d) 21; R.L.

*Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228, 67 Sask. R. 123, 8 A.C.W.S. (3d) 380;

*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577, 61 B.C.L.R. 145 [leave to appeal to S.C.C. refused 61 N.R. 240n];

*Hubbard v. Pitt*, [1976] Q.B. 142;

*R. v. Mills* (1986), 29 D.L.R. (4th) 161, 26 C.C.C. (3d) 481, [1986] 1 S.C.R. 863, 52 C.R. (3d) 1, 21 C.R.R. 76, 67 N.R. 241, 58 O.R. (2d) 543n;

*Nelles v. Ontario* (1989), 60 D.L.R. (4th) 609, [1989] 2 S.C.R. 170, 41 Admin. L.R. 1, 49 C.C.L.T. 217, 37 C.P.C. (2d) 1, 71 C.R. (3d) 358, 42 C.R.R. 1, 35 O.A.C. 161, 98 N.R. 321, 69 O.R. (2d) 448n, 16 A.C.W.S. (3d) 318;

*Ainsley Financial Corp. v. Ontario (Securities Commission)* (1993), 106 D.L.R. (4th) 507, 10 B.L.R. (2d) 173, 14 O.R. (3d) 280;

*Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59, 42 O.R. (2d) 659, 20 A.C.W.S. (2d) 472;

*Esquimalt Anglers' Assn. v. Canada* (1988), 21 F.T.R. 304, 11 A.C.W.S. (3d) 336;

*Island Telephone Co. (Re)* (1987), 67 Nfld. & P.E.I.R. 158;

*Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439, 5 C.R.R. 305, [1983] 3 W.W.R. 7, 24 Alta. L.R. (2d) 106, 42 A.R. 118, 19 A.C.W.S. (2d) 13 [revd 8 D.L.R. (4th) 346, [1984] 6 W.W.R. 755, 26 A.C.W.S. (2d) 108];

*Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146, 68 B.C.L.R. 230;

*Rio Hotel Ltd. v. Commission des licences et permis d'accueil*, [1986] 2 S.C.R. ix;

*Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373;

*R. v. Oakes* (1986), 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 19 C.R.R. 308, 65 N.R. 87, 53 O.R. (2d) 719n, 16 W.C.B. 73

**Statutes referred to:**

Canadian Charter of Rights and Freedoms,

ss. 1, 2(b), 24(1) Code of Civil Procedure, R.S.Q., c. C-25, art. 523

[Constitution Act, 1867, s. 91](#)

[Supreme Court Act, R.S.C. 1985, c. S-26, ss. 65, 65.1](#) [enacted 1990, c. 8, s. 40], [97\(1\)\(a\) Tobacco Products Control Act, R.S.C. 1985, c. 14 \(4th Supp.\), ss. 3 to 9, 11 to 18](#)

### Rules and regulations referred to:

Rules of the Supreme Court of Canada, 1888, General Order No. 85(17) Rules of the Supreme Court of Canada, SOR/83-74,

Rule 27 Tobacco Products Control Regulations, SOR/89-21 [am. SOR/89-248; SOR/93-389]

Applications for release from the requirement to comply with regulations until a related constitutional challenge to the validity of tobacco products legislation had been resolved.

### The judgment of the Court on the applications for interlocutory relief was delivered by *Sopinka and Cory JJ.*:

#### I. Factual Background

1 These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment*, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The *Tobacco Products Control Act*, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the *Tobacco Products Control Act*, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(f) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(b) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed \$100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was *ultra vires* the Parliament of Canada and that it contravened the *Charter*. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the *Tobacco Products Control Act*. However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could

not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(b) of the Charter but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the Charter. Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the Charter. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: *Tobacco Products Control Regulations, amendment*, SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about \$30,000,000.

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the *Supreme Court Act*, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada*, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of *Tobacco Products Control Act*.

12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

## II. Relevant Statutory Provisions

*Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:*

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3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

(a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

*Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):*

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65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

*Rules of the Supreme Court of Canada, SOR/83-74, s. 27:*

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27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

### III. Courts Below

17 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

*Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449*

18 Chabot J. concluded that the dominant characteristic of the *Tobacco Products Control Act* was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the *Tobacco Products Control Act* as a law regulating advertising of a particular product, a matter within provincial legislative competence.

19 Chabot J. found that, with respect to [s. 2\(b\) of the Charter](#), the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that *Charter* guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

20 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that advertising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

*Court of Appeal (on the application for a stay)*

21 In deciding whether or not to exercise its broad power under [art. 523 of the Code of Civil Procedure of Québec](#) to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a *valid* act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or

delay the implementation or enforcement of *valid* legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under *Sec. 5* after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under *Sec. 5* of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.

We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.

. . . . .

Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

***Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289***

*1. LeBel J.A. (for the majority)*

22 LeBel J.A. characterized the *Tobacco Products Control Act* as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

23 LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

24 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to *s. 2(b) of the Charter* but found that it was justified under *s. 1 of the Charter*. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the *Oakes* test have been attenuated by later decisions of the Supreme Court of Canada. He found that the *s. 1* test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

*2. Brossard J.A. (dissenting in part)*

25 Brossard J.A. agreed with LeBel J.A. that the *Tobacco Products Control Act* should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

26 However, he did not think that the violation of *s. 2(b) of the Charter* could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

**IV. Jurisdiction**

27 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

28 First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the *Constitution Act, 1867* and justified under s. 1 of the *Charter*. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

29 The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

30 The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court Act* and r. 27 of the *Rules of the Supreme Court of Canada*.

### ***Supreme Court Act***

31

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

### ***Rules of the Supreme Court of Canada***

32

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

33 Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see *Rules of the Supreme Court of Canada*, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(a) of that section provides that the rules may be enacted:

97. ...

(a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of [this Act](#) and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to



facilitate the "bringing of cases" before the Court "for the effectual execution and working of [this Act](#)". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

34 Moreover, we cannot agree that the adoption of [s. 65.1](#) in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. [Section 65.1](#) should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

35 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both [s. 65.1](#) and [r. 27](#), not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

36 This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. *Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court.* I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

37 While the above passage appears to answer the submission of the respondents on this motion that *Labatt* was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in *Labatt* reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

38 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 . In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

39 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the *Charter* . A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

## V. Grounds for Stay of Proceedings

40 The applicants rely upon the following grounds:

1. The challenged *Tobacco Products Control Regulations, amendment* were promulgated pursuant to ss. 9 and 17 of the *Tobacco Products Control Act* , S.C. 1988, c. 20.
2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the *Canadian Charter of Rights and Freedoms* .
3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.
4. The tests for granting of a stay are met in this case:
  - (i) There is a serious constitutional issue to be determined.
  - (ii) Compliance with the new regulations will cause irreparable harm.
  - (iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

## VI. Analysis

41 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, *supra* . If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

### A. Interlocutory Injunctions, Stays of Proceedings and the Charter

42 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

43 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

44 On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

45 Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

46 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores*, at p. 127, Beetz J. expressed the position in these words:

A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

47 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

48 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

### ***B. The Strength of the Plaintiff's Case***

49 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

50 In *Metropolitan Stores*, Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

51 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269 , at p. 272:

The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.) , at p. 620:

Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.) , at p. 576:

While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

52 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

53 The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that *no Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores* , at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

54 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores, supra* , at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

55 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

56 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:

Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

57 In *Trieiger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried *in the sense of a case with enough legal merit* to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

58 In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

59 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

60 The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores*, at p. 133:

There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

61 The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

### C. Irreparable Harm

62 Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

63 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

64 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

65 The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

66 This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to

assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

#### **D. The Balance of Inconvenience and Public Interest Considerations**

67 The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

68 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

[i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

69 The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:

Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

##### *1. The Public Interest*

70 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

71 It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

72 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants*, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

73 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

74 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act*, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

(b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304.

75 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The public interest is equally well served, in the same sense, by any appeal....

76 In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

77 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. *The Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

78 Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law is



suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439 ; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146 ; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix .

79 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.) , the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

## 2. The Status Quo

80 In the course of discussing the balance of convenience in *American Cyanamid* , Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

### E. Summary

81 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a *Charter* case.

82 As indicated in *Metropolitan Stores* , the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

83 At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

84 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

85 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

86 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the

interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

## VII. Application of the Principles to these Cases

### A. A Serious Question to be Tried

87 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the *Charter*. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

### B. Irreparable Harm

88 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

89 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

### C. Balance of Inconvenience

90 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

91 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of \$50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondly, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

92 Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the *Tobacco Products Control Act*. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores*. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify

these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation" (p. 147).

93 The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores* :

Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: ... *the protection of public health* .... It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

94 The regulations under attack were adopted pursuant to s. 3 of the *Tobacco Products Control Act* which states:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

(a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

95 The Regulatory Impact Analysis Statement, in the *Canada Gazette*, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

96 These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

97 When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

98 The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is

balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

99 The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

*Applications dismissed.*

Solicitors of record:

Solicitors for the applicant RJR — MacDonald Inc.: *Mackenzie, Gervais*, Montreal.

Solicitors for the applicant Imperial Tobacco Inc.: *Ogilvy, Renault*, Montreal.

Solicitors for the respondent: *Côté & Ouellet*, Montreal.

Solicitors for the interveners on the application for interlocutory relief the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: *McCarthy, Tétrault*, Toronto.

### Headnote

Injunctions --- Injunctions involving Crown — Miscellaneous injunctions

Injunctions --- Availability of injunctions — Public interest

Injunctions --- Availability of injunctions — Need to show irreparable injury

Injunctions --- Availability of injunctions — Interim, interlocutory and permanent injunctions — Balance of convenience — Restraint of governmental acts

Practice --- Practice on appeal — Appeal to Supreme Court of Canada — Stay pending appeal

Jurisdiction of Supreme Court of Canada to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — [Tobacco Products Control Act, S.C. 1988, c. 20](#) — [Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1](#) — Can R. 27.

Applicants challenged the constitutional validity of the Tobacco Products Control Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements pursuant to [s. 65.1 of the Supreme Court Act](#), or, in the event that leave was granted, pursuant to R. 27. A preliminary issue of jurisdiction was raised. Held, the Court had jurisdiction to grant such relief but the applications for stays were dismissed. The phrase "other relief" in R. 27 was broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered, and could apply even though leave to appeal was not yet granted. [S. 65.1](#) was to be interpreted as conferring the same broad powers as R. 27. The Court had to be able to intervene not only against the direct dictates of a judgment, but also against its effects. Even if the relief requested by applicants was for the suspension of the regulation rather than for an exemption from it, jurisdiction to grant such relief existed, as a distinction between such cases was only to be made after jurisdiction was otherwise established. Application for stay of compliance with new tobacco packaging regulations — [Tobacco Products Control Act, S.C. 1988, c. 20](#). Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and [Charter](#) cases. The case clearly raised serious questions of law and the expenditures which the new regulations required would impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. Public interest had to be taken into account. Public interest consideration carried less weight in exemption cases than in suspension cases, the present case being of the latter type. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.

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Jurisdiction to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — [Tobacco Products Control Act, S.C. 1988, c. 20](#) — [Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1](#) — Can. R. 27.

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#### Footnotes

[Carswell](#) View Carswell references