Court File No. CV-17-11846-00CL

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 SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

BOOK OF AUTHORITIES OF THE MONITOR
(Motion returnable May 7, 2019)

May 2, 2019

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TABLE OF CONTENTS

TAB	AUTHORITY
13	P Watts and FMB Reynolds, eds, *Bowstead and Reynolds on Agency*, 20th ed (London: Sweet & Maxwell, 2014) at §§ 2-030 – 2-031

TAB 1

Case Name:

Slater Steel Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended
AND IN THE MATTER OF A Plan of Compromise or Arrangement of Slater Steel Inc., Slater Steels Stainless Corp., Sorel Forge Inc., 833840 Ontario Inc., 1124207 Ontario Inc., and 3014063 Nova Scotia Company
AND IN THE MATTER OF Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended
AND IN THE MATTER OF Slater Steels Corporation

[2009] O.J. No. 2229

54 C.B.R. (5th) 52

2009 CarswellOnt 3122

177 A.C.W.S. (3d) 505

Court File No. 06-CL-6708

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

May 27, 2009.

(74 paras.)

Pensions and benefits law -- Private pension plans -- Winding-up of plan -- Liability of employer -- Offences and enforcement -- Civil procedure -- Settlements -- Application by directors to enforce minutes of settlement dismissed -- The directors entered a settlement with the Financial Services Commission of Ontario (FSCO) and the receiver in respect of offence proceedings regarding a pension shortfall and non-compliant filings -- The appointed administrator of the plan commenced separate proceedings against the actuary that prepared the filings -- The directors were added as third parties -- The court found that it was premature to summarily determine whether FSCO had

acted in a representative capacity, or whether its claim was subrogated to the administrator's in a manner that triggered the release provisions -- Pension Benefits Act, s. 86(4).

Civil litigation -- Civil procedure -- Settlements -- Releases -- Application by directors to enforce minutes of settlement dismissed -- The directors entered a settlement with the Financial Services Commission of Ontario (FSCO) and the receiver in respect of offence proceedings regarding a pension shortfall and non-compliant filings -- The appointed administrator of the plan commenced separate proceedings against the actuary that prepared the filings -- The directors were added as third parties -- The court found that it was premature to summarily determine whether FSCO had acted in a representative capacity, or whether its claim was subrogated to the administrator's in a manner that triggered the release provisions -- Pension Benefits Act, s. 86(4).

Application by ten former directors and officers of the companies, Slater Steel, Slater Stainless and related entities, for declaratory relief. In June 2003, the companies were granted protection. Prior to expiry of a claims bar order in respect of the directors, the Financial Services Commission of Ontario (FSCO) filed a claim against the directors alleging that the companies had contravened the Pension Benefits Act by failing to file compliant actuarial valuation reports and failing to exercise the requisite diligence, skill and care in adopting the reports and the administration of pension funds. The claim contended that the directors had acquiesced or participated in the offences under the Act. The Crown intended to seek a fine of $100,000 and claimed a restitution order of $30.2 million payable to the pension funds. In August 2004, the protection proceedings were terminated and PWC was appointed interim receiver and manager. The directors were released from all claims with the exception of those already commenced. In September 2008, Morneau was appointed as administrator of the pension plans with a mandate to wind up the plans and administer their assets. In October 2004, the directors filed a preliminary reply to FSCO's claim stating that they had relied on advice from AON, an expert hired by the companies in relation to pension compliance and actuarial issues. In December 2004, PWC, the directors and the Crown executed Minutes of Settlement and a release whereby the receiver paid FSCO $100,000 from operating reserves, and judgment would be entered against the companies for $18.3 million or the actual shortfall. The directors were not obliged to pay any funds. In 2005, Morneau commenced an action on behalf of the plan against AON, and FSCO laid charges regarding failure to comply with accepted practice in respect of the actuarial reports. AON commenced third party proceedings against the directors. Meanwhile, FSCO made an interim payment from its pension guarantee fund to Morneau, with the possibility of partial repayment via a damages award. The directors sought a declaration that FSCO was obliged to indemnify them under the Minutes of Settlement or withdraw Morneau's claim against AON. FSCO took the position that the release was inapplicable, as they had not commenced the proceeding or acted in an advisory capacity to Morneau.

HELD: Application dismissed. It was premature to determine whether FSCO was subrogated to the rights of Morneau under s. 86(4) of the Pension Benefits Act, in a manner that triggered the language of the release and indemnification provisions in the Minutes of Settlement in favour of the

directors. Although FSCO had a subrogation right, it did not necessarily follow that remedies or claims against FSCO were subsumed as a result. Such determination required a trial that would address whether FSCO had exercised its subrogation right and asserted control of the Morneau action. In addition, there was a genuine issue for trial as to whether FSCO exercised any representative capacity on behalf of Morneau.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.6

Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28, s. 1, s. 4

Ontario Civil Procedure Rules, Rule 1.04, Rule 49.09

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 22, s. 71, s. 71(1), s. 83, s. 84, s. 86, s. 86(4), s. 110(2), s. 110(4)

Counsel:

E. Babin and J. Bunting, for the Moving Party Former Directors and Officers of Slater Steel Inc. et al.

D. McPhail and M. Bailey, for the Respondent Superintendent of Financial Services.

A.F. Esterbauer, for the Respondent Morneau Sobeco Inc.

B. Bresner, for the Respondent AON Consulting Inc.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 Ten individuals who were the former directors and officers of Slater Steel Inc. ("Slater"), Slater Stainless Corp. ("SSC") and related companies seek a declaration that Minutes of Settlement dated December 9, 2004 and entered into among PriceWaterhouseCoopers Inc. ("PWC") in its capacity as monitor, interim receiver and receiver manager of Slater and SSC, the directors and officers of Slater (the "Directors"), the Superintendent of Financial Services (the "Superintendent" or "FSCO") and a syndicate of lenders (the "Senior Lending Syndicate ") obligate FSCO to either:

i) withdraw the claim commenced on November 18, 2005 by Morneau Sobeco Limited Partnership, the current administrator of the pension plans of SSC members of the National Automobile, Aerospace, Transportation, and General Workers Union of Canada (the "CAW plan") and the United Steelworkers of America (Local 7777) (the "USWA plan"); or

ii) provide the Directors with an enforceable indemnity to hold them harmless from all costs, expenses, judgments and losses in respect of certain third party claims.

2 FSCO brings a cross motion for an order striking out the notice of motion of the Directors and in the alternative, requests an order determining that a motion on the Commercial List is not the proper procedure to finally determine rights pursuant to the Minutes of Settlement made in the *Companies' Creditors Arrangement Act* ("CCAA") proceeding; and in the further alternative requests an order staying the motion until the liability of the Directors as third parties in the civil action commenced by Morneau Sobeco Limited Partnership ("Morneau") in court file number 05-CV-300733PD1 has been finally determined.

3 These motions involve an interpretation of section 86(4) of the *Pension Benefits Act*[1] (the "PBA").

The Facts

a) CCAA and Claims Bar Proceedings

4 On June 2, 2003, Farley J. granted protection to Slater, SSC and their related companies pursuant to the CCAA. The order included a stay of any proceedings against the Slater companies. That order also included a Directors' charge of up to $17.5 million.

5 On April 30, 2004, Farley J. granted a claims bar order. That order provided that any claims against the Directors were to be asserted by June 25, 2004. The claims of all persons wishing to assert a claim against the Directors would be extinguished and barred from and after that date and all claimants would be deemed to have fully and finally released and discharged all Directors from all claims subject to certain exceptions such as gross negligence and willful misconduct.

6 Prior to the expiry of the claims bar proceeding, FSCO filed a claim against the Directors alleging, amongst other things, that as the administrator of certain pension plans, SSC had contravened the PBA and its Regulation by failing to file actuarial valuation reports that met the prescribed requirements set out in the PBA and Regulation. FSCO claimed that SSC contravened section 22 of the PBA because, in adopting the reports, it failed to exercise the care, diligence and skill in the administration of the pension funds for the plans that a person of ordinary prudence would exercise in dealing with the property of another person and failed to carry out reasonable and prudent supervision of agents employed by SSC, which agents were the actuaries employed to prepare the actuarial valuation reports. FSCO alleged that the Directors were guilty of an offence

pursuant to section 110(2) of the PBA because they caused, authorized, permitted, acquiesced or participated in the aforesaid contraventions of the PBA and/or failed to take all reasonable care in the circumstances to prevent SSC from committing contraventions of the PBA. The Crown as represented by FSCO intended to seek a fine of $100,000 against the Directors. FSCO claimed that had the reports met the statutory requirements, they would have indicated that SSC was required to make contributions to the funds for the plans estimated to be $18 million without interest. The Crown, as represented by FSCO, intended to seek a restitution order under section 110(4) of the PBA that the Directors pay $18 million plus interest to the pension funds.

7 The claims notice also stated that FSCO was unable to assess the Slater plans to determine if there were additional violations that might give rise to any additional Director claims. The Superintendent would not be in a position to do so until such time as he could appoint an administrator for the plans. The notice closed with the following words:

> "The Superintendent therefore provides notice in respect of any and all claims resulting from the failure to administer the Slater plans in accordance with legal requirements, including but not limited to contraventions of the PBA and Regulation, which are not now known to the Superintendent. Such claims may be pursued through a prosecution under the PBA or through other proceedings."

8 The CCAA proceedings were unsuccessful and, on August 30, 2004, Farley J. granted an order terminating the CCAA proceedings with respect to the Slater companies. That order stated that the Directors were released from all claims including any claim or demand for contribution or indemnity. The exceptions to that release included any claims for actively or knowingly participating in a breach of fiduciary duty, gross negligence, and willful misconduct, and the release was "without prejudice to the rights of any person whose claim against such directors and officers has been allowed, partially allowed or is being disputed in accordance with the claims bar order."

9 That same day, PWC was appointed by Farley J. as interim receiver and receiver and manager of Slater and SSC.

10 On September 8, 2004, the Superintendent appointed Morneau as the administrator of the pension plans pursuant to section 71 of the PBA. It states:

> S. 71(1) If a pension plan that is to be wound up in whole or in part does not have an administrator or the administrator fails to act, the Superintendent may act as or may appoint an administrator.
>
> (2) The reasonable administration costs of the Superintendent or of the administrator appointed by the Superintendent may be paid out of the pension fund.
>
> (3) The Superintendent may terminate the appointment of an administrator appointed by him or her if the Superintendent considers it reasonable to do so.

11 The Superintendent and Morneau entered into an Appointment Agreement. Morneau's mandate was to wind up the pension plans. The agreement provided that the administrator would be directly responsible for administering the plans and their assets. Section 12.03 of the Appointment Agreement provided that:

> The Superintendent will not assume or have any responsibility for the conduct of any aspect of the administration and wind up process under the terms of this Agreement notwithstanding any prior consultation, review, concurrence or approval given in the course of the Appointment.

The Superintendent and the administrator were to meet at least once a year but the administrator had no power to bind the Superintendent nor was it to hold itself out as an agent, partner or employee of the Superintendent. Specifically, section 4.04 of the Appointment Agreement stated:

> The Administrator shall have no power or authority to bind the Superintendent or to assume or create any obligations or responsibility, express or implied, on the Superintendent's behalf. The Administrator shall not hold itself out as an agent, partner, or employee of the Superintendent. Nothing in this Agreement shall have the effect of creating an employment, partnership or agency relationship between the Superintendent and the Administrator (or any of the Administrator's directors, officers, shareholders, employees, Service Providers, partners, affiliates, volunteers or subcontractors) or constitute an appointment under the Public Service Act, R.S.O. 1990, c. P47, as amended.

The Superintendent's right to terminate the appointment was acknowledged.

12 As mentioned, the termination order of August 30, 2004 permitted the claims bar process to continue for certain claims already commenced. This included that of FSCO. Mr. Gordon Morantz was the claims officer appointed to hear the FSCO claim. At the end of September, 2004, he conducted a case conference at which counsel for FSCO and two representatives from Morneau were in attendance. The latter advised that they had been appointed as administrator of the pension plans by FSCO. They advised Mr. Morantz that they were monitoring the claims bar proceeding and they might apply to intervene in the future. They never did but Mr. Morantz directed that the Morneau counsel were to be copied on all other communications in the claims bar proceeding. On October 15, 2004, the Directors received a letter from FSCO requesting disclosure of certain information. FSCO copied Morneau's counsel on this letter. On October 18, 2004, counsel to the Directors wrote to Morneau's counsel advising that:

> "As you know, we are counsel to the directors and officers of Slater Steel Inc. We understand that representatives of the administrator have been in contact with certain officers of Slater. Considering that the administrator has indicated that it is conducting an investigation to determine if there are any claims that can be asserted against the directors and officers, we ask that all further correspondence

> with and requests for information from any of Slater's directors or officers be directed through us.
>
> We also understand that the administrator has contacted a number of Slater's pension advisors. Although we do not have any difficulty with the administrator obtaining any information from Slater's advisors with respect to the administration of the pension funds, we would ask that we be advised of any request for information that is not directly related to the administration of the pension funds."

13 On October 22, 2004, the Directors filed a preliminary reply, stated to be without prejudice, to FSCO's claim. In that reply, the Directors stated that they exercised due diligence and reasonably relied on experts hired by Slater to assist in dealing with pension matters. The experts included AON Consulting Inc. ("AON"). In light of the complexity of administering the plans and given that Slater did not have any in-house pension expertise, the Directors stated that they relied heavily on all of Slater's pension service providers. The Directors noted that Slater's primary contact at AON, Mr. Mel Norton, was a recognized expert in the field. The Directors stated that Slater relied on the advice of AON with respect to compliance with the PBA and that the actuarial valuations were performed in accordance with the standards of practice of the Canadian Institute of Actuaries. The Directors stated that AON and Slater disputed FSCO's claims that the reports did not comply with the PBA but to the extent they did not, the Directors would not be guilty of an offence. They also stated that the actuarial issue identified by FSCO was well outside the knowledge and expertise of the Directors and it was accordingly appropriate and reasonable for the Directors to retain and rely on expert advisors including AON in this regard.

14 On October 29, 2004, FSCO delivered a response to the Directors' preliminary reply. The response stated that the Directors were liable because they did not take reasonable care to ensure that the retainer of agents was reasonable and prudent nor did they ensure that the agents were adequately supervised in a reasonable and prudent manner.

15 On November 4, 2004, Morneau wrote to Mr. Morantz. Lawrence J. Swartz signed the correspondence on behalf of Morneau. He noted that Morneau was the administrator of the pension plans and that it had already provided Mr. Morantz with a copy of its appointment letter dated September 13, 2004. Mr. Swartz wrote:

> "As Administrator, we have a duty to ensure that the Pension Plans are administered, and have been administered, in accordance with the *Pension Benefits Act* and its regulations. Although we are still examining the financial status of the Pension Plans, it appears that retirees likely will face pension reductions because of the underfunded status of the Pension Plans. We are concerned that the underfunded status of the Pension Plans may have resulted

> from, among other things, breaches of the *Pension Benefits Act* by the former administrator, which was the company sponsoring the Pension Plans through its directors and officers."

He went on to note the claims filed against the Directors by the Superintendent totaling $30.22 million and stated:

> "Given that we have been appointed recently, we are not in a position at this time to file any further claims against the directors and officers. We are nevertheless very concerned with the issues identified by the Superintendent in its Proof of Claim in respect of the Pension Plans. To fulfill our fiduciary and statutory obligations as the administrator on behalf of the Pension Plans, we are an interested party in the outcome of the issues identified by the Superintendent. Accordingly, we wish to appear in the proceedings before you to support the Superintendent of Financial Services and to make submissions in respect of those claims.
>
> The participation of the administrator can advance the proceedings and bring information to light that will assist you in making decisions. As the administrator, we have custody of the relevant Pension Plan documents and records. Therefore, we expect to be able to provide evidence and information that will help you in making your determinations. Ultimately, the administrator will be a recipient on behalf of the Pension Plan members and beneficiaries, should monies be awarded in the proceedings related to the claims of the Superintendent. The administrator must administer the windup of the Pension Plans and the outcome of the proceedings before you will have a fundamental impact on the administration of the Pension Plan windups. The administrator's participation is necessary to make submissions on the administration issues of the Pension Plans that are part of the proceedings and to provide information on how damages should be quantified and dividends allocated and distributed."

He closed by indicating that he wished to attend when the parties reconvened before Mr. Morantz.

b) The Settlement

16 On December 9, 2004, PWC Inc., the Directors, Her Majesty the Queen in Right of Ontario as represented by the Superintendent of Financial Services and the Senior Lending Syndicate executed Minutes of Settlement. Morneau was not a party nor was a request made that it be a party. The Directors were not obliged to pay any funds as a term of the settlement. Pursuant to the Minutes of Settlement:

* the parties consented to the making of a consent implementation order.

* The parties agreed that except as set out in the Minutes of the Settlement, the terms of the Minutes and the order related to and applied only to the resolution of FSCO's claim and did not affect the rights of any person who was not a party.
* Nothing in the Minutes constituted an admission of liability or misconduct by any of the former Directors. The receiver would pay FSCO $100,000 from the operating reserves that the receiver maintained in lieu of payment of a fine.
* FSCO would withdraw its claim and release any claim to any of the funds held by the receiver including monies reserved for payment of the Directors' charge set forth in Farley J.'s order of June 2, 2003.
* There would be judgment against Slater for the lesser of $18.3 million and the actual aggregate deficiency of the plans on liquidation and that amount would constitute an unsecured creditor's claim against SSC.

17 Paragraph 7 of the Minutes stated:

> In consideration of the payment of $100,000, referred to in paragraphs 2 and 3 above, and for other good and valuable consideration, the receipt and sufficiency of which is hereby irrevocably acknowledged, FSCO on its own behalf and to the fullest extent that it exercises any representative capacity on behalf of any or all of the former employees of Slater, the beneficiaries of any pension plan of which Slater was the employer, sponsor or administrator (the "Plans"), the current administrator of the plans (Morneau Sobeco) or any union that is or was a party to any collective bargaining agreement with Slater (the "Releasor") hereby releases, remises, forever discharges (and, without limiting the generality of the foregoing, expressly covenants not to sue or to commence any legal proceeding under section 109 or section 110 of the PBA or any other provision of the PBA or the corresponding regulations) each and all of Slater ... and each of their respective former directors, former officers ... (the "Releasees") in respect of any and all actions, causes of action, suits, debts, dues, accounts, bonds, charges, covenants, contracts, prosecutions, claims and demands that the Releasor ever had, now has or may hereafter have against the Releasees, or any of them, including without limiting the generality of the foregoing: (a) any cause, matter or thing claimed or that could have been claimed in FSCO's claim; or (b) any cause, matter, or thing concerning or relating to the plans. **Nor will the Releasor bring any claim or commence any proceeding against any person or corporation relating to the facts or issues released herein in which a claim for contribution or indemnity could be made by the person or corporation against the Releasees or any of them (a "Claim Over"). In the event that the Releasor brings a claim against a person or corporation who makes a Claim Over, the Releasor shall forthwith withdraw the claim against the person or**

> **corporation or, if it wishes to proceed, the Releasor shall provide the applicable Releasee(s) with an enforceable indemnity to hold the Releasee(s) completely harmless from all costs, expenses, judgments, and losses in respect of the Claim Over (including legal fees on a solicitor and his or her own client basis) in a form acceptable to each Releasee.** (emphasis added)

18 The Directors requested, and FSCO agreed to, the reference to Morneau in paragraph 7 of the Minutes of Settlement. On December 8, 2004, the day before the Minutes were signed, FSCO's counsel sent an e-mail to Morneau's counsel and to Mr. Swartz at Morneau. In the e-mail, counsel for FSCO forwarded the proposed language of paragraph 7 of the Minutes of Settlement. Counsel for FSCO and Morneau subsequently had a telephone conversation and specifically discussed charges that FSCO was contemplating bringing against AON and the civil suit that Morneau was contemplating bringing against AON and Mr. Norton. Counsel determined that the release would not preclude a claim against AON or Mr. Norton but they did not discuss the claim over provision contained in the release. This was not communicated to the Directors nor were the Directors ever advised by FSCO that it did not act in a representative capacity over Morneau or that, in its view, Morneau could bring a claim against third parties that might result in a claim over that would not be covered by the Minutes. The Directors would not have executed the Minutes had they known that they were at risk of a claim by Morneau. The Directors understood and intended that the claim over provision in the Minutes would apply to any third party claims commenced against the Directors as a result of proceedings commenced by FSCO or a party over whom FSCO exercised any representative capacity. This included a claim over resulting from a proceeding commenced by Morneau.

19 On December 9, 2004, Farley J. granted an order approving the Minutes of Settlement and incorporating many of their relevant terms including judgment in favour of FSCO against SSC.

c) Morneau's Action against AON and Mr. Norton

20 After the execution of the Minutes, FSCO and Morneau met on a number of occasions. During those meetings, they discussed commencing a claim against AON and Mr. Norton. A list entitled "Contentious Issues Risk" was prepared by FSCO in January, 2005. It stated "Superintendent to take action against the actuary for Slater Stainless"; "the administrator is taking legal action to recover approximately $18 million for the pension fund"; and that "FSCO is coordinating with Morneau in their action against the actuary."

21 On March 14, 2005, Morneau wrote to FSCO noting that it had spent time participating in a lawsuit for negligence and breach of fiduciary duty against the Directors and the claim had been settled.

22 On April 11, 2005, FSCO laid charges against AON and Mr. Norton. It alleged that AON and Mr. Norton had failed to comply with accepted actuarial practice in respect of the actuarial reports.

23 On November 18, 2005, by its General Partner, Morneau Sobeco Corporation, Morneau commenced a claim against AON and Mr. Norton seeking, amongst other things, damages for negligence and breach of fiduciary duty in the amount of $20 million. The action stated that Morneau was bringing it in its capacity as administrator of the plans and on behalf of the plans' members and beneficiaries whose rights and interests in the plans had been harmed by the actions of the defendants. Morneau alleged that AON and Mr. Norton acted negligently and in breach of their duties in providing advice to Slater and in preparing solvency valuation reports that were not in accordance with accepted actuarial practice or the PBA. They are alleged to have prepared reports that showed a solvency excess when in reality there was a solvency deficiency. The actions of AON and Mr. Norton were alleged to have resulted in the under-funding of certain of Slater's pension plans. Morneau specifically pleaded that it was reasonable for the administrator to place reliance on the reports and that it did reasonably rely on the expertise of AON and Mr. Norton as did the plans' member beneficiaries. At that time, SSC was the administrator.

24 In her reasons for decision in the appeal discussed subsequently in these reasons, Gillese J.A., [2008] O.J. No. 1022, described the Morneau claim.

> "Morneau may, as the successor plan administrator, pursue any claims that Slater might have taken. In addition, however, Morneau has the right to bring suit on behalf of the Plan's beneficiaries. Fundamentally, it is the latter which lies at the heart of the Morneau claim. The Morneau claim is asserted on behalf of the Plans' members and beneficiaries, the people who suffered or will suffer as a result of the underfunding of the Plans due to the allegedly negligent preparation of the solvency calculations. The success of the Morneau claim is not dependent on establishing that Slater reasonably relied on the reports. It is dependent on establishing that the allegedly negligent report played a role in enabling Slater to avoid making the required payments."[2]

25 AON and Mr. Norton brought a motion seeking to commence third party claims against the Directors in respect of the Morneau claim. On July 6, 2006, relying on the terms of the release in the Minutes of Settlement, counsel for the Directors wrote to FSCO inquiring as to whether it intended to indemnify the Directors or withdraw the Morneau claim. On July 12, 2006, FSCO responded advising that the Morneau proceeding had not been brought or commenced by FSCO or the Superintendent nor did they act in a representative capacity for the plaintiff in the Morneau proceeding. As such, the indemnification provision in the release was inapplicable and FSCO was not in a position to withdraw the Morneau proceeding.

26 AON and Mr. Norton proceeded with their motion seeking an order permitting them to issue the third party proceedings. They were opposed by the Directors who brought a cross motion seeking an order enforcing the Minutes of Settlement in the event that the third party proceedings were permitted. The motions were heard by another judge who refused to allow the third party claims and as such, he did not address the issue of enforcement of the Minutes of Settlement. That

decision was overturned by the Court of Appeal. Gillese J.A. writing for the Court held that it was not plain and obvious that the claims of Aon and Mr. Norton against the Directors failed to disclose a reasonable cause of action. Furthermore, the issuance of the third party claims was not precluded by the CCAA orders. Leave to appeal to the Supreme Court of Canada was dismissed. The Directors then renewed their motion seeking an order to enforce the Minutes of Settlement.

d) Pension Benefits Guarantee Fund Payment

27 On December 22, 2005, Morneau submitted an application to FSCO seeking an interim allocation from the Pension Benefits Guarantee Fund (the "Fund") in respect of the plans. The Fund serves as a mechanism to pay amounts to an underfunded pension plan of an insolvent employer. On February 24, 2006, FSCO allocated from the Fund an amount not to exceed $73,911,800 to the CAW plan and an amount not to exceed $9,324,700 to the USWA plan for a total of approximately $80 million. The evidence suggests that the payment from the Fund may be insufficient to cover the pension liabilities of all of the beneficiaries in the plans and that there will be benefit reductions for certain members in spite of the payment from the Fund. Any award of damages in the Morneau action will be paid to the funds of the CAW and USWA plans, a portion of which may come back to the Fund. As stated by Ms. Ellis in her cross-examination, monies recovered go into the pension plan. The pension plan then goes through a recalculation to raise the funded ratio of the benefits and a portion of that money may come back to the Fund and a portion of it will be distributed amongst the plan members. The damage claim against AON and Mr. Norton is for $22 million plus pre-judgment interest and costs. As also observed by Ms. Ellis[3], the approximate amount of $80 million does not fully encompass the $22 million claim as non-guaranteed benefits would not be completely covered. Put differently, the beneficiaries of the CAW plan and the USWA plan were not made whole as some had non-guaranteed benefits that faced a reduction.

28 According to Morneau, it did not consult with FSCO or seek instructions or advice from FSCO at any stage of the proceeding in the civil suit brought by Morneau against AON and Mr. Norton.

The Issues

(a) Is FSCO required by the terms of the Minutes of Settlement to provide an indemnity to the Directors or to withdraw Morneau's claim against AON and Mr. Norton because:

(i) it is subrogated to Morneau's rights; or because
(ii) it is exercising "representative capacity" as contemplated by the Minutes of Settlement?

(b) Is a motion on the Commercial List the proper procedure to finally

determine rights pursuant to Minutes of Settlement in the CCAA proceeding?

The Positions of the Parties

29 In brief, the parties' positions are as follows.

a) The Directors' Position

30 The Directors submit that FSCO is subrogated to the rights of Morneau pursuant to the provisions of the PBA. As a result of the authorization of payments from the Fund and pursuant to section 86(4) of the PBA, the Superintendent is subrogated to Morneau. FSCO therefore assumed the rights and remedies of Morneau including its right to control the action brought by Morneau.

31 Secondly, quite apart from that argument, FSCO exercises its representative capacity over Morneau through its ability to remove Morneau as administrator pursuant to section 71 of the PBA and to assume the role of administrator itself and through its supervision and approval of Morneau's conduct pursuant to the Appointment Agreement entered into between Morneau and FSCO.

32 Thirdly, the commencement of the action was an unusual step in the context of the windup of the plans and was taken with full knowledge and involvement of FSCO. Indeed, the Appointment Agreement expressly contemplated litigation being commenced against the administrator but contained no reciprocal provision in respect of a claim being brought by the administrator. The Directors submit that FSCO cannot avoid its obligations under the Minutes of Settlement by indirectly commencing proceedings against AON and Mr. Norton that assert the very same pension claims it settled against the Directors without triggering the release provisions in the Minutes of Settlement.

b) FSCO's Position

33 Dealing firstly with the issue of subrogation, FSCO submits that while there may be a right of subrogation, this does not make the claim FSCO's claim. The cause of action belongs to the insured, not FSCO. Furthermore, if Morneau obtained judgment, the proceeds would not automatically go to the Fund.

34 As to the issue of representative capacity, FSCO submits that the Superintendent and Morneau as administrator have two distinct statutory roles and the Appointment Agreement entered into by them confirms this separation of roles. That Agreement expressly provided that there was no employment, agency, or partnership arrangement between the Superintendent and Morneau and that Morneau had no power or authority to bind the Superintendent. Similarly, the Agreement provided that the Superintendent would not have any responsibility for the conduct of any aspect of the administration and windup process. Furthermore, the nature of the claim made by FSCO in the CCAA claims bar proceeding was a restitutionary order within a prosecution which Morneau did

not have the status to commence. Conversely, Morneau's claim is for damages which the Superintendent does not have the status to commence. While the Fund allocation gives the Superintendent certain subrogation rights, this does not mean that the Superintendent or FSCO acts in a representative capacity for Morneau. Furthermore, the Minutes of Settlement should not be interpreted to require FSCO to indemnify the Directors on the third party claims. There is no ambiguity in the words used in those Minutes; there is no evidence that it was the parties' intention that the release and indemnification provision of the Minutes would apply to the Morneau action; and the Directors did not give any consideration for such a settlement.

35 FSCO also submits that a motion on the Commercial List is not the appropriate forum for declaratory relief. The motion is analogous to a motion for summary judgment or a motion on a point of law. The Directors are asking the Court to determine an issue of liability prior to trial. FSCO submits that a determination of whether FSCO exercised any representative capacity on behalf of Morneau is not an issue that can be resolved solely on the basis of the words in the Minutes of Settlement. This determination requires evidence at a trial of the Morneau action. Secondly, it would be procedurally unfair to determine this issue summarily by way of motion as if successful, the Directors would have no financial incentive to defend themselves against the third party claims. Thirdly, it is premature to decide whether FSCO must indemnify the Directors because this issue may be moot if the third party claims are ultimately unsuccessful at trial.

c) Morneau's Position

36 Addressing firstly the Directors' subrogation argument, Morneau submits that the PBA does not give FSCO the right to control, assume or manage the action on behalf of the administrator. It simply operates to create a trust over funds received by the administrator for the benefit of FSCO. Furthermore, the payments made by the Fund are insufficient to cover the pension liabilities of all of the beneficiaries in the plans. Accordingly, there will be benefit reductions for certain members. As such, Morneau's action does not consist of a fully subrogated claim.

37 As to the issue of representative capacity, Morneau submits that it was not a party to the Minutes of Settlement and the subsequent court order does not affect its rights in any manner whatsoever. FSCO does not act in any representative capacity for any plan administrator appointed pursuant to section 71 of the PBA. The Directors are unable to establish that FSCO was acting in any representative capacity for Morneau at the time of the Minutes of Settlement and the court order. If this were not the case, FSCO would not have to appoint an administrator as FSCO itself could act as administrator. The statutory scheme demonstrates that the administrator of a pension plan including an appointed administrator is legally distinct from FSCO. Nor is there any factual basis on which to assert that FSCO was acting as an agent of Morneau. Indeed, the Minutes and the court order expressly state that they do not affect the rights of any non-parties. There was no consideration flowing from the Directors to FSCO. The Directors were sophisticated individuals who were represented by experienced commercial counsel at all relevant times.

38 Morneau takes a similar position to that of FSCO with respect to the procedural issue and the appropriateness of determining this dispute by way of a motion on the Commercial List.

Discussion

a) Subrogation

39 The first argument to address is whether FSCO is subrogated to the rights of Morneau and whether as a result, the language in the release in the Minutes of Settlement is triggered in favour of the Directors. In considering this issue, it is helpful to briefly address the scheme of the PBA and applicable legal principles.

40 The Superintendent of Financial Services is the regulator of pension plans under the PBA and is the Chief Executive Officer of FSCO under the *Financial Services Commission of Ontario Act* (the "*FSCO Act*"). The purposes of FSCO are to provide regulatory services that protect the public interest and enhance public confidence in the regulated sectors, to make recommendations to the Minister on the regulated sectors, and to provide resources for the Financial Services Tribunal. Persons who establish or administer a pension plan within the meaning of the PBA, and employers or other persons on their behalf who are required to contribute to such pension plans, are included in the definition of regulated sector.[4]

41 Under the *FSCO Act*, the Superintendent is responsible for administering and enforcing a number of statutes including the PBA and for supervising generally the regulated sectors. The Superintendent is also responsible for the administration of the Pension Benefits Guarantee Fund. This Fund is established under the PBA. It guarantees certain pension benefits for certain plans that are wound up but that have insufficient assets to pay all the benefits. Employers who have plans that are eligible for coverage are required to pay annual assessments to the Fund.

42 Under section 83 of the PBA, the Superintendent shall make a declaration that the Fund applies to a pension plan if, amongst other things, the plan is wound up and the Superintendent is of the opinion, upon reasonable and probable grounds, that the funding requirements of the PBA and Regulation cannot be satisfied. Section 86 of the PBA provides that the Superintendent has a lien and charge over the assets of the employer where money is paid out of the Fund as a result of the wind-up, in whole or in part, of a pension plan.

43 In addition, where the Superintendent has authorized payment out of the Fund, he or she becomes subrogated to the rights of the administrator. Section 86(4) of the PBA states:

> The Superintendent is subrogated to the rights of the administrator of a pension plan of which the Superintendent authorizes payment from the Guarantee Fund in satisfaction of a pension, deferred pension, pension benefit or contribution guaranteed under section 84 (guaranteed benefits).

44 In *Re Stelco Inc.*,[5] Farley J. noted that payment from the Fund does not eliminate liability, rather the Fund or FSCO is subrogated to the claims of the employees. As described in "*Pension Benefits Law in Ontario*",

> "...the rights of the Superintendent are substituted in place of the rights of the plan administrator. In other words, the Superintendent "steps into the shoes" of the administrator. Accordingly, if the administrator brought a court action under s. 59 against the employer or its directors to obtain payment of contributions due under a pension plan, and obtained a judgment, the Superintendent would be entitled to use those funds to repay the PBGF debt owing by the employer notwithstanding that the administrator could have provided such funds to the benefit of plan members. Needless to say, any amount recovered by action in excess of the PBGF liability, would be applied for the members' benefit."[6]

45 The administrator is defined in the PBA as the person or persons that administer the pension plan. It has various responsibilities that are described in the PBA including filing materials concerning the plan with the Superintendent and ensuring that the plan is administered in accordance with the filed documents and the PBA. The Superintendent may terminate the appointment of an administrator appointed by him or her but according to the Divisional Court in *Kerry (Canada) Inc. v. Ontario*,[7] the Superintendent does not have jurisdiction to require an administrator to amend a plan.

46 In this case, the Directors submit that by virtue of FSCO's authorization of the payments from the Fund and by operation of section 86(4) of the PBA, FSCO is subrogated to the rights of Morneau as administrator, and thereby has the right to control the court proceeding brought by Morneau. As such, the Directors argue that FSCO is bound to abide by the terms of the release and indemnity found in the Minutes of Settlement.

47 Subrogation is a broad and flexible equitable remedy: Ziegel and Denomme, *The Ontario Personal Property Security Act: Commentary and Analysis*.[8] So by way of example, in *Crosbie-Hill v. Sayer*,[9] where a third party at the request of the mortgagor paid off the first mortgage, he became entitled in equity "to stand as against the property, in the shoes of the first mortgagee." The fundamental principle underlying the doctrine is one of fairness in light of all the circumstances: *Mutual Trust Company v. Creditview Estate Homes Ltd.*[10] The primary function of subrogation is to prevent unjust enrichment either by the party whose interests are subrogated or by the party against whom a claim is made.[11]

48 In *N'Amerix Logistix Inc.*,[12] Spence J. noted that subrogation is defined as "the substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies or securities: *Black's Law Dictionary* as approved in *Midland Mortgage Corp. v. 784401 Ontario Ltd*. [1993] O.J. No. 2671 (Gen. Div.)." Granger J. also described the doctrine in *London*

Life Insurance Co. v. Forget[13]:

> "The answer to this proposition is to be found in the definition of subrogation which in general terms provides that if the insured is compensated he holds any surplus for the benefit of the insurer. In *Gibson v. Sun Life Assurance Co. of Canada* (1984), 45 O.R. (2d) 326, 6 D.L.R. (4th) 746 (H.C.J.), Henry J. stated at p. 333 O.R., pp. 752-53 D.L.R.:
>
> > The doctrine of subrogation is a principle of equity that applies to a contract of indemnity. The meaning of subrogation was stated by Chancellor Boyd in *National Fire Ins. Co. et al. v. McLaren* (1886), 12 O.R. 682 at p. 687 (cited with approval by the Supreme Court of Canada in *Ledingham et al. v. Ontario Hospital Services Com'n et al.,* [1975] 1 S.C.R. 332 at p. 337, 46 D.L.R. (3d) 699 at p. 702, 2 N.R. 32 *sub nom. Ledingham v. Minister of Transport* (S.C.C.)):
> >
> > > The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where a third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of securing full indemnity to the insured, on the one hand, and on the other of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss. Being an equitable right, it partakes of all the ordinary incidents of such rights, one of which is that in administering relief the Court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company."

49 In *G.E. Canada Equipment Financing G.P. v. ING Insurance Co. of Canada*[14], Cronk J.A. described subrogation as "... a derivative right that rests on the principle of indemnification. It contemplates that on full indemnification of an insured by an insurer for an insured loss, the insurer becomes entitled to exercise a right belonging to the insured."

50 The cause of action in a subrogated claim continues to belong to the subrogor. In *Mason (Litigation Guardian of) v. Ontario,*[15] Laskin J.A. discussed the concept.

> "... where an insurer is subrogated to the claim of its insured, the claim nonetheless remains that of the insured in whose name and with whose rights the

> claim must be advanced."

He then quoted with approval from *MacGillivray and Parkington on Insurance Law.*[16]

> "Consistently with [the rule that the cause of action in a subrogated claim remains that of the insured] the law ignores the fact that, when proceedings are instituted at the behest of the insurer, he is the real plaintiff. Thus a Canadian court has held that an order for security for costs may be made against a foreign assured in whose name a domestic insurance company is bringing an action. ... Judgment must be entered in the name of the nominal plaintiff, the assured, and the defendant will obtain a good discharge only if he pays the assured, not if he pays the insurer."

51 In keeping with this principle, subrogation does not amount to an assignment of a cause of action. In *Gough v. Toronto and York Radial R.W. Co.*[17] Middleton J. stated:

> "When the owner in the first place chooses to call upon the insurance company to indemnify him, then the insurance company is by law subrogated to his rights against the wrongdoer. This is not an assignment of the right of action, for it is founded in tort and cannot be assigned; but it is the right of the insurer to resort to the courts and to assert, in the name of the insured, his right of action against the wrongdoer. When the judgment is recovered, though in the name of the insured, it is the property of the insurer."

52 In *Somersall v. Friedman*,[18] the Supreme Court of Canada examined the issue of subrogation within the context of automobile insurance and more specifically, s. 278(1) of the *Insurance Act*[19] and the Family Protection Endorsement that had been a common feature in Ontario automobile insurance agreements. Section 278(1) provided that:

> "An insurer who makes any payment or assumes liability therefore under a contract is subrogated to all rights of recovery of the insured against any person and may bring an action in the name of the insured to enforce those rights."

Similarly, the Endorsement provided that where a claim was made, the insurer was subrogated to the rights of the claimant and could maintain an action in the claimant's name.

53 In that decision, Iacobucci J. addressed a number of relevant substantive principles relating to the doctrine of subrogation. Firstly, he discussed the underlying objectives of the doctrine as being:

> "to ensure (i) that the insured receives no more and no less than a full indemnity, and (ii) that the loss falls on the person who is legally responsible for causing it (citations omitted). The doctrine of subrogation operates to ensure that the insured receives only a just indemnity and does not profit from the insurance

> (citations omitted). Consequently, if there is no danger of the insured being over compensated and the tortfeasor has exhausted his or her capacity to compensate the insured there is no reason to invoke subrogation."[20]

54 Secondly, he observed that in the absence of contractual terms to the contrary, the insurer's right of subrogation will not arise until the insured has been fully indemnified and the insurer may not control the process of litigation until this full indemnity has been met. In this regard, he relied on *Globe & Rutgers Fire Insurance Co. v. Truedell*[21]. In that case, the Ontario Court of Appeal held that subrogation occurred only where the insurance monies paid were sufficient to cover the entire loss suffered by the insured as opposed to simply the insured loss. (The corollary of this principle being that the customer is under a duty to pursue his or her claim against a third party diligently and in good faith.)

55 Thirdly, Iacobucci J. stated that: "... the insured is obliged to pursue any claim it has against a third party, up until such time as the insurer is entitled to and does assert control of the claim, in good faith."(emphasis added). In the case before the Supreme Court, Iacobucci J. concluded that the insurer's right of subrogation was not required to be exercised and that the insured could maintain the right of action until such time as the insurer assumed control.[22]

56 I will then turn to an application of these legal principles to the facts before me. Firstly, the facts of the case seem to fall within the parameters of the doctrinal objectives. To achieve the objectives of subrogation and to avoid any unjust enrichment, recovery in the name of Morneau would accrue at least in part to the benefit of the Fund. Conversely, the defendants to the law suit, namely AON and Mr. Norton, should not be able to escape possible liability just because there has been some payment from the Fund.

57 Secondly, in this case, the right of subrogation is governed by statute rather than by a contract. The right is only contingent on authorization of payment from the Fund in satisfaction of a pension, deferred pension, pension benefit or contribution guaranteed under section 84 of the Act. The trigger to entitlement to a right of subrogation appears to be payment of the amounts guaranteed, not full payment for the loss or shortfall.

58 That said, as held in the *Mason* decision, while the Superintendent may step into the shoes of Morneau, the claim continues to belong to Morneau. By logical extension, a defendant may only assert defenses that would be available as against Morneau. As such, had Morneau sued the Directors directly, they could not defend on the basis that they had obtained a release from FSCO in the absence of a release from Morneau. Put differently, FSCO has a subrogation right but that does not necessarily mean that remedies or claims against FSCO are subsumed or conflated as a result of the subrogation. This is particularly the case in circumstances where it is unclear that FSCO has in fact exercised its subrogation right and asserted control of the claim. Here, while FSCO would appear to be entitled to control the claim against AON and Mr. Norton, it has not been established that it has exercised its subrogation right and asserted control of the claim. As is clear from

Iacobucci J.'s comments in the *Somersall* decision, an insured may have a right to all or some of the fruits of an action but is not required or obliged to assume control of that action. Although not entirely free from doubt, prima facie it would appear that Morneau continues to pursue the claim and that FSCO has not assumed control of the action. Based on the record before me, there is a genuine issue for trial as to whether FSCO has exercised its subrogation right and asserted control of the action.

59 In these circumstances, it is premature to trigger the language of the release and indemnification in the Minutes of Settlement as a result of the Directors' subrogation argument. Such a determination requires a trial that will address whether in fact FSCO did exercise its subrogation right and asserted control of the action.

(b) Representative Capacity

60 One must then ask whether FSCO is exercising "any representative capacity on behalf of any or all of the former employees of Slater, the beneficiaries of any pension plan of which Slater was the employer, sponsor or administrator ... and the current administrator of the Plans (Morneau Sobeco)." As indicated in paragraph 3 of its factum, the Directors are not arguing that subrogation creates or conveys representative capacity on FSCO over Morneau.

61 Does FSCO exercise representative capacity on behalf of Morneau as alleged by the Directors given that pursuant to s. 71 of the PBA it may remove Morneau as administrator and assume the role of administrator itself, and given that pursuant to the Appointment Agreement, it supervises and approves Morneau's conduct in certain respects?

62 In addressing this issue, one questions the meaning of the term 'representative capacity' found in the Minutes of Settlement. Both the Directors and FCSO maintain that the Minutes of Settlement are unambiguous.

63 Representative capacity is defined in Black's Law Dictionary as "the position of one standing or acting for another, esp. through delegated authority <an agent acting in a representative capacity for the principal >."[23]

64 The PBA establishes separate roles for the Superintendent and the administrator. In addition, section 71(1) of the PBA provides that the Superintendent may act as or appoint an administrator. In fact, Morneau was appointed administrator by FSCO pursuant to this provision. In my view, section 71 does not amount to FSCO exercising any representative capacity on behalf of Morneau.

65 Similarly, the Appointment Agreement confirmed the separation of the roles of the two entities. It provided that the Superintendent could not assume or have any responsibilities for the conduct of any aspect of the administration and nothing in the agreement would have the effect of creating an employment partnership or agency relationship between FSCO and Morneau.

66 The Minutes of Settlement could have included Morneau but did not. Farley J.'s December 9, 2004 order stated that its terms applied only to the resolution of FSCO's claim and did not affect the rights of any person who was not a party to the Minutes of Settlement. There is no express evidence before me of any representation having been made to the Directors that FSCO was acting in a representative capacity for Morneau.

67 The release does speak of FSCO exercising any representative capacity on behalf of Morneau. Whether FSCO exercised any representative capacity is a factual determination and is the subject of competing facts and possible inferences. Lynda Ellis, who was the main FSCO representative who communicated with Morneau at the relevant time, maintained in her affidavit that FSCO did not instruct, control or otherwise act in a representative capacity over Morneau. She stated that Morneau did not consult FSCO at any stage of the proceeding in the civil suit brought by Morneau against Aon and Mr. Norton. In contrast, a Contentious Issues List prepared by FSCO and that was produced by FSCO as an answer to an undertaking, stated that "FSCO is coordinating with Morneau in their action against the actuary." Furthermore, Morneau confirmed that litigation is not normally associated with a typical plan wind-up. In its totality, this evidence could lead one to conclude that FSCO did in fact exercise representative capacity on behalf of Morneau.

68 Based on the evidentiary record before me, there is a genuine issue for trial as to whether FSCO was exercising any representative capacity on behalf of Morneau.

(c) Procedural Issue

69 This brings me to the third issue, namely, is this motion the appropriate forum to interpret the Minutes of Settlement and more specifically, the release and indemnification provision found in the Minutes of Settlement?

70 A claims bar order was issued in the CCAA proceedings and provided for a claims bar proceeding with respect to the Directors. A termination order was issued on August 30, 2004. It stated that the Directors were released from all claims except: a) any claims for active or knowing participation in a breach of fiduciary duty; b) any claims arising from gross negligence or willful misconduct; or, c) any claims allowed in the claims bar proceeding. The Superintendent asserted a claim within that process and it was settled pursuant to Minutes of Settlement and a court order. The Directors bring their motion within the CCAA proceeding on the Commercial List.

71 FSCO submits that the Directors' motion is analogous to a motion for summary judgment or a motion on a point of law. With the former, the moving party must establish that there is no genuine issue for trial and with the latter, the moving party must demonstrate that it is plain and obvious that a trial of the issue is unnecessary. Morneau also takes exception to this issue being determined by a way of motion. For their part, the Directors submit that in deciding whether the relief sought may be granted, the court should decide whether the issue before it can be determined without a trial.

72 It seems to me that the interpretation and enforcement of Minutes of Settlement entered into

within a CCAA proceeding are properly within the jurisdiction and purview of a motions judge sitting on the Commercial List. If the court is in a position to effectively dispose of the issue, it should do so. Summary determinations of disputes are desirable in that they save time and expense. The Rules of Civil Procedure are consistent with such an approach. Rule 1.04 provides that the rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits and where matters are not provided for in the rules, the practice shall be determined by analogy. By analogy to this case, Rule 49.09 provides that where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may move for judgment. It seems to me that the enforcement of Minutes of Settlement should similarly be enforceable by motion in the proceeding rather than requiring a party to institute fresh proceedings. In addition, given that the issue in part involves indemnification for legal fees, it is wholly appropriate to attempt to deal with the issue in a summary fashion. This is somewhat akin to an application or motion involving a duty to defend. That said, there must be both procedural and substantive fairness associated with such a determination. In this case, I must be satisfied that the issues in dispute may properly be determined without a trial. I am not so satisfied.

73 While the parties to the Minutes of Settlement who are before me, namely the Directors and FSCO, both take the position that the Minutes of Settlement are unambiguous, in my view, there is a genuine issue for trial as to whether FSCO exercised any representative capacity on behalf of Morneau. I agree with FSCO that this issue is not resolved solely on the basis of the words of the Minutes of Settlement but also on the basis of evidence to ascertain the extent, if any, to which FSCO exercised any representative capacity on behalf of Morneau. As already noted, the evidence on this issue is inconclusive and subject to conflicting inferences and potential findings. I do not accept that there are no material issues of fact that require a trial for resolution. Similarly, there is also a genuine issue for trial as to whether FSCO exercised its subrogation right and asserted control of the claim against AON and Mr. Norton.As such, while I am of the view that the matter potentially could be determined on a summary basis, in this case it should not be.

Conclusion

74 For these reasons, I am dismissing the Directors' motion, however, as suggested by FSCO, it is dismissed without prejudice to the Directors to raise the same issues at or after the trial. The cross-motion of FSCO to strike, stay, or order that a motion on the Commercial List is not the proper procedure is also dismissed. The parties were to file written cost outlines. I received them from some but not all of the parties. If they are unable to agree on costs, the parties are to make brief written submissions.

S.E. PEPALL J.

cp/e/qllxr/qlpxm/qlltl/qlaxw/qlced

1 R.S.O. 1990, c. P.8.

2 At para 26.

3 Q 223-233 of Ellis cross-examination

4 Sections 1 and 3 of *FSCO Act*, 1997, S.O. 1997, c.28.

5 (2004), 48 C.B.R. (4th) 299.

6 McFarlane and McSweeney, (Scarborough: Thomson Carswell, 2007).

7 (2006), 52 C.C.P.B. 1.

8 2nd ed. (Toronto: Butterworths, 2000) at para. 30.8.

9 [1908] 1 Ch. 866 (Eng. Ch. Div.).

10 (1997), 34 O.R. (3d) 583 (C.A.).

11 Charles Mitchell, *The Law of Subrogation*, (Oxford: Clarendon Press, 1994) at 9-10.

12 (2001), 29 C.B.R. (4th) 222.

13 (1991), 3 O.R (3d) 559 at 564.

14 2009 ONCA 171 at para. 47.

15 (1998), 39 O.R.(3d) 225 at 231 (C.A.).

16 8th ed. (London: Sweet & Maxwell; 1988) at 496.

17 (1918), 42 O.L.R. 415.

18 [2002] 3 S.C.R. 109.

19 R.S.O. 1990, c. I.8

20 *Supra,* note 18 at para. 52.

21 (1927), 60 O.L.R. 227 (S.C. App. Div.)

22 *Ibid,* at para. 59.

23 7th ed. (St. Paul: West Group; 1999).

TAB 2

Bayerische Landesbank Girozentrale v. R.S.W.H. Vegetable Farmers Inc. et al. [Indexed as: Bayerische Landesbank Girozentrale v. R.S.W.H. Vegetable Farmers Inc.]

53 O.R. (3d) 374

[2001] O.J. No. 745

Docket No. 98-CV-158339

Ontario Superior Court of Justice

Molloy J.

March 2, 2001

Civil procedure--Summary judgment--Offer to settle --Principles of motion for summary judgment applying to motion for judgment in accordance with terms of accepted offer to settle--No genuine issue for trial--No genuine credibility issue--Plaintiff granted summary judgment--Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 20, 49.09.

The plaintiff ("the Bank") made a secured loan to the defendants. The loan went into default, and the Bank demanded payment from the defendants and from two individuals who had guaranteed repayment of the loan. The Bank then sued the defendants but not the guarantors. In November 1999, the Bank signed minutes of settlement with the defendants. The minutes of settlement provided that if certain payments were not made within six months, then the Bank could take out a judgment in accordance with the consent to judgment signed by the defendants. A letter enclosing the settlement documents provided that the minutes of settlement were conditional on the guarantors signing them. The guarantors never signed the minutes of settlement. The defendants never made the stipulated payments. The Bank moved for judgment under rule 49.09, which provides that where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may make a motion to a judge for judgment in the terms of the accepted offer.

Held, the plaintiff should be granted judgment.

The principles applicable to a motion for summary judgment under Rule 20 apply to a motion for judgment under rule 49.09. Judgment may be granted on such a motion only if there are no genuine

factual disputes that require a trial for resolution. An issue of credibility must be a genuine one to defeat the motion. The settlement agreement by its express terms was conditional upon the guarantors signing the Minutes of Settlement and it was not necessary to resort to parol evidence. This condition was inserted solely for the benefit of the Bank. The Bank was entitled to waive the condition, and it did so. Accordingly, the defendants were bound by the terms of the minutes of settlement notwithstanding that the document was never signed by the guarantors. The defendant's assertion that he never would have signed the minutes of settlement if he had known that the Bank was going to take the position that there was an agreement without the consent of the guarantors was a self-serving assertion made after the fact. It had no chance of success and was not enough to raise a genuine issue for trial. Further, the defendant's allegation that the Bank later represented to him that the guarantors had signed the agreement did not create a triable issue. The defendant did not act on this representation, did not rely upon it, and suffered no detriment as a result of it. Accordingly, the minutes of settlement were binding, and the Bank was entitled to judgment.

Cases referred to

Aguonie v. Galion Solid Waste Material Inc. (1998), 38 O.R. (3d) 161, 156 D.L.R. (4th) 222, 17 C.P.C. (4th) 219, 107 O.A.C. 114 (C.A.); Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086, 74 O.R. (2d) 763n, 41 O.A.C. 250, 73 D.L.R. (4th) 686, 112 N.R. 362, 50 C.R.R. 59, 43 C.P.C. (2d) 165, affg (1987), 60 O.R. (2d) 676, 22 O.A.C. 38, 41 D.L.R. (4th) 129, 41 C.R.R. 48, 19 C.P.C. (2d) 249 (C.A.) (sub nom. R. v. Danson); Dawson v. Rexcraft Storage & Warehouse Inc. (1998), 164 D.L.R. (4th) 257, 20 R.P.R. (3d) 207, 26 C.P.C. (4th) 1, 111 O.A.C. 201 (C.A.); Goss v. Nugent (Lord) (1833), 5 B. & Ad. 58, 2 Nev. & M.K.B. 28, 2 L.J.K.B. 127, 110 E.R. 713; Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1, 247 N.R. 97, 49 B.L.R. (2d) 68, [2000] I.L.R. 1-3741, 39 C.P.C. (4th) 100; Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545, 83 D.L.R. (4th) 734, 1 C.P.C. (3d) 248, 20 R.P.R. (2d) 49n (C.A.); Kentucky Fried Chicken Canada v. Scott's Food Services Inc. (1998), 114 O.A.C. 357, 41 B.L.R. (2d) 42 (C.A.); Kilpatrick v. Peterborough Civic Hospital (1999), 44 O.R. (3d) 321, 174 D.L.R. (4th) 435, 42 C.C.E.L. (2d) 50, 99 C.L.L.C. 210-040, 33 C.P.C. (4th) 321 (C.A.); Leitch Gold Mines v. Texas Gulf Sulphur Co. (1968), [1969] 1 O.R. 469, 3 D.L.R. (3d) 161 (H.C.J.); Prenn v. Simmonds, [1971] 3 All E.R. 237, [1971] 1 W.L.R. 1381, 115 Sol. Jo. 654 (H.L.); R. v. Jetco Manufacturing Ltd. (1987), 57 O.R. (2d) 776, 18 O.A.C. 313, 31 C.C.C. (3d) 171 (C.A.); Rogers Cable TV Ltd. v. 373041 Ontario Ltd. (1994), 22 O.R. (3d) 25 (Gen. Div.); Royal Bank of Canada v. Rogerson, [1994] O.J. No. 2546 (Gen. Div.); Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of) (1999), 45 O.R. (3d) 417, 178 D.L.R. (4th) 634, 50 B.L.R. (2d) 64 (C.A.), affg (1998), 40 B.L.R. (2d) 1, [1998] O.J. No. 2637 (Ont. Gen. Div.); Zhilka v. Turney, [1959] S.C.R. 578, 18 D.L.R. (2d) 447

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 14, 20, 49.09, 49.09(a)

MOTION for judgment under rule 49.09 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

Linda Galessiere, for plaintiff (moving party). Brad Teplitsky, for defendants (responding parties).

MOLLOY J.:--

A. Background

[1] The plaintiff ("the Bank") moves for judgment in accordance with Minutes of Settlement executed by the defendants. The defendants were in default on a loan advanced by the Bank and mortgages given as security for the loan. The Bank made demand on the loan and under its security and also made demand on two individuals who were guarantors on the loan. The Bank thereafter commenced an action against the defendants, but not the guarantors. Minutes of Settlement were signed by the defendants and the Bank in November 1999. The purpose of the settlement was to give the defendants further time to pay, during which time the Bank would take no steps against them. One of the terms of the settlement was that the defendants would pay a certain amount within six months, failing which the Bank would be at liberty to take out judgment in accordance with the Consent to Judgment signed by the defendants. The defendants made no payments within the six-month period and the Bank therefore claims entitlement to judgment as stipulated in the Minutes of Settlement. The defendants allege that the settlement was conditional upon the two guarantors also agreeing to its terms and executing the Minutes of Settlement. Since the two guarantors refused to be parties to the settlement, the defendants take the position that there was no binding settlement and claim the right to defend this action on its merits.

B. The Test to be Applied

[2] The plaintiff brings this motion pursuant to Rule 49.09 [Rules of Civil Procedure, R.R.O. 1990, Reg. 194] which states:

> 49.09 Where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may,
>
> (a) make a motion to a judge for judgment in the terms of the accepted offer, and the judge may grant judgment accordingly; or
> (b) continue the proceeding as if there had been no accepted offer to settle.

[3] Counsel for the plaintiff sought to distinguish a motion, such as this one, under rule 49.09(a)

from a motion for summary judgment under Rule 20. Much of her argument was directed towards attacking the credibility of the defendant Helmut Sieber based on conflicts in his testimony, the improbability of his version of events and the fact that his evidence on several points is directly contradicted by the evidence of representatives of the Bank. She argued that the test for summary judgment under Rule 20 did not apply and that principles established in case law under Rule 20 likewise had no application.

[4] I disagree. A settlement agreement is enforceable as a contract. A motion for judgment in accordance with a settlement agreement is a motion for judgment on a contract. Rule 49.09 facilitates the bringing of a motion for judgment within an action on the basis of the settlement of that action, thus making it unnecessary to start a new action to enforce the settlement agreement. However, that does not mean that judgment may be granted on a summary basis where there are genuine issues for trial or a dispute with respect to material facts. A motion for judgment on a settlement agreement is no different in that regard than a motion for judgment on any other kind of agreement. It is part of our tradition of justice that parties are entitled to a viva voce trial except in those exceptional circumstances where a final determination can safely be made without a trial. It is not in accordance with those well established principles for a judge to conduct what is in effect a "paper trial" by "evaluating c redibility, weighing evidence and drawing factual inferences" on a motion: Kilpatrick v. Peterborough Civic Hospital (1999), 44 O.R. (3d) 321, 174 D.L.R. (4th) 435 (C.A.); Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1. This basic principle underlies the case law on Rule 20 as well as cases under Rule 14 which have held that even where a matter may properly be commenced as an application, it is not appropriate to decide the matter based on affidavit evidence if there are material facts in dispute: R. v. Jetco Manufacturing Ltd. (1987), 57 O.R. (2d) 776, 31 C.C.C. (3d) 171 (C.A.); Danson v. Ontario (Attorney General) (1987), 60 O.R. (2d) 676, 19 C.P.C. (2d) 249 (C.A.), appeal dismissed, [1990] 2 S.C.R. 1086, 73 D.L.R. (4th) 686, 43 C.P.C. (2d) 165, 112 N.R. 362. In my opinion, it applies with equal force to motions under rule 49.09. Judgment may be granted on such a motion only if there are no genuine factual disputes that require a trial for their resolution. The Rule 20 case law applies. It is not possible on such a motion to base a decision on assessments of credibility: Dawson v. Rexcraft Storage and Warehouse Inc. (1998), 164 D.L.R. (4th) 257, 26 C.P.C. (4th) 1, 111 O.A.C. 201, 20 R.P.R. (3d) 207 (C.A.); Aguonie v. Galion Solid Waste Material Inc. (1998), 38 O.R. (3d) 161, 156 D.L.R. (4th) 222, 17 C.P.C. (4th) 219, 107 O.A.C. 114 (C.A.). That said, it is not every issue of credibility that will prevent a motion for judgment from succeeding. It is appropriate on a motion to weed out spurious allegations with no hope of success at trial. The issue of credibility must be a genuine one to defeat the motion: Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545, 83 D.L.R. (4th) 734 (C.A.).

C. Analysis

[5] The defendants submit that the settlement agreement was conditional upon the guarantors being parties to it. The individual defendant, Helmut Sieber, alleges in his affidavit that he was specifically told that this was the case by the Bank's representative in Germany with whom he dealt

when he signed the Minutes of Settlement. Mr. Sieber acknowledges that he treated the agreement as binding upon him after it was signed but states that this was because he was told by the bank's representative in Germany that the guarantors had in fact signed the agreement. The plaintiff Bank denies that the agreement was conditional upon the guarantors becoming parties, denies that anyone said that to Mr. Sieber and denies that anyone at the Bank ever told Mr. Sieber that the guarantors had signed the agreement.

[6] Parol evidence is not admissible to vary the clear terms of a written agreement: Goss v. Nugent (Lord) (1883), 5 B. & Ad. 58, 110 E.R. 713 (K.B.); Leitch Gold Mines v. Texas Gulf Sulphur Co. (1968), [1969] 1 O.R. 469 at pp. 523-24, 3 D.L.R. (3d) 161 (H.C.J.). Thus, if the terms of the settlement agreement are clear and unambiguous, evidence of statements made by the Bank as to its terms would not be admissible to vary it. There is nothing in the language of the agreement itself that requires the guarantors to be parties to it or that makes its terms conditional upon the guarantors being parties. However, the Minutes of Settlement clearly contemplate three sets of parties: (1) the Bank; (2) the defendant company and Mr. Sieber; and (3) the two guarantors. All three sets of parties are set out in the style of cause, all are referred to in the preamble, and the signing page provides for all of their signatures. The agreement provides, inter alia, that if the defendants do not make a stipulated payment within six months, the Bank will be at liberty to pursue the defendants and the guarantors. The agreement is silent as to whether it is binding on some of the parties if all of the parties have not signed.

[7] Even where the language used in a written agreement is clear, it is appropriate to look at the "general context that gave birth to the document, or its 'factual matrix'" as an aid to interpretation: Kentucky Fried Chicken Canada v. Scott's Food Services Inc. (1998), 114 O.A.C. 357, 41 B.L.R. (2d) 42 (C.A.) at para. 25; Prenn v. Simmonds, [1971] 3 All E.R. 237, [1971] 1 W.L.R. 1381 (H.L.). In Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of) (1998), 40 B.L.R. (2d) 1, [1998] O.J. No. 2637 (Gen. Div.), Winkler J. held at para. 410:

> Where an agreement is clear and unambiguous on its face, the parole evidence rule operates to prohibit admission of evidence to alter or vary the written terms of the contract. However, the court may admit evidence of the surrounding circumstances, including evidence of the commercial purpose of the contract, the genesis of the transaction, the background, the context and the market in which the parties were operating. In this regard, evidence to be admitted must be objective in the sense of what reasonable persons in the position of the parties would have had in mind, rather than subjective evidence of the parties' actual intentions.

(Emphasis added)

[8] The commercial context of the agreement in this case was to put litigation on hold for a period of time to enable the debt to be repaid by the principal debtors. The guarantors had already been complaining that the Bank was not proceeding quickly enough against the defendant debtors.

The Bank was therefore anxious to protect its position under the guarantees by having the guarantors agree to this further delay. The Bank proposed that the guarantors sign not only the Minutes of Settlement, but also an Acknowledgment pursuant to which the guarantors specifically agreed that the terms of the Minutes of Settlement were not in accord with the guarantees but that the guarantors would not raise that as a defence in any subsequent claim by the Bank.

[9] The terms of the settlement agreement between the Bank and Mr. Sieber are set out in a letter dated October 12, 1999 from Mr. Kelly (counsel for the Bank) to Mr. Sieber. In that letter Mr. Kelly advises that he has now received final instructions from the bank and is therefore enclosing four documents: (1) original Minutes of Settlement; (2) original Consent to an Order changing the name of the plaintiff to reflect an assignment of the loan; (3) original Consent to Judgment; and (4) copy of Acknowledgment and Consent to be executed by the guarantors. He then states:

> My client is prepared to proceed in accordance with the terms of the Minutes of Settlement on the condition that the above-mentioned documents together with a special resolution of the shareholders of R.S.W.H. Vegetable Farmers Inc. authorizing the corporation to consent to the judgment against it are returned, executeted (sic), to me within the next ten days.

(Emphasis added)

[10] Subsequent to Mr. Sieber signing the settlement documents, the Bank continued its attempts to persuade the guarantors to sign. This was unsuccessful. It is clear that the guarantors never agreed to the terms of the proposed settlement and never signed any of the settlement documents. However, the Bank proceeded as if it were bound by the terms of the agreement vis-à-vis the defendants and took no further steps against either the defendants or the guarantors until after the defendants had defaulted in making the payment required within the first six months.

[11] It is not correct to look at the language of the Minutes of Settlement alone to determine its meaning. At a minimum, the letter of October 12 must be considered as it sets out the terms of the settlement between the parties, only one of which was the signing of the Minutes of Settlement. The October 12 letter is probably properly characterized as one of the contractual documents; at the very least it is part of the factual matrix to be taken into account. That letter provides that the settlement agreement is conditional upon the guarantors signing the Minutes of Settlement. That being the case, it is not necessary to decide the truth of Mr. Sieber's allegation that the Bank's representative in Germany told him that the settlement was conditional upon the guarantors signing, nor is it necessary to determine whether such evidence would be admissible under the parol evidence rule. The alleged representation simply mirrors what is already clearly stated in the October 12 letter. I therefore conclude that the settlement agreement, by its express terms, was conditional upon the guarantors signing the Minutes of Settlement.

[12] A finding that the settlement agreement was conditional upon the agreement of the guarantors is not, however, the end of the matter. It is well settled that if a condition in an

agreement is inserted solely for the benefit of one of the parties, it may be waived by that party. As was stated by the Supreme Court of Canada in Zhilka v. Turney, [1959] S.C.R. 578, 18 D.L.R. (2d) 447, at p. 583 S.C.R.:

> . . . one party to a contract may forego a promised advantage or may dispense with part of the promised performance of the other party which is simply and solely for the benefit of the first party and is severable from the rest of the contract.

[13] This principle was applied in Royal Bank of Canada v. Rogerson, [1994] O.J. No. 2546 (Gen. Div.). In that case, the bank had sued a guarantor when the principal debtor defaulted. The guarantor argued that the bank had advanced funds to the debtor before ensuring that certain conditions precedent had been met. Grossi J. held at para. 11:

> The condition precedent may be waived by the party for whose benefit the condition is inserted into a binding contract. The failure of the Bank to require compliance with all the conditions precedent in the Agreement prior to advancing monies to 809897 does not benefit [the guarantor]. It may be to the detriment of the Bank. However that is the Bank's risk.

[14] The Bank in the case before me argues that even if the settlement was conditional upon the guarantors signing the Minutes, this was a condition that was solely for the protection of the Bank and had been waived by the Bank. The benefit to the Bank in obtaining the agreement of the guarantors to the settlement is obvious. The guarantors were already complaining that the Bank was not moving expeditiously enough against the debtors and were already taking the position that as a result of this delay they would not be liable for any interest on the outstanding debt. By granting a further extension of up to one year to the principal debtors, the Bank was running a risk with respect to the enforceability of its claim against the guarantors. However, I cannot see how it would make any difference to the defendants whether the guarantors had agreed to the settlement terms or not. The defendants argue that what was important to them was to have all litigation at a standstill during this period so that they coul d attempt to raise the funds to satisfy the Bank's claim. However, there were no proceedings between the defendants and the guarantors, nor were there any proceedings against the guarantors by the Bank. In the absence of the Bank pursuing the guarantors, there would be no basis in law for the guarantors to come after the defendants. As long as the Bank was bound by the terms of the Minutes of Settlement as against the defendants, its collection of its debt was at a standstill. It would not have been entitled during the currency of the agreement to bring action against the guarantors. The fact that the Bank had agreed with the principal debtor that payment would not be due except as under the Minutes of Settlement would be a complete defence by the guarantors to any action brought by the Bank prior to the expiry of the term specified in the Minutes of Settlement (or termination of the Minutes by breach). In my opinion, it is clear that obtaining the agreement of the guarantors to the settlement was of benefit only to the Bank. The Bank was therefore entitled to waive that condition and it did so. Accordingly, the defendants are bound by the terms of the Minutes of Settlement notwithstanding that the document was never

signed by the guarantors.

[15] Mr. Sieber states in his affidavit that he never would have signed the Minutes of Settlement if he had known that the Bank was going to take the position that there was an agreement without the consent of the guarantors. He says that he "did not see any point in entering into a standstill agreement with the Bank and at the same time possibly being involved in litigation with the guarantors". In my view, this bald assertion does not constitute a genuine issue for trial. There must be some air of reality to assertions put forward by a defendant in order to defeat a summary judgment motion. There was no litigation with the guarantors, nor any possibility of litigation with the guarantors during the currency of the Minutes of Settlement. The condition with respect to the guarantors was stipulated by the Bank and was of no concern to Mr. Sieber whatsoever, not having been raised at all until well after he was in default under the Minutes of Settlement and the Bank had taken steps to enforce it. In these circumstances a self-serving assertion by the defendant after the fact which has no chance of success is not enough to raise a genuine issue for trial: Guarantee Co. of North America v. Gordon Capital Corp., supra; Rogers Cable TV Ltd. v. 373041 Ontario Ltd. (1994), 22 O.R. (3d) 25 (Gen. Div.).

[16] Further, Mr. Sieber's allegation that the Bank later represented to him that the guarantors had signed the agreement does not create a triable issue. Even assuming that such a statement had been made by the Bank, it had no impact on the defendants. The defendants obtained everything they bargained for under the settlement agreement. The Bank did nothing to enforce its security as against either the debtors or the guarantors and took no further steps in respect of its action against the defendants for the six-month period agreed to in the Minutes of Settlement. The Bank, in waiving the condition requiring consent by the guarantors, took a significant risk both with respect to collecting on its claim against the defendants and with respect to jeopardizing the enforceability of its full claim against the guarantors. Thus the Bank received no benefit under the agreement, but did suffer detriment. The defendants, on the other hand, received the full benefit of the settlement agreement, suffered no detriment and nevertheless failed to pay any amount on the debt. Whatever may have been Mr. Sieber's belief as to whether the guarantor's had signed, and regardless of whether this had been told to him by the Bank, he did not act on it, did not rely upon it, and suffered no detriment as a result of it. Quite simply, it is irrelevant.

D. Conclusion and Order

[17] I therefore conclude that the Minutes of Settlement executed by the defendants are valid and binding. The defendants defaulted in making the required payment in the first six-month period, such that the plaintiffs are now at liberty to have the judgment consented to by the defendants issued and entered. The Consent to Judgment entitles the plaintiff to costs of this action on a solicitor and client basis. The defendants unnecessarily strung out this proceeding since the Bank first attempted to enforce the settlement upon the failure of the defendants to make the required payments. The defendants' initial line of defence involved an allegation that the Bank was in default of a side-agreement to give him a letter of good standing. Ultimately, that defence was abandoned prior

to the argument of this motion. The defendants, in resisting this motion, have simply been stalling and trying to buy more time before judgment is issued against them. In these circumstances, it is appropriate that the costs dispos ition in the Consent to Judgment should include the costs of this motion. Those costs, as stipulated in the agreement, shall be on a solicitor and client basis.

Judgment accordingly.

TAB 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: Mason v. Perras Mongenais | 2018 ONSC 1477, 2018 CarswellOnt 3321, [2018] O.J. No. 1178, 289 A.C.W.S. (3d) 854 | (Ont. S.C.J., Mar 6, 2018)

2014 SCC 7, 2014 CSC 7
Supreme Court of Canada

Hryniak v. Mauldin

2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 2014 CSC 7, [2014] 1 S.C.R. 87, [2014] A.C.S. No. 7, [2014] S.C.J. No. 7, 12 C.C.E.L. (4th) 1, 21 B.L.R. (5th) 248, 239 A.C.W.S. (3d) 896, 27 C.L.R. (4th) 1, 314 O.A.C. 1, 366 D.L.R. (4th) 641, 37 R.P.R. (5th) 1, 453 N.R. 51, 46 C.P.C. (7th) 217, 95 E.T.R. (3d) 1

Robert Hryniak, Appellant and Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith, Respondents and Ontario Trial Lawyers Association and Canadian Bar Association, Interveners

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: March 26, 2013
Judgment: January 23, 2014
Docket: 34641

Proceedings: affirming *Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.); affirming *Combined Air Mechanical Services Inc. v. Flesch* (2010), 71 B.L.R. (4th) 27, 2010 CarswellOnt 2026, 2010 ONSC 1729 (Ont. S.C.J.); affirming *Parker v. Casalese* (2010), 99 C.L.R. (3d) 1, 2010 ONSC 5636, 2010 CarswellOnt 7991 (Ont. Div. Ct.); affirming *Parker v. Casalese* (2010), 2010 CarswellOnt 4406, 268 O.A.C. 378 (Ont. S.C.J.); affirming *394 Lakeshore Oakville Holdings Inc. v. Misek* (2010), 98 R.P.R. (4th) 21, 2010 ONSC 6007, 2010 CarswellOnt 8323 (Ont. S.C.J.); reversing in part *Bruno Appliance & Furniture Inc. v. Cassels Brock & Blackwell LLP* (2010), 2010 ONSC 5490, 2010 CarswellOnt 8325 (Ont. S.C.J.)

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Javad Heydary, Jeffrey D. Landmann, David K. Alderson, Michelle Jackson, Jonathan A. Odumeru, for Respondents
Allan Rouben, Ronald P. Bohm, for Intervener, Ontario Trial Lawyers Association
Paul R. Sweeny, David Sterns, for Intervener, Canadian Bar Association

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Employment; Labour;

Property; Public; Torts; Family

Headnote

Civil practice and procedure --- Summary judgment — General principles
Group of American investors, led by M, provided funds to Canadian "traders" — H was principal of company T that traded in bonds and debt instruments, and P was lawyer who acted for H, T and C who was principal of Panamanian investment company — Money wired by M group to law firm was pooled with other funds and transferred to T — T forwarded pooled funds to offshore bank, and money disappeared — M group joined another plaintiff in action for fraud against H, P and law firm, and motions for summary judgment were heard together — Motion judge used powers under new R. 20.04(2.1) of Rules of Civil Procedure to weigh evidence, evaluate credibility and draw inferences — Motion judge concluded trial was not required against H, and dismissed remainder of motion for summary judgment — H appealed, and Court of Appeal set out threshold test stating that "interest of justice" required that new powers be exercised only at trial, unless motion judge can achieve "full appreciation" of evidence and issues required to making dispositive findings on motion for summary judgment — Court found that, given factual complexity and voluminous record, action was type that generally required full trial, however, record supported that H had committed tort of civil fraud and dismissed his appeal — H appealed — Appeal dismissed — Summary judgment motion enhances access to justice as cheaper, faster alternative to full trial, and new R. 20 reflects recommendations for improving access to justice — New fact-finding powers in R. 20 can be exercised unless it is in interest of justice for them to be exercised only at trial — When judge is able to make necessary findings of fact, apply law to facts, and achieve just result in proportionate, expeditions and less expensive means, then there will be no genuine issue requiring trial — On summary judgment motion, evidence need not be equivalent to that at trial, but must be such that judge can fairly resolve dispute — While summary judgment must be granted where there is no genuine issue requiring trial, decision to use expanded fact-finding powers or call oral evidence is discretionary — In this case, motion judge made no palpable and overriding error in granting summary judgment as record was sufficient to make fair and just determination.

Civil practice and procedure --- Summary judgment — Evidence on application — General principles
Group of American investors, led by M, provided funds to Canadian "traders" — H was principal of company T that traded in bonds and debt instruments, and P was lawyer who acted for H, T and C who was principal of Panamanian investment company — Money wired by M group to law firm was pooled with other funds and transferred to T — T forwarded pooled funds to offshore bank, and money disappeared — M group joined another plaintiff in action for fraud against H, P and law firm, and motions for summary judgment were heard together — Motion judge used powers under new R. 20.04(2.1) of Rules of Civil Procedure to weigh evidence, evaluate credibility and draw inferences — Motion judge concluded trial was not required against H, and dismissed remainder of motion for summary judgment — H appealed, and Court of Appeal set out threshold test stating that "interest of justice" required that new powers be exercised only at trial, unless motion judge can achieve "full appreciation" of evidence and issues required to making dispositive findings on motion for summary judgment — Court found that, given factual complexity and voluminous record, action was type that generally required full trial, however, record supported that H had committed tort of civil fraud and dismissed appeal — H appealed — Appeal dismissed — Summary judgment motion enhances access to justice as cheaper, faster alternative to full trial, and new R. 20 reflects recommendations for improving

access to justice — New fact-finding powers in R. 20 can be exercised unless it is in interest of justice for them to be exercised only at trial — When judge is able to make necessary findings of fact, apply law to facts, and achieve just result in proportionate, expeditions and less expensive means, then there will be no genuine issue requiring trial — On summary judgment motion, evidence need not be equivalent to that at trial, but must be such that judge can fairly resolve dispute — While summary judgment must be granted where there is no genuine issue requiring trial, decision to use expanded fact-finding powers or call oral evidence is discretionary — In this case, motion judge made no palpable and overriding error in granting summary judgment as record was sufficient to make fair and just determination.

Procédure civile --- Jugement sommaire — Principes généraux
Groupe d'investisseurs américains dirigés par M ont confié leur argent à des « courtiers » canadiens — H était le dirigeant de T, une société qui faisait le commerce des obligations et des titres de créance, et P était l'avocat de H, T et C, lequel était le dirigeant d'une société de placement panaméenne — Fonds transférés par le groupe M au cabinet d'avocats ont été mis en commun avec d'autres fonds puis transférés à T — T a viré les fonds à une banque étrangère, et l'argent a disparu — Groupe M s'est joint à un autre demandeur en vue d'intenter une action pour fraude civile contre H, P et le cabinet d'avocats, et des requêtes en jugement sommaire ont été instruites ensemble — Juge saisi de la requête a exercé les pouvoirs prévus en vertu du nouvel art. 20.04(2.1) des Règles de procédure civile pour apprécier la preuve, évaluer la crédibilité et tirer des conclusions — Juge saisi de la requête a estimé qu'il n'était pas nécessaire de tenir un procès contre H et a rejeté les autres points soulevés dans la requête — H a interjeté appel, et la Cour d'appel a énoncé un critère préliminaire affirmant que « l'intérêt de la justice » exigeait que les nouveaux pouvoirs ne soient exercés que lors d'un procès, sauf si un juge saisi d'une requête peut procéder à la « pleine appréciation » de la preuve et des questions en litige qui s'impose pour tirer des conclusions décisives sur une requête en jugement sommaire — Cour a conclu que l'action était du type de celles qui nécessitent généralement la tenue d'un procès, compte tenu de la complexité des faits en cause et de son dossier volumineux; toutefois, le dossier étayait la conclusion selon laquelle H avait commis le délit de fraude civile, et la Cour a rejeté l'appel de H — Ce dernier a formé un pourvoi — Pourvoi rejeté — Requête en jugement sommaire améliore l'accès à la justice en tant que solution de rechange moins coûteuse et plus rapide à un procès formel, et la nouvelle R. 20 découle de recommandations visant à améliorer l'accès à la justice — Nouveaux pouvoirs en matière de recherche des faits prévus à la R. 20 peuvent être exercés, à moins qu'il ne soit dans l'intérêt de la justice qu'ils ne soient exercés que dans le cadre d'un procès — Lorsque le juge est en mesure de tirer les conclusions de fait nécessaires, d'appliquer les règles de droit aux faits et d'en arriver à un résultat juste en ayant recours à des moyens proportionnés, plus expéditifs et moins coûteux, alors il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès — Dans le cadre d'une requête en jugement sommaire, il n'est pas nécessaire que la preuve soit la même que celle présentée lors d'un procès, mais elle doit être telle que le juge puisse résoudre équitablement le litige — Bien qu'une requête en jugement sommaire doit être accueillie lorsqu'il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès, la décision d'exercer le pouvoir élargi en matière de recherche des faits ou le pouvoir d'ordonner la présentation de témoignages oraux est de nature discrétionnaire — En l'espèce, le juge saisi de la requête n'a pas commis d'erreur manifeste et dominante en exerçant les pouvoirs pour accueillir la requête en jugement sommaire, étant donné que le dossier était suffisant pour permettre de rendre une décision juste.

Procédure civile --- Jugement sommaire — Preuve en instance — Principes généraux

Groupe d'investisseurs américains dirigés par M ont confié leur argent à des « courtiers » canadiens — H était le dirigeant de T, une société qui faisait le commerce des obligations et des titres de créance, et P était l'avocat de H, T et C, lequel était le dirigeant d'une société de placement panaméenne — Fonds transférés par le groupe M au cabinet d'avocats ont été mis en commun avec d'autres fonds puis transférés à T — T a viré les fonds à une banque étrangère, et l'argent a disparu — Groupe M s'est joint à un autre demandeur en vue d'intenter une action pour fraude civile contre H, P et le cabinet d'avocats, et des requêtes en jugement sommaire ont été instruites ensemble — Juge saisi de la requête a exercé les pouvoirs prévus en vertu du nouvel art. 20.04(2.1) des Règles de procédure civile pour apprécier la preuve, évaluer la crédibilité et tirer des conclusions — Juge saisi de la requête a estimé qu'il n'était pas nécessaire de tenir un procès contre H et a rejeté les autres points soulevés dans la requête — H a interjeté appel, et la Cour d'appel a énoncé un critère préliminaire affirmant que « l'intérêt de la justice » exigeait que les nouveaux pouvoirs ne soient exercés que lors d'un procès, sauf si un juge saisi d'une requête peut procéder à la « pleine appréciation » de la preuve et des questions en litige qui s'impose pour tirer des conclusions décisives sur une requête en jugement sommaire — Cour a conclu que l'action était du type de celles qui nécessitent généralement la tenue d'un procès, compte tenu de la complexité des faits en cause et de son dossier volumineux; toutefois, le dossier étayait la conclusion selon laquelle H avait commis le délit de fraude civile, et la Cour a rejeté l'appel de H — Ce dernier a formé un pourvoi — Pourvoi rejeté — Requête en jugement sommaire améliore l'accès à la justice en tant que solution de rechange moins coûteuse et plus rapide à un procès formel, et la nouvelle R. 20 découle de recommandations visant à améliorer l'accès à la justice — Nouveaux pouvoirs en matière de recherche des faits prévus à la R. 20 peuvent être exercés, à moins qu'il ne soit dans l'intérêt de la justice qu'ils ne soient exercés que dans le cadre d'un procès — Lorsque le juge est en mesure de tirer les conclusions de fait nécessaires, d'appliquer les règles de droit aux faits et d'en arriver à un résultat juste en ayant recours à des moyens proportionnés, plus expéditifs et moins coûteux, alors il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès — Dans le cadre d'une requête en jugement sommaire, il n'est pas nécessaire que la preuve soit la même que celle présentée lors d'un procès, mais elle doit être telle que le juge puisse résoudre équitablement le litige — Bien qu'une requête en jugement sommaire doit être accueillie lorsqu'il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès, la décision d'exercer le pouvoir élargi en matière de recherche des faits ou le pouvoir d'ordonner la présentation de témoignages oraux est de nature discrétionnaire — En l'espèce, le juge saisi de la requête n'a pas commis d'erreur manifeste et dominante en exerçant les pouvoirs pour accueillir la requête en jugement sommaire, étant donné que le dossier était suffisant pour permettre de rendre une décision juste.

In June 2001, members of a group of American investors led by M met with two principals of investments companies and a Canadian lawyer to discuss an investment opportunity. H was the principal of T, a company which traded in bonds and debt instruments. C was the principal of F, a Panamanian investment company. P was the lawyer representing H, T and C. The M group wired US$1.2 million to the law firm, which was pooled with other funds and transferred to T. T then forwarded the pooled funds to an offshore bank, and the money then disappeared. H claimed that T's funds were stolen.

The M group joined another plaintiff in an action for civil fraud against H, P and the law firm, and brought a motion for summary judgment. The motion judge held that a trial was not required against H. The remainder of the motion was dismissed. H appealed, and this was the first occasion on which the Court of Appeal considered the new R. 20 of the Rules of Civil Procedure regarding summary judgment. The Court of Appeal set out a threshold test for when a judge could employ the new evidentiary powers

under R. 20.04(2.1), stating that the "interest of justice" required that the new powers be exercised only at trial unless a motion judge can achieve the "full appreciation" of the evidence and issues required to make dispositive findings. The Court found that, given the factual complexity and voluminous record, the action was the type for which a trial would generally be required, however, the record supported the finding that H had committed the tort of civil fraud and dismissed H's appeal. H appealed.

Held: The appeal was dismissed

Per Karakatsanis J. (McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Wagner JJ. concurring): Rule 20 was amended in 2010 following recommendations concerning improving access to justice. The reforms create a legitimate alternative to trials as a means for adjudicating and resolving legal disputes. The amendments changed the test for summary judgment from asking whether a case presents "a genuine issue for trial" to asking whether there is a "genuine issue requiring a trial", demonstrating that a trial is not the default procedure. The new powers in the Rule permit motion judges to weigh evidence, evaluate credibility and draw reasonable inferences, as well as call oral evidence.

The Court of Appeal suggested that summary judgment would be most appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or where the record could be supplemented by oral evidence on discrete points. However, this is not a strict rule. There is no genuine issue requiring a trial when a judge can make necessary findings of fact, apply the law to the facts, and achieve a just result in proportionate, expeditious and less expensive means.

The evidence on a summary judgment motion must be such that the judge can fairly resolve the dispute, and the powers in R. 20.04(2.1) and 20.04(2.2) provide the motion judge with a valid manner of fact finding. The guidelines suggested by the Court of Appeal for calling oral evidence concerning small number of witnesses, the issue having significant impact, and the issue being narrow and discrete are useful, however these are not absolute rules. The power to call oral evidence should be employed when it allows the judge to reach a fair and just adjudication, and it is the proportionate course of action.

The first step on a motion for summary judgment under R. 20.04 is a determination of whether there is a genuine issue requiring trial based on the evidence without using the new fact-finding powers. If there appears to be a genuine issue requiring trial, the judge should then determine if the need for a trial can be avoided by using the new powers under R. 20.04(2.1) and 20.04(2.2). These powers can be used, provided that their use is not against the interest of justice. The powers are presumptively available, and the decision to use the fact-finding powers or to call oral evidence is discretionary.

The action underlying this motion for summary judgment was for civil fraud, which has four elements. First, a false representation. Second, some level of knowledge of the falsehood of the representation, whether through knowledge or recklessness. Third, the false representation caused the plaintiff to act. And finally, the plaintiff's actions resulted in a loss. The Court of Appeal agreed with the motion judge that the M group was induced to invest with H due to what H said at their meeting in 2001. The motion judge also found the requisite knowledge or recklessness as to the falsehood of the representation, and rejected the defence that the funds were stolen. There was also intention that the M group would act on H's false representations, and clearly there was loss by the M group. The motion judge properly concluded there was no issue requiring a trial, and made no palpable and overriding error in granting summary judgment. The motion judge did not err in exercising his fact-finding powers under R. 20.04(2.1) as the record was sufficient to make a fair and just determination.

En juin 2001, les membres d'un groupe d'investisseurs dirigés par M ont rencontré deux dirigeants de sociétés de placement de même qu'un avocat canadien dans le but de discuter d'une possibilité d'investissement. H était le dirigeant de T, une société qui faisait le commerce des obligations et des titres de créance. C était le dirigeant de F, une société de placement panaméenne. P était l'avocat de H, T et C. Le groupe M a transféré 1,2 million $US au cabinet d'avocats, où cette somme a été mise en commun avec d'autres fonds puis transférée à T. T a alors viré les fonds à une banque étrangère, et l'argent a disparu. Selon H, les fonds de T ont été dérobés.

Le groupe M s'est joint à un autre demandeur en vue d'intenter une action pour fraude civile contre H, P et le cabinet d'avocats et ils ont présenté des requêtes en jugement sommaire. Le juge saisi de la requête a estimé qu'il n'était pas nécessaire de tenir un procès contre H. Les autres points soulevés dans la requête ont été rejetés. H a interjeté appel, et il s'agissait de la première fois que la Cour d'appel appliquait la nouvelle R. 20 des Règles de procédure civile à un jugement sommaire. La Cour d'appel a énoncé un critère préliminaire pour déterminer dans quelles circonstances un juge peut exercer les nouveaux pouvoirs en matière de preuve prévus à la R. 20.04(2.1) des Règles, affirmant que « l'intérêt de la justice » exigeait que les nouveaux pouvoirs ne soient exercés que lors d'un procès, sauf si un juge saisi d'une requête peut procéder à la « pleine appréciation » de la preuve et des questions en litige qui s'impose pour tirer des conclusions décisives. La Cour a conclu que l'action était du type de celles qui nécessitent généralement la tenue d'un procès, compte tenu de la complexité des faits en cause et de son dossier volumineux. Toutefois, le dossier étayait la conclusion selon laquelle H avait commis le délit de fraude civile, et la Cour a rejeté l'appel de H. Ce dernier a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Karakatsanis, J. (McLachlin, J.C.C., LeBel, Abella, Rothstein, Cromwell, Wagner, JJ., souscrivant à son opinion) : La R. 20 a été modifiée en 2010 à la suite de recommandations visant à améliorer l'accès à la justice. Les réformes ont créé une solution de rechange légitime pour trancher et régler les litiges d'ordre juridique. Les modifications ont eu pour effet de modifier le critère applicable aux jugements sommaires en remplaçant la question de savoir si la cause ne « soulève pas de question litigieuse » par celle de savoir si la cause soulève une « véritable question litigieuse nécessitant la tenue d'une instruction », démontrant que la tenue d'un procès ne constitue pas la procédure par défaut. Les nouveaux pouvoirs prévus aux Règles permettent au juge saisi d'une requête d'apprécier la preuve, d'évaluer la crédibilité et de tirer des conclusions raisonnables et d'ordonner la présentation de témoignages oraux.

La Cour d'appel a laissé entendre qu'il est le plus souvent indiqué de rendre un jugement sommaire dans des affaires où les documents occupent une place prépondérante, où il y a peu de témoins et de questions de fait litigieuses, ou encore des affaires dans lesquelles il est possible de compléter le dossier en présentant des témoignages oraux sur des points distincts. Toutefois, il ne s'agit pas d'une règle stricte. Il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès lorsque le juge est en mesure de tirer les conclusions de fait nécessaires, d'appliquer les règles de droit aux faits et d'arriver à un résultat juste de manière proportionnée, plus expéditive et moins coûteuse.

La preuve dans le cadre d'une requête en jugement sommaire doit être telle que le juge soit confiant de pouvoir résoudre équitablement le litige, et l'exercice des pouvoirs prévus à la R. 20.04(2.1) et 20.04(2.2) des Règles permet au juge saisi de la requête de procéder à une recherche des faits valable. Bien que les indications suggérées par la Cour d'appel lorsqu'il est possible d'entendre les témoignages oraux d'un nombre restreint de témoins, lorsque la question soulevée a une incidence importante et

lorsque cette question est précise et distincte soient utiles, ces règles ne sont pas absolues. Le pouvoir d'ordonner des témoignages oraux devrait être exercé lorsqu'il permet au juge de rendre une décision juste et équitable sur le fond et que son exercice constitue la marche à suivre proportionnée.

La première étape à suivre dans le cadre d'une requête en jugement sommaire en vertu de la R. 20.04 est de décider, sans recourir aux nouveaux pouvoirs en matière de recherche des faits, s'il existe une véritable question litigieuse nécessitant la tenue d'un procès. S'il semble y avoir une véritable question nécessitant la tenue d'un procès, le juge devrait alors déterminer si l'exercice des nouveaux pouvoirs prévus à la R. 20.04(2.1) et (2.2) des Règles permettra d'éviter la tenue d'un procès. Le juge peut exercer ces pouvoirs à son gré, pourvu que leur exercice ne soit pas contraire à l'intérêt de la justice. Ces pouvoirs sont présumés être disponibles, et la décision d'exercer les pouvoirs en matière de recherche des faits ou d'ordonner des témoignages oraux est discrétionnaire.

C'était une action pour fraude civile qui était à l'origine de la présente requête en jugement sommaire. La fraude civile comporte quatre éléments : premièrement, une fausse déclaration du défendeur; deuxièmement, une certaine connaissance de la fausseté de la déclaration de la part du défendeur (connaissance ou insouciance); troisièmement, le fait que la fausse déclaration a amené le demandeur à agir; et quatrièmement, le fait que les actes du demandeur ont entraîné une perte. La Cour d'appel partageait l'avis du juge saisi de la requête que le groupe M avait été amené à investir avec H en raison des propos tenus par H lors de la réunion de 2001. Le juge saisi de la requête a également conclu à l'existence de la connaissance ou de l'insouciance requise quant à la fausseté de la déclaration et a rejeté la thèse invoquée en défense selon laquelle les fonds avaient été dérobés. Il y avait également l'intention de H que ses fausses déclarations incitent le groupe M à agir et, manifestement, le groupe M a subi une perte. Le juge saisi de la requête a eu raison de conclure qu'il n'y avait pas de question litigieuse nécessitant la tenue d'un procès et n'a pas commis d'erreur manifeste et dominante en rendant un jugement sommaire. Le juge saisi de la requête n'a pas commis d'erreur en exerçant les pouvoirs en matière de recherche des faits que lui confère la R. 20.04(2.1) des Règles, étant donné que le dossier était suffisant pour permettre de rendre une décision juste et équitable.

APPEAL by defendant from judgment reported at *Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.), affirming motion judge's decision to grant summary judgment in favour of plaintiff.

POURVOI formé par le défendeur à l'encontre d'un jugement publié à *Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.), ayant confirmé la décision du juge des requêtes de rendre un jugement sommaire en faveur du demandeur.

Karakatsanis J. **(McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Wagner JJ. concurring):**

1 Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of

civil cases, the development of the common law is stunted.

2 Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

3 Summary judgment motions provide one such opportunity. Following the *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) (the Osborne Report), Ontario amended the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (*Ontario Rules* or Rules) to increase access to justice. This appeal, and its companion, *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8 (S.C.C.), address the proper interpretation of the amended Rule 20 (summary judgment motion).

4 In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

5 To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

6 As the Court of Appeal observed, the inappropriate use of summary judgment motions creates its own costs and delays. However, judges can mitigate such risks by making use of their powers to manage and focus the process and, where possible, remain seized of the proceedings.

7 While I differ in part on the interpretation of Rule 20, I agree with the Court of Appeal's disposition of the matter and would dismiss the appeal.

I. Facts

8 More than a decade ago, a group of American investors, led by Fred Mauldin (the Mauldin Group), placed their money in the hands of Canadian "traders". Robert Hryniak was the principal of the company Tropos Capital, which traded in bonds and debt instruments; Gregory Peebles, is a corporate-commercial lawyer (formerly of Cassels Brock & Blackwell) who acted for Hryniak, Tropos and Robert Cranston, formerly a principal of a Panamanian company, Frontline Investments Inc.

9 In June 2001, two members of the Mauldin Group met with Cranston, Peebles, and Hryniak, to discuss an investment opportunity.

10 At the end of June 2001, the Mauldin Group wired US$1.2 million to Cassels Brock, which was pooled with other funds and transferred to Tropos. A few months later, Tropos forwarded more than

US$10 million to an offshore bank, and the money disappeared. Hryniak claims that at this point, Tropos's funds, including the funds contributed by the Mauldin Group, were stolen.

11 Beyond a small payment of US$9,600 in February 2002, the Mauldin Group lost its investment.

II. Judicial History

A. Ontario Superior Court of Justice, 2010 ONSC 5490 (Ont. S.C.J.)

12 The Mauldin Group joined with Bruno Appliance and Furniture, Inc. (the appellants in the companion appeal) in an action for civil fraud against Hryniak, Peebles and Cassels Brock. They brought motions for summary judgment, which were heard together.

13 In hearing the motions, the judge used his powers under the new Rule 20.04(2.1) to weigh the evidence, evaluate credibility, and draw inferences. He found that the Mauldin Group's money was disbursed by Cassels Brock to Hryniak's company, Tropos, but that there was no evidence to suggest that Tropos had ever set up a trading program. Contrary to the investment strategy that Hryniak had described to the investors, the Mauldin Group's money was placed in an account with the offshore New Savings Bank, and then disappeared. He rejected Hryniak's claim that members of the New Savings Bank had stolen the Mauldin Group's money.

14 The motion judge concluded that a trial was not required against Hryniak. However, he dismissed the Mauldin Group's motion for summary judgment against Peebles, because that claim involved factual issues, particularly with respect to Peebles' credibility and involvement in a key meeting, which required a trial. Consequently, he also dismissed the motion for summary judgment against Cassels Brock, as those claims were based on the theory that the firm was vicariously liable for Peebles' conduct.

B. Court of Appeal for Ontario, 2011 ONCA 764, 108 O.R. (3d) 1 (Ont. C.A.)

15 The Court of Appeal simultaneously heard Hryniak's appeal of this matter, the companion *Bruno Appliance* appeal, and three other matters which are not before this Court. This was the first occasion on which the Court of Appeal considered the new Rule 20.

16 The Court of Appeal set out a threshold test for when a motion judge could employ the new evidentiary powers available under Rule 20.04(2.1) to grant summary judgment under Rule 20.04(2)(a). Under this test, the "interest of justice" requires that the new powers be exercised only at trial, unless a motion judge can achieve the "full appreciation" of the evidence and issues required to make dispositive findings on a motion for summary judgment. The motion judge should assess whether the benefits of the trial process, including the opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first-hand, are necessary to fully appreciate the evidence in the case.

17 The Court of Appeal suggested that cases requiring multiple factual findings, based on conflicting evidence from a number of witnesses, and involving an extensive record, are generally not fit for

determination in this manner. Conversely, cases driven by documents, with few witnesses, and limited contentious factual issues are appropriate candidates for summary judgment.

18 The Court of Appeal advised motion judges to make use of the power to hear oral evidence, under Rule 20.04(2.2), to hear only from a limited number of witnesses on discrete issues that are determinative of the case.

19 The Court of Appeal concluded that, given its factual complexity and voluminous record, the Mauldin Group's action was the type of action for which a trial is generally required. There were numerous witnesses, various theories of liability against multiple defendants, serious credibility issues, and an absence of reliable documentary evidence. Moreover, since Hryniak and Peebles had cross-claimed against each other and a trial would nonetheless be required against the other defendants, summary judgment would not serve the values of better access to justice, proportionality, and cost savings.

20 Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that Hryniak had committed the tort of civil fraud against the Mauldin Group, and therefore dismissed Hryniak's appeal.

III. Outline

21 In determining the general principles to be followed with respect to summary judgment, I will begin with the values underlying timely, affordable and fair access to justice. Next, I will turn to the role of summary judgment motions generally and the interpretation of Rule 20 in particular. I will then address specific judicial tools for managing the risks of summary judgment motions.

22 Finally, I will consider the appropriate standard of review and whether summary judgment should have been granted to the respondents.

IV. Analysis

A. Access to Civil Justice: A Necessary Culture Shift

23 This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

24 However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available,[1] ordinary Canadians cannot afford to access the adjudication of civil disputes.[2] The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in *Bruno Appliance*) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

[1] For instance, state funding is available in the child welfare context under *G. (J.)* orders even where legal aid is not available (see *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.), or for cases involving certain minority rights (see the Language Rights Support Program).

[2] In M. D. Agrast, J. C. Botero and A. Ponce, the 2011 *Rule of Law Index*, published by the World Justice Project, Canada ranked 9th among 12 European and North American countries in access to justice. Although Canada scored among the top ten countries in the world in four rule of law categories (limited government powers, order and security, open government, and effective criminal justice), its lowest scores were in access to civil justice. This ranking is "partially explained by shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases" (p. 23).

25 Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.

26 In some circles, private arbitration is increasingly seen as an alternative to a slow judicial process. But private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined.

27 There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

28 This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

29 There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

30 The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice.[3] For example, Ontario Rules 1.04(1) and 1.04(1.1) provide:

3 This principle has been expressly codified in British Columbia, Ontario, and Quebec: *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 1-3(2); *Ontario Rules*, Rule 1.04(1.1); and *Code of Civil Procedure*, R.S.Q., c. C-25, art. 4.2. Aspects of Alberta's and Nova Scotia's rules of court have also been interpreted as reflecting proportionality: *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312 (Alta. Q.B.), at para. 11; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371 (N.S. S.C.), at para. 12.

> **1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> **1.04** (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

31 Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes ... an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation" (*Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311 (N.L. C.A.), at para. 53).

32 This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

33 A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

B. Summary Judgment Motions

34 The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary judgment mechanism in their respective rules of civil procedure.[4] Generally, summary judgment is available where there is no genuine issue for trial.

4 Quebec has a procedural device for disposing of abusive claims summarily: see arts. 54.1 ff of the

Code of Civil Procedure. While this procedural device is narrower on its face, it has been likened to summary judgment: see *Bal Global Finance Canada Corp. c. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (C.S. Que.). Moreover, s. 165(4) of the Code provides that the defendant may ask for an action to be dismissed if the suit is "unfounded in law".

35 Rule 20 is Ontario's summary judgment procedure, under which a party may move for summary judgment to grant or dismiss all or part of a claim. While, Ontario's Rule 20 in some ways goes further than other rules throughout the country, the values and principles underlying its interpretation are of general application.

36 Rule 20 was amended in 2010, following the recommendations of the Osborne Report, to improve access to justice. These reforms embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes.

37 Early summary judgment rules were quite limited in scope and were available only to plaintiffs with claims based on debt or liquidated damages, where no real defence existed.[5] Summary judgment existed to avoid the waste of a full trial in a clear case.

5 For a thorough review of the history of summary judgment in Ontario, see T. Walsh and L. Posloski, "Establishing a Workable Test for Summary Judgment: Are We There Yet?", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2013* (2013), 419, at pp. 422-32.

38 In 1985, the then new Rule 20 extended the availability of summary judgement to both plaintiffs and defendants and broadened the scope of cases that could be disposed of on such a motion. The rules were initially interpreted expansively, in line with the purposes of the rule changes.[6] However, appellate jurisprudence limited the powers of judges and effectively narrowed the purpose of motions for summary judgment to merely ensuring that: "claims that have no chance of success [are] weeded out at an early stage".[7]

6 *Ibid.*, at p. 426; for example, see *Vaughan v. Warner Communications Inc.* (1986), 56 O.R. (2d) 242 (Ont. H.C.).

7 *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14, [2008] 1 S.C.R. 372 (S.C.C.), at para. 10.

39 The Ontario Government commissioned former Ontario Associate Chief Justice Coulter Osborne Q.C., to consider reforms to make the Ontario civil justice system more accessible and affordable, leading to the report of the Civil Justice Reform Project (the Osborne Report). The Osborne Report concluded that few summary judgment motions were being brought and, if the summary judgment rule was to work as intended, the appellate jurisprudence that had narrowed the scope and utility of the rule had to be reversed (p. 35). Among other things, it recommended that summary judgment be made more widely available, that judges be given the power to weigh evidence on summary judgment motions, and that judges be given discretion to direct that oral evidence be presented (pp. 35-36).

40 The report also recommended the adoption of a summary trial procedure similar to that employed in British Columbia (p. 37). This particular recommendation was not adopted, and the legislature made the choice to maintain summary judgment as the accessible procedure.

41 Many of the Osborne Report's recommendations were taken up and implemented in 2010. As noted above, the amendments codify the proportionality principle and provide for efficient adjudication when a conventional trial is not required. They offer significant new tools to judges, which allow them to adjudicate more cases through summary judgment motions and attenuate the risks when such motions do not resolve the entire case.

42 Rule 20.04 now reads in part:[8]

8 The full text of Rule 20 is attached as an Appendix.

> **20.04** . . .
>
> (2) [General] The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
>
> (2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.
>
> (2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set

out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

43 The Ontario amendments changed the test for summary judgment from asking whether the case presents "a genuine issue for trial" to asking whether there is a "genuine issue requiring a trial". The new rule, with its enhanced fact-finding powers, demonstrates that a trial is not the default procedure. Further, it eliminated the presumption of substantial indemnity costs against a party that brought an unsuccessful motion for summary judgment, in order to avoid deterring the use of the procedure.

44 The new powers in Rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.[9]

[9] As fully canvassed by the Court of Appeal, the powers in Rule 20.04(2.1) were designed specifically to overrule a number of long-standing appellate decisions that had dramatically restricted the use of the rule; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (Ont. C.A.); *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

45 These new fact-finding powers are discretionary and are presumptively available; they may be exercised *unless* it is in the interest of justice for them to be exercised only at a trial; Rule 20.04(2.1). Thus, the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.

46 I will first consider when summary judgment can be granted on the basis that there is "no genuine issue requiring a trial" (Rule 20.04(2)(a)). Second, I will discuss when it is against the "interest of justice" for the new fact-finding powers in Rule 20.04(2.1) to be used on a summary judgment motion. Third, I will consider the power to call oral evidence and, finally, I will lay out the process to be followed on a motion for summary judgment.

(1) When is There no Genuine Issue Requiring a Trial?

47 Summary judgment motions must be granted whenever there is no genuine issue requiring a trial (Rule 20.04(2)(a)). In outlining how to determine whether there is such an issue, I focus on the goals and principles that underlie whether to grant motions for summary judgment. Such an approach allows the application of the rule to evolve organically, lest categories of cases be taken as rules or preconditions which may hinder the system's transformation by discouraging the use of summary judgment.

48 The Court of Appeal did not explicitly focus upon when there is a genuine issue requiring a trial. However, in considering whether it is against the interest of justice to use the new fact-finding powers, the court suggested that summary judgment would most often be appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or when the record could be

supplemented by oral evidence on discrete points. These are helpful observations but, as the court itself recognized, should not be taken as delineating firm categories of cases where summary judgment is and is not appropriate. For example, while this case is complex, with a voluminous record, the Court of Appeal ultimately agreed that there was no genuine issue requiring a trial.

49 There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

50 These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

51 Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.

(2) The Interest of Justice

52 The enhanced fact-finding powers granted to motion judges in Rule 20.04(2.1) may be employed on a motion for summary judgment unless it is in the "interest of justice" for them to be exercised only at trial. The "interest of justice" is not defined in the Rules.

53 To determine whether the interest of justice allowed the motion judge to use her new powers, the Court of Appeal required a motion judge to ask herself, "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?" (para. 50).

54 The Court of Appeal identified the benefits of a trial that contribute to this full appreciation of the evidence: the narrative that counsel can build through trial, the ability of witnesses to speak in their own words, and the assistance of counsel in sifting through the evidence (para. 54).

55 The respondents, as well as the interveners, the Canadian Bar Association, the Attorney General of Ontario and the Advocates' Society, submit that the Court of Appeal's emphasis on the virtues of the traditional trial is misplaced and unduly restrictive. Further, some of these interveners submit that this approach may result in the creation of categories of cases inappropriate for summary judgment, and this will limit the development of the summary judgment vehicle.

56 While I agree that a motion judge must have an appreciation of the evidence necessary to make

dispositive findings, such an appreciation is not only available at trial. Focussing on how much and what kind of evidence could be adduced at a trial, as opposed to whether a trial is "requir[ed]" as the Rule directs, is likely to lead to the bar being set too high. The interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability. Otherwise, the adjudication permitted with the new powers — and the purpose of the amendments — would be frustrated.

57 On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute. A documentary record, particularly when supplemented by the new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly. The powers provided in Rules 20.04(2.1) and 20.04(2.2) can provide an equally valid, if less extensive, manner of fact finding.

58 This inquiry into the interest of justice is, by its nature, comparative. Proportionality is assessed in relation to the full trial. It may require the motion judge to assess the relative efficiencies of proceeding by way of summary judgment, as opposed to trial. This would involve a comparison of, among other things, the cost and speed of both procedures. (Although summary judgment may be expensive and time consuming, as in this case, a trial may be even more expensive and slower.) It may also involve a comparison of the evidence that will be available at trial and on the motion as well as the opportunity to fairly evaluate it. (Even if the evidence available on the motion is limited, there may be no reason to think better evidence would be available at trial.)

59 In practice, whether it is against the "interest of justice" to use the new fact-finding powers will often coincide with whether there is a "genuine issue requiring a trial". It is logical that, when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure.

60 The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

(3) The Power to Hear Oral Evidence

61 Under Rule 20.04(2.2), the motion judge is given the power to hear oral evidence to assist her in making findings under Rule 20.04(2.1). The decision to allow oral evidence rests with the motion judge since, as the Court of Appeal noted, "it is the motion judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed" (para. 60).

62 The Court of Appeal suggested the motion judge should only exercise this power when

> (1) Oral evidence can be obtained from a small number of witnesses and gathered in a manageable period of time; (2) Any issue to be dealt with by presenting oral evidence is likely to have a significant impact on whether the summary judgment motion is granted; and (3) Any such issue is narrow and discrete — *i.e.*, the issue can be separately decided and is not enmeshed with other issues on the motion. [para. 103]

This is useful guidance to ensure that the hearing of oral evidence does not become unmanageable; however, as the Court of Appeal recognized, these are not absolute rules.

63 This power should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure.

64 Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge in weighing the evidence, assessing credibility, or drawing inferences and to provide a "will say" statement or other description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

65 Thus, the power to call oral evidence should be used to promote the fair and just resolution of the dispute in light of principles of proportionality, timeliness and affordability. In tailoring the nature and extent of oral evidence that will be heard, the motion judge should be guided by these principles, and remember that the process is not a full trial on the merits but is designed to determine if there is a genuine issue requiring a trial.

(4) The Roadmap/Approach to a Motion for Summary Judgment

66 On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

67 Inquiring first as to whether the use of the powers under Rule 20.04(2.1) will allow the dispute to be resolved by way of summary judgment, before asking whether the interest of justice requires that those powers be exercised only at trial, emphasizes that these powers are presumptively available, rather than exceptional, in line with the goal of proportionate, cost-effective and timely dispute resolution. As well, by first determining the consequences of using the new powers, the benefit of their use is clearer. This will assist in determining whether it is in the interest of justice that they be exercised only at trial.

68 While summary judgment *must* be granted if there is no genuine issue requiring a trial,[10] the decision to use either the expanded fact-finding powers or to call oral evidence is discretionary.[11] The discretionary nature of this power gives the judge some flexibility in deciding the appropriate course of action. This discretion can act as a safety valve in cases where the use of such powers would clearly be inappropriate. There is always the risk that clearly unmeritorious motions for summary judgment could be abused and used tactically to add time and expense. In such cases, the motion judge may choose to decline to exercise her discretion to use those powers and dismiss the motion for summary judgment, without engaging in the full inquiry delineated above.

10 Rule 20.04(2): "The court shall grant summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial ...".

11 Rule 20.04(2.1): "In determining ... whether there is a genuine issue requiring a trial ... if the determination is being made by a judge, the judge may exercise any of the following powers ... 1. Weighing the evidence. 2. Evaluating the credibility of a deponent. 3. Drawing any reasonable inference from the evidence." Rule 20.04(2.2): "A judge may ... order that oral evidence be presented ...".

C. Tools to Maximize the Efficiency of a Summary Judgment Motion

(1) Controlling the Scope of a Summary Judgment Motion

69 The *Ontario Rules* and a superior court's inherent jurisdiction permit a motion judge to be involved early in the life of a motion, in order to control the size of the record, and to remain active in the event the motion does not resolve the entire action.

70 The Rules provide for early judicial involvement, through Rule 1.05, which allows for a motion for directions, to manage the time and cost of the summary judgment motion. This allows a judge to provide directions with regard to the timelines for filing affidavits, the length of cross-examination, and the nature and amount of evidence that will be filed. However, motion judges must also be cautious not to impose administrative measures that add an unnecessary layer of cost.

71 Not all motions for summary judgment will require a motion for directions. However, failure to bring such a motion where it was evident that the record would be complex or voluminous may be considered when dealing with costs consequences under Rule 20.06(a). In line with the principle of proportionality, the judge hearing the motion for directions should generally be seized of the summary judgment motion itself, ensuring the knowledge she has developed about the case does not go to waste.

72 I agree with the Court of Appeal (at paras. 58 and 258) that a motion for directions also provides the responding party with the opportunity to seek an order to stay or dismiss a premature or improper motion for summary judgment. This may be appropriate to challenge lengthy, complex motions,

particularly on the basis that they would not sufficiently advance the litigation, or serve the principles of proportionality, timeliness and affordability.

73 A motion for summary judgment will not always be the most proportionate way to dispose of an action. For example, an early date may be available for a short trial, or the parties may be prepared to proceed with a summary trial. Counsel should always be mindful of the most proportionate procedure for their client and the case.

(2) Salvaging a Failed Summary Judgment Motion

74 Failed, or even partially successful, summary judgment motions add — sometimes astronomically — to costs and delay. However, this risk can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction.

75 Rule 20.05(1) and (2) provides in part:

> **20.05** (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.
>
> (2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just ...

76 Rules 20.05(2)(a) through (p) outline a number of specific trial management orders that may be appropriate. The court may: set a schedule; provide a restricted discovery plan; set a trial date; require payment into court of the claim; or order security for costs. The court may order that: the parties deliver a concise summary of their opening statement; the parties deliver a written summary of the anticipated evidence of a witness; any oral examination of a witness at trial will be subject to a time limit or; the evidence of a witness be given in whole or in part by affidavit.

77 These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion. The motion judge should look to the summary trial as a model, particularly where affidavits filed could serve as the evidence of a witness, subject to time-limited examinations and cross-examinations. Although the Rules did not adopt the Osborne Report's recommendation of a summary trial model, this model already exists under the simplified rules or on consent. In my view, the summary trial model would also be available further to the broad powers granted a judge under Rule 20.05(2).

78 Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge. I agree with the Osborne Report that the involvement of a single judicial officer throughout

> saves judicial time since parties will not have to get a different judge up to speed each time an issue

> arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue. [p. 88]

79 While such an approach may complicate scheduling, to the extent that current scheduling practices prevent summary judgment motions being used in an efficient and cost effective manner, the courts should be prepared to change their practices in order to facilitate access to justice.

D. Standard of Review

80 The Court of Appeal concluded that determining the appropriate test for summary judgment — whether there is a genuine issue requiring a trial — is a legal question, reviewable on a correctness standard, while any factual determinations made by the motions judge will attract deference.

81 In my view, absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error in principle, findings of mixed fact and law, should not be overturned, absent palpable and overriding error, *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 36.

82 Similarly, the question of whether it is in the "interest of justice" for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) depends on the relative evidence available at the summary judgment motion and at trial, the nature, size, complexity and cost of the dispute and other contextual factors. Such a decision is also a question of mixed fact and law which attracts deference.

83 Provided that it is not against the "interest of justice", a motion judge's decision to exercise the new powers is discretionary. Thus, unless the motion judge misdirected herself, or came to a decision that is so clearly wrong that it resulted in an injustice, her decision should not be disturbed.

84 Of course, where the motion judge applies an incorrect principle of law, or errs with regard to a purely legal question, such as the elements that must be proved for the plaintiff to make out her cause of action, the decision will be reviewed on a correctness standard (*Housen v. Nikolaisen*, at para. 8).

E. Did the Motion Judge Err by Granting Summary Judgment?

85 The motion judge granted summary judgment in favour of the Mauldin Group. While the Court of Appeal found that the action should not have been decided by summary judgment, it nevertheless dismissed the appeal. Hryniak argues this constituted "prospective overruling" but, in light of my conclusion that the motion judge was entitled to proceed by summary judgment, I need not consider these submissions further. For the reasons that follow, I am satisfied that the motion judge did not err in granting summary judgment.

(1) The Tort of Civil Fraud

86 The action underlying this motion for summary judgment was one for civil fraud brought against Hryniak, Peebles, and Cassels Brock.

87 As discussed in the companion *Bruno Appliance* appeal, the tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss.

(2) Was There a Genuine Issue Requiring a Trial?

88 In granting summary judgment to the Mauldin Group against Hryniak, the motion judge did not explicitly address the correct test for civil fraud but, like the Court of Appeal, I am satisfied that his findings support that result.

89 The first element of civil fraud is a false representation by the defendant. The Court of Appeal agreed with the motion judge that "[u]nquestionably, the Mauldin group was induced to invest with Hryniak because of what Hryniak said to Fred Mauldin" at the meeting of June 19, 2001 (at para. 158), and this was not disputed in the appellant's factum.

90 The motion judge found the requisite knowledge or recklessness as to the falsehood of the representation, the second element of civil fraud, based on Hryniak's lack of effort to ensure that the funds would be properly invested and failure to verify that the eventual end-point of the funds, New Savings Bank, was secure. The motion judge also rejected the defence that the funds were stolen, noting Hryniak's feeble efforts to recover the funds, waiting some 15 months to report the apparent theft of US$10.2 million.

91 The motion judge also found an intention on the part of Hryniak that the Mauldin Group would act on his false representations, the third requirement of civil fraud. Hryniak secured a US$76,000 loan for Fred Mauldin and conducted a "test trade", actions which, in the motion judge's view, were "undertaken ... for the purpose of dissuading the Mauldin group from demanding the return of its investment" (para. 113). Moreover, the motion judge detailed Hryniak's central role in the web of deception that caused the Mauldin Group to invest its funds and that dissuaded them from seeking their return for some time after they had been stolen.

92 The final requirement of civil fraud, loss, is clearly present. The Mauldin Group invested US$1.2 million and, but for a small return of US$9,600 in February 2002, lost its investment.

93 The motion judge found no credible evidence to support Hryniak's claim that he was a legitimate trader, and the outcome was therefore clear, so the motion judge concluded there was no issue requiring a trial. He made no palpable and overriding error in granting summary judgment.

(3) Did the Interest of Justice Preclude the Motion Judge from Using his Powers Under Rule 20.04?

94 The motion judge did not err in exercising his fact-finding powers under Rule 20.04(2.1). He was prepared to sift through the detailed record, and was of the view that sufficient evidence had been presented on all relevant points to allow him to draw the inferences necessary to make dispositive findings under Rule 20. Further, while the amount involved is significant, the issues raised by Hryniak's defence were fairly straightforward. As the Court of Appeal noted, at root, the question turned on whether Hryniak had a legitimate trading program that went awry when the funds were stolen, or whether his program was a sham from the outset (para. 159). The plaintiffs are a group of elderly American investors and, at the return date of the motion, had been deprived of their funds for nearly a decade. The record was sufficient to make a fair and just determination and a timely resolution of the matter was called for. While the motion was complex and expensive, going to trial would have cost even more and taken even longer.

95 Despite the fact that the Mauldin group's claims against Peebles and Cassels Brock had to proceed to trial, there is little reason to believe that granting summary judgment against Hryniak would have a prejudicial impact on the trial of the remaining issues. While the extent of the other defendants' involvement in the fraud requires a trial, that matter is not predetermined by the conclusion that Hryniak clearly was *a* perpetrator of the fraud. The motion judge's findings speak specifically to Hryniak's involvement and neither rely upon, nor are inconsistent with, the liability of others. His findings were clearly supported by the evidence. It was neither against the interest of justice for the motion judge to use his fact-finding powers nor was his discretionary decision to do so tainted with error.

V. Conclusion

96 Accordingly, I would dismiss the appeal, with costs to the respondents.

Appeal dismissed.
Pourvoi rejeté.

Appendix

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

RULE 20 SUMMARY JUDGMENT

20.01 [Where Available] (1) [To Plaintiff] A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

(3) [To Defendant] A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the

statement of claim.

20.02 [Evidence on Motion] (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

20.03 [Factums Required] (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

(4) Revoked.

20.04 [Disposition of Motion] (1) [General] Revoked.

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

(2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

(2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

(4) [Only Genuine Issue Is Question Of Law] Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

(5) [Only Claim Is For An Accounting] Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

20.05 [Where A Trial Is Necessarry] (1) [Powers of Court] Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

(2) [Directions And Terms] If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a

without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

(i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

(n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;

(o) for payment into court of all or part of the claim; and

(p) for security for costs.

(3) [Specified Facts] At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice.

(4) [Order re Affidavit Evidence] In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration.

(5) [Order re Experts, Costs] If an order is made under clause (2) (k), each party shall bear his or her own costs.

(6) [Failure To Comply With Order] Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default.

20.06 [Costs Sanctions For Improper Use Of Rule] The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or

(b) the party acted in bad faith for the purpose of delay.

20.07 [Effect Of Summary Judgment] A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief.

20.08 [Stay Of Execution] Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just.

20.09 [Application To Counterclaims, Crossclaims And Third Party Claim] Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

End of Document

TAB 4

Case Name:

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

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

[2010] O.J. No. 4336

2010 ONCA 673

268 O.A.C. 279

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

2010 CarswellOnt 7643

193 A.C.W.S. (3d) 1151

Docket: C51317

Ontario Court of Appeal
Toronto, Ontario

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

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

(33 paras.)

Commercial law -- Franchising -- Franchise agreement -- Renewal -- Termination -- Appeal by franchisor from decision finding it breached franchise agreement dismissed -- Parties entered into franchise agreement with respect to mall location -- Franchisor was lessee under head lease with mall and prior to expiry of lease, it negotiated lease for new location, entered into new franchise agreement with new franchisee and informed respondents that franchise agreement expired when lease expired -- Trial judge made no error in finding that franchisor breached franchise agreement

and duty of good faith, or in assessment of damages at $230,358 for future loss of income and $50,000 for breach of duty of good faith and mental distress.

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

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

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

distress. The franchisor sought to appeal the judgment on the basis that the trial judge erred in failing to distinguish between the individual respondent and the numbered company, in her interpretation of the schedule to the agreement, in her finding that the franchisor owed a duty of care and breached it, and in her assessment and award of damages.

HELD: Appeal dismissed. There was ample evidence to support the trial judge's finding that the appellant maintained a relationship with both the individual franchisee and its assignee corporation. The trial judge engaged in an analysis of the contractual rights between the parties, considered all of the relevant documents, and there was no error in the approach she adopted. On the facts found by the trial judge, there was no doubt that the conduct at issue fell squarely within the performance or enforcement of the franchise agreement and that the appellant breached the duty of good faith it owed to the franchisee under the Arthur Wishart Act. Finally, there was no basis to interfere with the trial judge's assessment of damages.

Statutes, Regulations and Rules Cited:

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

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

Appeal From:

On appeal from the judgment of Justice Monique Métivier[1] of the Superior Court of Justice dated October 26, 2009, with amended reasons dated January 21, 2010, and reported at (2010), 65 B.L.R. (4th) 235.

Counsel:

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

Stephen S. Appotive, for the Respondents.

The judgment of the Court was delivered by

1 W.K. WINKLER C.J.O.:-- Timothy's Coffees of the World Inc. ("Timothy's") appeals a decision of the Superior Court of Justice finding that it breached a franchise agreement with the respondents. The trial judge found that the franchise agreement provided the respondents with a conditional right of renewal and that the appellant denied them this right. She awarded damages for breach of contract, breach of the duty of good faith and mental distress. I agree with the trial judge's

reasons and find no error in her decision. I would dismiss the appeal. My reasons follow.

BACKGROUND

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

3 Mr. Salah was concerned about the short term of the lease and the franchise agreement, given the amount of his investment in purchasing the franchise and setting up operations. In response to Mr. Salah's concerns about the term, Timothy's proposed the inclusion of Schedule "A" in the franchise agreement. Schedule "A" provided that in the event that Timothy's entered into a new head lease with the Bayshore Shopping Centre, Mr. Salah's franchise agreement would be renewed with a new sublease. In the event that the new head lease was to be for a period of less than five years, there would be no additional franchise fee payable by Mr. Salah. If the new head lease was for a period of more than five years, Mr. Salah would be required to pay an amount equal to 50% of the then current franchise fee.

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

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

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

DECISION OF THE TRIAL JUDGE

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

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

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

ISSUES ON APPEAL

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

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

ANALYSIS

i. Treating Mr. Salah and 147 as one entity

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

11 I cannot accede to that submission. There was ample evidence to support the trial judge's

finding that the appellant "maintained a relationship with both the individual franchisee and its assignee corporation. It never intended to accept the corporation in the place of Mr. Salah for all purposes." While the franchisor allowed Mr. Salah to assign the franchise agreement to 147, one of the main purposes of the Assignment and Guarantee was to ensure that all obligations under the franchise agreement continued to be those of Mr. Salah personally. In addition, as noted by the trial judge, the concluding words of s. 4 of the Assignment and Guarantee state as follows:

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

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

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

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

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

ii. Interpretation of the franchise agreement

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

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

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

18 Indeed, the only agreement that specifically referred to the third floor was the head lease between the Bayshore Shopping Centre and Timothy's. The appellant contends that the trial judge failed to take the head lease into account in her analysis. I do not agree. A review of her reasons demonstrates otherwise. Moreover, to the extent that any discrepancy exists between the head lease and the franchise agreement, I agree with the trial judge that the franchise agreement should be interpreted *contra proferentem*. The head lease had been negotiated by Timothy's with the landlord, and its terms were obviously known to Timothy's at the time it drafted Schedule "A". Timothy's had the opportunity to limit the scope of Schedule "A" to the third floor premises and either chose not to do so or was aware that Mr. Salah would not have accepted such a limitation. In either event, there is no basis to find that the trial judge committed a reviewable error. Her conclusions that the franchise agreement and Schedule "A" applied to the whole shopping centre and that Timothy's conduct -- which effectively amounted to a refusal to allow Mr. Salah the option of renewing the franchise agreement -- constituted a breach of contract are unassailable.

iii. Breach of duty of good faith

19 Section 3 of the *Wishart Act* provides:

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

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

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

22 I turn then to the conduct of the appellant. When Timothy's could no longer renew the head lease of the third floor location and was negotiating a new lease on the second floor, the evidence showed that the franchisor deliberately kept Mr. Salah in the dark about its intentions. The trial judge found that "Mr. Black [the senior vice-president of development at Timothy's] e-mailed Bayshore Shopping Centre representatives asking them to refrain from passing on any information

about the second floor location to Mr. Salah". The trial judge made further factual findings that Timothy's "actively sought to keep the franchisee from finding out what was going on with the lease" and that Timothy's deliberately withheld "critical information and did not return calls". These findings of fact more than support the conclusion that there was a breach of the duty of good faith that franchisors owe franchisees under s. 3(1) of the *Wishart Act*.

iv. Damages

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

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

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

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

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

28 Our courts have given limited recognition to the duty of good faith between contracting parties in general. However, by enacting legislation that addresses the particular relationship between franchisors and franchisees, the legislature has clearly indicated that such relationships give rise to

special considerations, both in terms of the duties owed and the remedies that flow from a breach of those duties. This is evident in the wording of s. 3(2), which focuses on the conduct of the breaching party and not injury to the other side. The trial judge's award of damages was informed by these considerations.

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

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

v. The Pleadings Argument

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

CONCLUSION

32 I would dismiss the appeal.

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

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

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

TAB 5

Case Name:

RBC Dominion Securities Inc. v. Crew Gold Corp.

Between
RBC Dominion Securities Inc. and Royal Bank of Canada Europe Limited,
Plaintiffs (Appellants), and
Crew Gold Corporation, Defendant (Respondent)

[2017] O.J. No. 4146

2017 ONCA 648

2017 CarswellOnt 12188

281 A.C.W.S. (3d) 756

73 B.L.R. (5th) 173

Docket: C62781

Ontario Court of Appeal

K.M. Weiler, K.M. van Rensburg and G. Huscroft JJ.A.

Heard: June 9, 2017.
Judgment: August 10, 2017.

(57 paras.)

Contracts -- Interpretation -- Appeal by RBC from dismissal of action for payment of success fees dismissed -- RBC, an investment bank, and defendant Crew Gold Corporation entered into agreement which provided for payment of success fee for transactions completed during term of agreement -- RBC sent success fee invoices to Crew, which included success fees on third party purchases of Crew shares, with which RBC had no involvement -- Agreement was unambiguous -- RBC was not intended to receive success fee unless there was some causal link between its activities and completed transaction.

Contracts -- Performance and discharge -- Performance -- Payment -- Appeal by RBC from

dismissal of action for payment of success fees dismissed -- RBC, an investment bank, and defendant Crew Gold Corporation entered into agreement which provided for payment of success fee for transactions completed during term of agreement -- RBC sent success fee invoices to Crew, which included success fees on third party purchases of Crew shares, with which RBC had no involvement -- Agreement was unambiguous -- RBC was not intended to receive success fee unless there was some causal link between its activities and completed transaction.

Appeal by RBC Dominion Securities Inc and Royal Bank of Canada Europe Limited (RBC) from dismissal of action for payment of success fees. RBC operated as an investment bank. The defendant Crew Gold Corporation was a gold-mining company whose principal asset was a gold mine in Guinea, West Africa. In October 2008, the mine was not performing particularly well and Crew retained RBC to prepare strategic alternatives. The parties entered into an agreement which provided for the payment of a success fee if a transaction was completed during the term of the agreement. Crew formally terminated the agreement in April 2010. RBC subsequently sent a series of success fee invoices to Crew, which included success fees for third party purchases of the Crew shares with which it had no involvement. RBC submitted that the language of the agreement was so broad and general as to permit the claim even though it was not instrumental in or involved with any of the purchases. The trial judge dismissed the action. He concluded that RBC was not intended to receive a success fee unless there was some causal link between its activities and the transaction that was completed. RBC appealed arguing that the trial judge made errors of law in the interpretation of the agreement.

HELD: Appeal dismissed. The trial judge did not err in his interpretation of the agreement. The agreement was unambiguous. Although RBC was not required to introduce the successful purchaser to the transaction and its involvement was not required to be a material cause of the transaction, RBC was not intended to receive a success fee unless there was some causal link between its activities and the completed transaction.

Appeal From:

On appeal from the judgment of Justice Arthur M. Gans of the Superior Court of Justice, dated September 13, 2016, with reasons reported at 2016 ONSC 5529, [2016] O.J. No. 4862.

Counsel:

Jeremy Devereux and Michael Bookman, for the appellants.

Alistair Crawley and Natalia Vandervoort, for the respondent.

The judgment of the Court was delivered by

K.M. van **RENSBURG J.A.**:--

I. OVERVIEW

1 This is an appeal in a contract interpretation case.

2 The central facts are not in dispute. The appellants, RBC Dominion Securities Inc. and Royal Bank of Canada Europe Limited (together "RBC"), sued the respondent, Crew Gold Corporation ("Crew"), for a fee, described as a Success Fee, that they argued was owed to them under an engagement letter for the provision of investment banking services (the "Agreement"). RBC provided services under the Agreement to assist Crew in developing and implementing "strategic alternatives". The Agreement provided for service fees based on specific work performed by RBC, and for a Success Fee, payable on completion of a "Transaction", as defined by the Agreement.

3 In the course of the Agreement, Crew, then a public company, was the subject of a takeover, an event that was not anticipated by either party. The sole issue at trial was whether, under the Agreement, RBC was entitled to a Success Fee in respect of any or all of the transactions involved in the takeover even though it played no part in the transactions. The trial judge found that RBC was not entitled to a Success Fee under the Agreement and dismissed RBC's action.

4 RBC appeals, asserting that the trial judge made extricable errors of law in his interpretation of the Agreement. I find no such errors, and for the reasons that follow, would dismiss the appeal.

II. FACTS

5 Crew was a gold mining company whose principal asset was a gold mine in West Africa. At all material times, Crew's shares were publically traded on the Toronto and Oslo Stock Exchanges (the "TSE" and the "Oslo Bors").

6 In October 2008, the mine was not yielding sufficient net revenue to service Crew's significant debt obligations. Crew's board of directors (the "Crew Board") retained RBC as a financial advisor for a term of 18 months to develop, evaluate and potentially assist the company in implementing strategic transaction alternatives based on its valuation of the company (the "2008 Engagement"). After RBC presented its strategic alternatives to Crew, RBC invoiced the company and was paid US$95,000 for its work under the 2008 Engagement.

7 In late November 2008, using a Norwegian securities firm, Crew undertook a rights offering on the Oslo Bors to meet its cash flow needs.

8 In March 2009, RBC made a further presentation to the Crew Board on Crew's strategic alternatives in light of the rights offering and improved market conditions. These generally contemplated either an *en bloc* sale of shares for cash or shares, or the disposition of Crew assets or some form of strategic partnership (the "RBC Alternatives"). In October 2009, RBC made another presentation to the Crew Board, outlining, among other things, its strategies for implementing one of the RBC Alternatives.

9 The parties entered into the Agreement in mid-December, dated as of October 20, 2009. The term of RBC's engagement under the Agreement was until the earliest of "the closing of the Transaction", the termination of the engagement by either party upon written notice, and 12 months after the Agreement's commencement.

10 The relevant terms of the Agreement are as follows:

* Crew engaged RBC "as its financial advisor in connection with a potential transaction (the "Transaction") involving the direct or indirect sale or disposition of the Company".

* The Transaction "may involve (i) a sale of all or a substantial portion of the shares, business or assets of the Company to a third party, (ii) an investment by a third party in the Company that results in a change of control of the Company or (iii) an amalgamation, arrangement or other business transaction involving the Company and a third party to effect such sale or disposition".

* RBC agreed to provide services "in connection with a Transaction", which included financial analysis and advice on structuring, planning and negotiating a Transaction; if requested, the furnishing of fairness opinions; assistance in preparing a confidential information memorandum ("CIM") for prospective investors; and managing the sale process, including contacting prospective purchasers, evaluating offers, and assisting in the completion of a Transaction.

* The fees for RBC's services consisted of a Work Fee of US$25,000 per month for each month that RBC was actively involved in assisting in the execution of the Transaction; an Announcement Fee/Opinion Fee of US$750,000 payable on the earlier of the public announcement of the Transaction or the delivery of a fairness opinion; an Additional Opinion Fee of US$125,000 payable upon the delivery of each additional fairness opinion provided by RBC (after its initial opinion); and a Success Fee.

* The Success Fee was to be calculated as the greater of US$2,000,000, and 0.95% of the Transaction Proceeds up to US$325,000,000 plus 1.75% of the Transaction Proceeds in excess of US$325,000,000, against which was to be credited 100% of the other fees paid or payable under the Agreement.

* "Transaction Proceeds" included "all amounts received by the Company or any affiliate or shareholder of the Company... from the purchaser".

* RBC was entitled to the Success Fee "if a Transaction [was] completed involving any party, whether or not solicited by RBC, pursuant to an agreement to effect or otherwise complete a Transaction entered into during the term of its engagement or for a period of twelve months after termination of its engagement" (the "tail provision").

11 While the Agreement was in force, Crew concluded a restructuring agreement with its debenture holders that closed in December 2009, and was also handled by the Norwegian securities firm. As a result of the restructuring, the debenture holders came to own 95% of Crew's issued and outstanding equity. GLG Partners ("GLG"), a London-based hedge fund and former debenture holder, became Crew's largest shareholder, with a control block of approximately 31.6% of Crew's shares, and appointed three new directors to the Crew Board.

12 RBC made another presentation to the Crew Board on December 15, 2009 regarding the RBC Alternatives. RBC asserted that the time was right to engage in a "broad solicitation" of potential bidders under RBC's stewardship. At a meeting on January 22, 2010, the Crew Board approved by resolution "the implementation of the RBC plan involving the marketing and sale or partial sale of the Company". In December 2009 and January 2010, RBC worked on numerous tasks to prepare a sale process, including the preparation of a draft CIM and identifying potential bidders to purchase GLG's control block.

13 RBC and Crew were aware that GLG could sell its interest to a third party without their involvement. Neither contemplated, however, that a serious purchaser would conclude an agreement without some form of due diligence, which would require a CIM and standstill agreement.

14 In fact, Endeavour Financial Corporation ("Endeavour"), a Vancouver-based investment bank, was in serious discussions with GLG to buy its control block, and was prepared to buy the block without reliance on the RBC/Crew-controlled due diligence process and without the execution of a CIM. In January 2010, Endeavour purchased GLG's shares and that of another institutional investor through one of its subsidiaries on the Oslo Bors, bringing its holdings in Crew to just under 38%.

Endeavour was not on RBC's list of potential bidders and RBC played no part in brokering the deal.

15 Immediately after the Endeavour purchase, OAO Severstal ("Severstal"), a Russian mining company, began to significantly increase its holdings in Crew. As the trial judge described it, "the race was then on between Endeavour and Severstal for the ultimate control and ownership of Crew." By early April 2010, each had increased its absolute position -- Severstal owned almost 27% and Endeavour owned almost 43% of the company. In July 2010, Severstal had increased its shareholdings in Crew to just over 50%. Endeavour then sold its interest in Crew to Severstal in mid-September. Severstal eventually acquired the remaining Crew shares in January 2011 through a plan of arrangement.

16 While the takeover was unfolding, RBC offered to assist the Crew Board, but the offer was refused. Instead, Crew engaged Genuity Capital Markets to assist it in the takeover matters. On April 29, 2010, Crew terminated the Agreement. RBC immediately invoiced Crew for the Work Fee covering a six-month period, ending January 2010, which Crew paid.

17 In late August 2010, RBC sent the first in a series of Success Fee invoices to Crew, claiming an amount in excess of US$5,700,000, calculated on amounts paid by Severstal and Endeavour for the shares they acquired in the open market or by agreement with institutional vendors in 2010. Later, after Severstal purchased Endeavour's block, RBC sent an amended invoice for the Success Fee for in excess of US$7,200,000.

18 As the trial judge explained, with the exception of the acquisition of the last remaining shares, each of the trades leading up to the takeover by Severstal, including those obtained by Endeavour, was through an open market transaction concluded on the Oslo Bors, and none of the transactions triggered Canadian or Norwegian takeover laws.

19 After Crew refused to pay the Success Fee invoices, RBC started the underlying action.

III. THE TRIAL JUDGE'S REASONS

20 The trial judge rejected RBC's claim. After setting out the facts, he turned to consider the positions of the parties.

21 RBC argued that the language of the Agreement was so broad and general as to permit the claim even though RBC was not involved in Endeavour's or Severstal's purchases of Crew shares. RBC argued that Severstal's activities between February and December 2010 in purchasing the entirety of Crew's shares and thereafter taking the company private amounted to the sale of all of the Company's shares to a third party. Alternatively, RBC argued that the separate purchases by Endeavour and Severstal amounted to the sale of a "substantial portion of the shares... of the Company to a third party". RBC relied on what it asserted was the expanded definition of Transaction in the definition of "Transaction Proceeds" to argue that these purchases constituted Transactions under the Agreement. RBC also asserted that, unlike the other fees payable under the

Agreement, there was nothing to tie the Success Fee to services provided by RBC; and that the payment of the Service Fee depended only on the closing of a Transaction. Finally, RBC relied on the tail provision in support of the argument that it was entitled to a Success Fee so long as a Transaction was concluded within 12 months of the termination of the Agreement, regardless of RBC's contribution.

22 Crew argued that, for a Transaction to have taken place, RBC had to be involved in some manner and that a Success Fee was only payable as a consequence of the provision of financial advisory services. For a fee to be payable upon the "closing" of the Transaction, the Transaction must arise from the work effort of RBC. The description of services contained in the RBC proposals tabled before and after the execution of the Agreement underscored the notion RBC would be controlling any process connected to a Transaction, and that the Success Fee was payable as a function of the services performed. Crew also argued that RBC's interpretation, which would require it to pay a Success Fee upon the conclusion of any transaction between a third party and Crew's shareholders who were disposing of a control block, made no commercial sense.

23 After setting out the relevant principles of contractual interpretation, which were not in dispute, the trial judge interpreted the Agreement.

24 First, he noted there was no ambiguity in the language used in respect of the terms "Transaction" or "Success Fee". He held that, in interpreting the term "Transaction" and determining the intention of the parties at the time the Agreement was drawn, it was too limiting to simply have regard to the preamble and the extended definition found in "Transaction Proceeds", as proposed by RBC, and that regard must be had to the Agreement as a whole.

25 The trial judge held that the Agreement was intended to speak to the rights and obligations of the parties in engaging RBC as the "financial advisor in connection with a potential transaction... involving the direct or indirect sale or disposition of the Company". The Agreement described a range of services RBC was to provide, which anticipated RBC's involvement in the Transaction. Under the Agreement, according to the trial judge, RBC was to be the "composer, arranger and orchestrator -- if not the orchestra leader -- of the Transaction, in all its facets, for which it was to be paid a series of fees for services rendered".

26 The trial judge concluded that RBC was not intended to receive a Success Fee unless there was some causal link between its activities and the completed transaction, even though RBC was not required to introduce the successful purchaser to the transaction and even though RBC's involvement was not required to be a material cause of the transaction. The trial judge rejected RBC's submission that the wording of "Transaction Proceeds" expanded the definition of Transaction, concluding instead that it described the amounts to be included for Success Fee calculation purposes.

27 The trial judge then reviewed the factual matrix. He found that the entire thrust of RBC's strategy after the debt restructuring was to maximize shareholder value by creating and rolling out

an RBC Alternative, namely a process for the sale of Crew's assets or control shares. RBC's presentations all emphasized some form of an *en bloc* sale of assets or shares through a process orchestrated by RBC. RBC never spoke of the possibility of a third party purchase. Further, it was "not on anyone's radar" that any one of the RBC Alternatives would include a purchase of control through the acquisition of sufficient shares on the Oslo Bors, or that any purchaser would acquire a significant interest in Crew without a due diligence inquiry, which would have involved RBC.

28 The trial judge offered an alternative ground for his interpretation of the Agreement that was not argued by the parties. The Agreement provided for the negotiation of an additional fee in the event that there was "an investment by a third party in the Company that does not result in a change of control". The trial judge characterized the share purchases by Severstal and Endeavour in the first six months of 2010 to be a "substantial portion" of Crew's outstanding shares, but concluded that these purchases did not amount to a change of control. Therefore, RBC would not be entitled to a Success Fee on the purchases that took place in the lead up to an actual change of control. I note here that Crew does not necessarily agree with this characterization and does not seek to uphold the trial judge's decision on this basis.

IV. STANDARD OF REVIEW

29 The primary goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was drawn. Contractual interpretation involves the application of contractual interpretation principles to the words of the contract, considered in light of the factual matrix, and is therefore a question of mixed fact and law, which is entitled to deference absent a palpable and overriding error: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 50, 55. The palpable and overriding error test is met if the trial judge misapprehended the evidence in that the findings are "clearly wrong", "unreasonable" or not "reasonably supported by the evidence": *L.(H.) v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 55-56.

30 Where an extricable error of law can be identified independent of the trial judge's application of the law to the facts, the error is to be reviewed on a standard of correctness. Extricable errors of law made in the course of contractual interpretation may include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor": *Sattva*, at para. 53, citing *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 21. The circumstances in which a question of law can be extricated from the interpretation process will be rare: *Sattva*, at para. 55.

V. ISSUES

31 RBC contends that, although the trial judge correctly identified the proper principles of contractual interpretation, he did not apply these principles and, as such, committed errors of law. RBC argues that there were three categories of extricable errors of law in the trial judge's interpretation of the Agreement, which can be broadly described as follows:

1. The trial judge failed to consider the plain words of the Agreement in the context of the contract as a whole, and in a manner that gives meaning to all of its terms and that avoids an interpretation that would render one or more of its terms ineffective.

2. The trial judge failed to correctly consider the objective evidence of the surrounding circumstances and relied on his findings as to the parties' subjective intentions or the lack thereof, and allowed those findings to overwhelm the wording of the Agreement.

3. The trial judge failed to consider the commercial reasonableness of the interpretation of the Agreement advanced by RBC.

32 Within these three categories, RBC seeks to identify specific errors. I will address each category in turn.

VI. DISCUSSION

(1) Alleged Failure to Consider the Plain Words of the Agreement in the Context of the Contract as a Whole

33 RBC contends that the trial judge failed to determine the meaning of the words in the Agreement by construing the contract "as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective": *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, 268 O.A.C. 279, at para. 16.

34 Here RBC relies on many of the same arguments it advanced at trial -- essentially that "Transaction" is broadly defined in the Agreement; that the purchases by Endeavor and Severstal fell within the enumerated examples of "Transaction" in the Agreement, as Endeavor's purchased a "substantial portion" of Crew's shares and Severstal's purchases resulted in a "change of control"; and that the definition contained no express requirement for the involvement of Crew or RBC in the Transaction.

35 As well, RBC says the trial judge ignored the fact that, while the other fees under the Agreement are expressly linked to services provided by RBC, the Success Fee is payable upon "the closing of the Transaction". RBC contends that this distinction supports the conclusion that a "causal link" between its services and a Transaction was not necessary for entitlement to a Success Fee. RBC also argues that the trial judge disregarded the broad definition of "Transaction Proceeds", which it says does not exclude the sale of Crew shares from qualifying as a "Transaction" simply on the basis that the shares were purchased on a stock exchange.

36 All of these arguments were addressed by the trial judge at paras. 56 to 61 of his reasons. As the trial judge observed, the specific words RBC relied on had to be considered in the context of the Agreement as a whole. In rejecting its proposed interpretation, the trial judge did not, as RBC alleges, fail to apply proper contract interpretation principles; rather, the trial judge applied the principles, just not in the manner proposed by RBC.

37 The trial judge's interpretation of the Success Fee requirement as being linked to some action on the part of RBC is a reasonable interpretation borne out by a consideration of the Agreement as a whole.

38 As the trial judge observed, the Success Fee was payable in the context of RBC's engagement as a financial advisor to Crew in connection with a potential Transaction. The range of services to be provided by RBC covered the entire sale process, whatever form that took, and the Agreement anticipated RBC's involvement in the Transaction. In exchange for these services, RBC was to receive a variety of fees. RBC was unable to provide most of the anticipated advisory services because of the intervention of the takeover and the way it took place. Indeed, the Agreement was terminated only a few months after it had been concluded and, at that point, RBC was only on the cusp of providing services with respect to the RBC Alternatives.

39 The Transaction was the culmination of RBC's financial advisory services, and the provision of a very large "Success Fee" to be paid on completion of the Transaction was presumably meant to reward RBC for its success in completing the Transaction and implied that there must be a connection between the services provided by RBC and the Transaction. Indeed, all of the fees payable under the Agreement, including the Success Fee, are stated to be "for its services hereunder". This contemplates a nexus between RBC's services and all of the fees payable to RBC under the Agreement, including the Success Fee.

40 RBC's approach to interpreting the Agreement is too narrow -- focusing on the terms "Transaction" and "Transaction Proceeds", without considering the nature and substance of the Agreement as a whole. In my view, there would have been an extricable error of law if the trial judge had adopted the approach advocated by RBC and read the "provision[s] of [the] contract in isolation rather than construe[d] the contract as a whole": *1298417 Ontario Ltd. v. Lakeshore (Town)*, 2014 ONCA 802, 122 O.R. (3d) 401, at para. 8.

41 In addition to the arguments set out above, RBC claims that the trial judge ignored the tail provision, which provided that RBC would be entitled to a Success Fee even if RBC did not solicit the Transaction and where the agreement to effect the Transaction was entered into in the 12-month period after the termination of the engagement (in other words, at a time when RBC had no obligation to provide Crew with services under the Agreement). RBC says the tail provision expressly contemplates that RBC will be paid for a Transaction in respect of which it did not provide services, and that the trial judge failed to deal with this provision.

42 I agree with Crew that, while the trial judge might have fleshed out in greater detail his

analysis of this provision and its impact on the interpretation of the Agreement, he adverted to the wording of the tail provision at para. 60 of his reasons, where he stated that a causal link was required even though "RBC was not required to introduce the successful purchaser to the transaction", and even though "RBC's involvement was not required to be a material cause". As well, his reasons as a whole reject the interpretation advanced by RBC. The tail provision simply provides for the payment of a Success Fee if a mandate is carried out after the Agreement has been terminated. This interpretation of the tail provision is not inconsistent with the requirement that the Transaction in respect of which a Success Fee is payable relate to work performed by RBC before the Agreement was terminated. Nor is this interpretation inconsistent with the evidence of Patrick Meier, relied on by RBC, who testified about the commercial purpose of the clause.

43 Finally, RBC argues that the trial judge failed to recognize and apply the case law holding that a contract may call for payment based solely on the occurrence of an event, without the service-provider having to demonstrate that it caused or contributed to the event. RBC says that the Agreement is similar to that in *Galan v. Alenkno*, [1950] O.R. 387 (C.A.) where the plaintiff was entitled to a commission on any sale effected during the currency of its authority, including sales that occurred without the plaintiff's intervention or assistance.

44 To the contrary, the trial judge did not dismiss out of hand RBC's claim for a Success Fee because RBC had not provided services in respect of the transactions that occurred. Rather, he interpreted the Agreement to determine whether a Success Fee was payable in such circumstances, and concluded that in respect of this Agreement, a "causal link" was required before a Success Fee was payable. Similarly, the fact that there are reported cases involving contracts that anticipate a fee being paid on the occurrence of an event, without the provision of services in respect of the transaction, does not assist: See, for example, *Re Hemosol Corp*., 37 C.B.R. (5th) 128. As RBC's counsel submitted in argument, these cases simply stand for the principle that each contract must be interpreted according to its own terms and factual context.

(2) Alleged Reliance on the Parties' Subjective Intentions and Failure to Consider the Objective Surrounding Circumstances

45 In *Dumbrell v. The Regional Group of Companies Inc*., 2007 ONCA 59, 85 O.R. (3d) 616, at para. 50, Doherty J.A. emphasized that, when interpreting written contracts in the context of commercial relationships, it is not helpful to frame the analysis in terms of the subjective intention of the parties at the time the contract was drawn. The purpose of the interpretation of a contract is not to discover how the parties understood the language of the text they adopted, but to determine the meaning of the contract against its objective contextual scheme. The focus must be on the intent expressed in the written words. The court must consider, among other things, the contract as a whole, the factual matrix underlying it, and the need to avoid commercial absurdity. But the court does not consider the subjective intention of the parties: *Downey v. Ecore International Inc.*, 2012 ONCA 480, 294 O.A.C. 200, at paras. 37-38 and *Salah*, at para. 16.

46 RBC argues that the trial judge based his decision that RBC was not entitled to a Success Fee unless there was some causal link between its activities and the Transaction, in large part on his findings as to the parties' subjective intentions, or lack of thereof, and that he allowed evidence of subjective intention to overwhelm his interpretation of the plain meaning of the Agreement. RBC contends that the trial judge did not limit himself to the parties' objective intentions as expressed in the words of the contract, as required.

47 There is no indication in the trial judge's reasons that he relied on any evidence of the parties' subjective intentions in interpreting the Agreement. The passages RBC relies on (which appear to be every occasion where the trial judge uses the words "intention" or "intended") simply do not support this argument. An example is para. 57, where the trial judge stated that it was his view that the Agreement was intended to speak to the rights and obligations of the parties in engaging RBC as Crew's financial advisor, and that the words in the Agreement were intended to describe the services RBC would undertake. The trial judge here was doing no more than determining, based on his review of the Agreement, what was objectively intended by the Agreement, or the "intent expressed in the written words". There is no reference to either Crew's or RBC's subjective intentions.

48 Nor is the trial judge's description of the takeover as "not on anyone's radar" a statement of the parties' subjective intentions. This was simply a statement of an obvious background fact. The parties agreed that the takeover was an unexpected event they had not contemplated when they entered into the Agreement. And there is no indication, as argued by RBC, that the trial judge dismissed its claim simply because it arose from an unanticipated transaction (which RBC contends is an "absence" of subjective intentions). Rather, the trial judge was interpreting the Agreement to determine whether the unanticipated transaction was a Transaction that would give rise to the payment of a Success Fee under the Agreement.

49 Finally, RBC argues that the trial judge erred in interpreting the contract by relying on the parties' conduct following the execution of the contract. RBC points to the trial judge's reference to the conduct of the parties after learning of GLG's intention to sell its shares in Crew at paras. 70 and 71 of his reasons -- namely, that RBC attempted to ensure that either GLG's shares were sold to a compliant buyer or that a standstill agreement would be concluded. RBC contends that this contravened this court's caution that "evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix": *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, 404 D.L.R. (4th) 512, at para. 46.

50 I disagree that, in interpreting the contract, the trial judge relied on the subsequent conduct of the parties. These observations were made after he had interpreted the Agreement. They were not part of his analysis of the meaning of the Agreement but confirmatory of his conclusions. The trial judge specifically stated that this was "not part of the classical factual matrix" and was "consonant with [his] conclusion on the intention of the parties at the time the Agreement was executed".

51 There is simply no merit to this ground of appeal. The trial judge did not make findings as to

the parties' subjective intentions in entering the Agreement, nor did he allow evidence of subjective intention to oust the plain words of the Agreement, as alleged by RBC.

(3) Commercial Common Sense

52 RBC contends that the trial judge adopted an interpretation of the Agreement that was not "in accordance with sound commercial principles and good business sense": *Kentucky Fried Chicken v. Scott's Food Services Inc*. (1998), 41 B.L.R. (2d) 42 (Ont. C.A.), at para. 27. In particular, RBC argues that the trial judge failed to recognize the business reasons for allocating risk in contracts by providing for payment based on the occurrence of an event rather than services rendered, and that the trial judge failed to appreciate that it would be impracticable to require RBC to demonstrate the extent to which it caused or contributed to a transaction.

53 RBC relies principally on the evidence of its witness, Patrick Meier, RBC's lead investment banker on the Crew mandate, who provided an explanation of the commercial purposes for transaction-based fees in investment banking contracts. In *Kentucky Fried Chicken*, however, this court cautioned that the construction of contracts in accordance with sound commercial principles and good business sense must be done objectively rather than from the perspective of the contracting parties. Further, Mr. Meier's evidence did not fully support RBC's interpretation. He acknowledged under cross-examination that some connection to the services provided would be required before a Success Fee would be payable.

54 Simply because the trial judge did not analyze the parties' arguments on this point under a separate heading does not mean that he ignored the commercial realities in interpreting the Agreement. Considerations of commercial reasonableness permeate his reasons. The objective evidence of the circumstances or factual matrix in this case was that both parties had a plan to embark on a sale process, which they were unable to complete because of the unanticipated takeover. The trial judge made a specific finding on the evidence that was available to him (and which has not been argued or demonstrated to be a palpable and overriding error) that the parties anticipated a sale process. The expectation was that RBC would have provided services in connection to the process culminating in the closing of a Transaction to warrant payment of a Success Fee.

55 I agree with Crew that the interpretation adopted by the trial judge was not commercially unreasonable and made commercial sense. Although the words of the Agreement might bear the interpretation RBC proposes, the interpretation advocated by RBC would have resulted in a significant windfall, with RBC receiving a very large Success Fee where there was no association between any services it provided Crew and the transactions, and where Crew was not in a position to avail itself of RBC's services.

56 RBC also argues that the trial judge failed to recognize the commercial sense in the allocation of risk in contracts that call for payment upon the occurrence of an event, such as in the real estate context. I agree with Crew that the commercial context here is very different from an exclusive

listing agreement in the real estate agency context. Here, the Crew Board retained RBC to assist the company in pursuing specific strategic alternatives to maximize shareholder value. In my view, the requirement to pay the significant fee claimed by RBC in respect of the transactions that occurred, which did not relate in any way to RBC's financial services would be commercially unreasonable.

VII. CONCLUSION AND DISPOSITION

57 For these reasons I would dismiss the appeal. I would award Crew its costs fixed at $40,000, inclusive of HST and disbursements.

K.M. van RENSBURG J.A.
K.M. WEILER J.A.:-- I agree.
G. HUSCROFT J.A.:-- I agree.

TAB 6

Most Negative Treatment: Check subsequent history and related treatments.

2014 SCC 53, 2014 CSC 53
Supreme Court of Canada

Creston Moly Corp. v. Sattva Capital Corp.

2014 CarswellBC 2267, 2014 CarswellBC 2268, 2014 SCC 53, 2014 CSC 53, [2014] 2 S.C.R. 633, [2014] 9 W.W.R. 427, [2014] B.C.W.L.D. 5218, [2014] B.C.W.L.D. 5219, [2014] B.C.W.L.D. 5230, [2014] B.C.W.L.D. 5255, [2014] S.C.J. No. 53, 242 A.C.W.S. (3d) 266, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 373 D.L.R. (4th) 393, 461 N.R. 335, 59 B.C.L.R. (5th) 1, 614 W.A.C. 1

Sattva Capital Corporation (formerly Sattva Capital Inc.), Appellant and Creston Moly Corporation (formerly Georgia Ventures Inc.), Respondent and Attorney General of British Columbia and BCICAC Foundation, Interveners

McLachlin C.J.C., LeBel, Abella, Rothstein, Moldaver, Karakatsanis, Wagner JJ.

Heard: December 12, 2013
Judgment: August 1, 2014
Docket: 35026

Proceedings: reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 554 W.A.C. 114, 326 B.C.A.C. 114, 2 B.L.R. (5th) 1, 36 B.C.L.R. (5th) 71, 2012 BCCA 329, 2012 CarswellBC 2327, Bennett J.A., Kirkpatrick J.A., Neilson J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2011), 2011 CarswellBC 1124, 2011 BCSC 597, 84 B.L.R. (4th) 102, Armstrong J. (B.C. S.C.); and reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 319 D.L.R. (4th) 219, 2010 BCCA 239, 2010 CarswellBC 1210, 7 B.C.L.R. (5th) 227, Levine J.A., Low J.A., Newbury J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2009), 2009 BCSC 1079, 2009 CarswellBC 2096, Greyell J. (B.C. S.C.)

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David Wotherspoon, Gavin R. Cameron, for Intervener, BCICAC Foundation

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

Headnote

Alternative dispute resolution --- Appeal from arbitration awards — Question of law
Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator concluded that stock exchange would have probably valued finder's fee at $0.15 per share under terms of agreement and that SC lost opportunity to sell shares at that value — CM brought application for leave to appeal arbitration award and chambers judge dismissed application as it was not brought on basis of

question of law but question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Alternative dispute resolution --- Appeal from arbitration awards — Leave to appeal — Miscellaneous
Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — CM brought application for leave to appeal arbitration award and chambers judge dismissed application as it was not brought on basis of question of law but on question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of Agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Unless Court places restrictions in order granting leave, order granting leave is "at large" — Appellants may raise issues on appeal that were not set out in leave application — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Business associations --- Powers, rights and liabilities — Contracts by corporations — Miscellaneous
Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was $0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market price definition and "maximum amount" proviso in reasonable manner.

Contracts --- Construction and interpretation — Resolving ambiguities — Reasonableness
Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was $0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in

absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market price definition and "maximum amount" proviso in reasonable manner.

Résolution alternative des conflits --- Appel interjeté à l'encontre de sentences arbitrales — Question de droit
Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu que la bourse aurait probablement évalué les honoraires d'intermédiation à 15 cents l'unité en vertu des termes de l'entente et que SC avait perdu l'occasion de vendre les actions à ce prix — CM a déposé une demande d'autorisation d'appel à l'encontre de la sentence arbitrale et le juge siégeant en son cabinet a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit — Appel interjeté par CM à l'encontre de la décision ayant rejeté la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts a été accueilli — Formation de la Cour d'appel saisie de la demande d'autorisation a conclu que l'interprétation de l'art. 3.1 de l'entente, et en particulier de la stipulation relative au « plafond », constituait une question de droit — Pourvoi de SC formé devant la Cour suprême du Canada accueilli — Approche qui a prévalu par le passé selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit devrait être abandonnée — Même s'il s'était agi d'une question de droit, la formation de la Cour d'appel saisie de la demande d'autorisation aurait dû s'en remettre à la décision de la formation de la Cour suprême saisie de la demande d'autorisation.

Résolution alternative des conflits --- Appel interjeté à l'encontre de sentences arbitrales — Demande d'autorisation d'appel — Divers
Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — CM a déposé une demande d'autorisation d'appel à l'encontre de la sentence arbitrale et le juge siégeant en son cabinet a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit — Appel interjeté par CM à l'encontre de la décision ayant rejeté la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts a été accueilli — Formation de la Cour d'appel saisie de la demande d'autorisation a conclu que l'interprétation de l'art. 3.1 de l'entente, et en particulier de la stipulation relative au « plafond », constituait une question de droit — Pourvoi de SC formé devant la Cour suprême du Canada accueilli — À moins que la Cour n'impose des restrictions dans l'ordonnance accordant l'autorisation, cette ordonnance est de « portée générale » — Appelant peut soulever en appel une question qui n'était pas énoncée dans la demande d'autorisation — Approche qui a prévalu par le passé selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit devrait être abandonnée — Même s'il s'était agi d'une question de droit, la formation de la Cour d'appel saisie de la demande d'autorisation aurait dû s'en remettre à la décision de la formation de la Cour suprême saisie de la demande d'autorisation.

Associations d'affaires --- Pouvoirs, droits et responsabilités — Contrats signés par la société — Questions diverses

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Contrats --- Interprétation — Résolution des ambiguïtés — Caractère raisonnable
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The dispute concerned which date should be used to determine the price of shares and thus the number of shares to which SC was entitled. The arbitrator ruled in favour of SC, and CM sought leave to appeal from the Supreme Court Leave Court, which dismissed the application on the grounds that it did not involve a question of law, but rather mixed fact and law. The Court of Appeal granted CM leave to appeal, holding that it was a question of law. The Supreme Court dismissed the appeal, but the Court of Appeal reversed this decision and found in favour of CM. SC appealed both this decision and the decision of the Court of Appeal Leave Court to the Supreme Court of Canada.

Held: The appeals were allowed.

Per Rothstein J. (McLachlin C.J.C., LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring):

The issue of whether the Court of Appeal Leave Court erred in finding a question of law for the purposes of granting leave to appeal was properly before the Court. While the subject of the appeal was important to the parties, the question was not a question of law within the meaning of s. 31 of the Arbitration Act. Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law. Canadian courts, however, have moved away from this historical approach. The interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding". Questions of law "questions about what the correct legal test is". Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. The fact that the legal system leaves broad scope to tribunals of first instance to resolve issues of limited application supports treating contractual interpretation as a question of mixed fact and law.

The issue whether the proposed appeal was on a question of law was expressly argued before the Leave Courts of both the Supreme Court and Court of Appeal. There was no reason why SC should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to the Supreme Court of Canada. Appellate review of an arbitrator's award will only occur where the requirements of s. 31(2) of the Arbitration Act are met and where the leave court does not exercise its residual discretion to nonetheless deny leave. Even if the Court of Appeal Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the Supreme Court Leave Court's denial of leave to appeal in deference to that court's exercise of judicial discretion. The Court of Appeal Court erred in holding that the Leave Court's comments on the merits of the appeal were binding on it and on the Supreme Court Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case. A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful. This is true even where the determination of whether to grant leave involves a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal. The fact that the Court of Appeal provided its own reasoning as to why it came to the same conclusion as the Leave Court did not vitiate the error.

The arbitrator's decision that the shares should be priced according to the market price definition gave effect to both the market price definition and the "maximum amount" proviso. The arbitrator's interpretation of the agreement, as reconciled the market price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.

Le litige portait sur la date devant servir à déterminer le prix des actions et, ainsi, le nombre d'actions auxquelles SC avait droit. L'arbitre a tranché en faveur de SC, et CM a déposé une demande d'autorisation d'appel auprès de la Cour suprême, laquelle a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit. CM a obtenu l'autorisation d'appeler de la Cour d'appel, laquelle a estimé qu'il s'agissait d'une question de droit. La Cour suprême a rejeté l'appel, mais la Cour d'appel a infirmé cette décision et a tranché en faveur de CM. SC a formé un pourvoi à l'encontre de cette décision et de la décision de la formation de la Cour d'appel saisie de la demande d'autorisation d'appel auprès de la Cour suprême du Canada.

Arrêt: Les pourvois ont été accueillis.

Rothstein, J. (McLachlin, J.C.C., LeBel, Abella, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : C'était à bon droit que la Cour était saisie de la question de savoir si la formation de la Cour d'appel a commis une erreur en concluant à la présence d'une question de droit dans le cadre de la demande d'autorisation d'appel. Bien que la question faisant l'objet du pourvoi était importante, il ne s'agissait pas d'une question de droit au sens de l'art. 31 de l'Arbitration Act. Historiquement, la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit. Les tribunaux canadiens, toutefois, ont abandonné cette approche historique. L'interprétation des contrats a évolué vers une démarche pratique, axée sur le bon sens plutôt que sur des règles de forme en matière d'interprétation. La question prédominante consiste à discerner « l'intention des parties et la portée de l'entente ». Les questions de droit « concernent la détermination du critère juridique applicable ». Or, lorsqu'il s'agit d'interprétation contractuelle, le but de l'exercice consiste à déterminer l'intention objective des parties. En établissant une distinction entre les questions de droit et les questions mixtes de fait et de droit, on vise principalement à restreindre l'intervention de la juridiction d'appel aux affaires qui entraîneraient probablement des répercussions qui ne seraient pas limitées aux parties au litige. Les obligations juridiques issues d'un contrat se limitent, dans la plupart des cas, aux intérêts des parties au litige. Le vaste pouvoir de trancher les questions d'application limitée que notre système judiciaire confère au tribunal administratif siégeant en première instance étaye la proposition selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit.

La question de savoir si l'appel proposé soulevait une question de droit a été expressément débattue devant les formations de la Cour suprême et de la Cour d'appel saisies de la demande d'autorisation. Rien n'empêchait SC de soulever cette question en appel, même si elle ne l'a pas mentionnée dans la demande d'autorisation d'appel qu'elle a présentée à la Cour suprême du Canada. L'appel d'une sentence arbitrale n'est donc entendu que si les critères de l'art. 31(2) de l'Arbitration Act sont remplis et que le tribunal saisi de la demande d'autorisation ne refuse pas néanmoins l'autorisation en vertu de son pouvoir discrétionnaire résiduel. Même si la formation de la Cour d'appel saisie de la demande d'autorisation avait défini une question de droit et qu'il avait été satisfait au critère du risque d'erreur judiciaire, elle aurait dû confirmer la décision de la formation de la Cour suprême saisie de la demande d'autorisation de rejeter cette demande, par égard pour l'exercice du pouvoir discrétionnaire de cette cour. La Cour d'appel saisie de l'appel a commis une erreur en concluant que les commentaires sur le bien-fondé de l'appel formulés par la formation de la Cour d'appel saisie de la demande d'autorisation la liaient et liaient également la formation de la Cour suprême saisie de l'appel. Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond; il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli. Cela vaut même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause. L'autorisation accordée ne saurait lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs. Le fait que la Cour d'appel soit arrivée à la même conclusion que celle saisie de la demande d'autorisation pour des motifs différents n'annule pas l'erreur.

La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donnait effet à cette dernière et à la stipulation relative au « plafond ». L'interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

APPEAL from judgment reported at *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 2012 BCCA 329, 2012 CarswellBC 2327, 36 B.C.L.R. (5th) 71, 2 B.L.R. (5th) 1, 326 B.C.A.C. 114, 554 W.A.C. 114 (B.C. C.A.), reversing dismissal of appeal from arbitrator's decision; APPEAL from judgment reported at *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 2010 BCCA 239, 2010 CarswellBC 1210, 319 D.L.R. (4th) 219, 7 B.C.L.R. (5th) 227 (B.C. C.A.), reversing decision to dismiss application for leave to appeal arbitrator's award of damages.

POURVOI formé à l'encontre d'un jugement publié à *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 2012 BCCA 329, 2012 CarswellBC 2327, 36 B.C.L.R. (5th) 71, 2 B.L.R. (5th) 1, 326 B.C.A.C. 114, 554 W.A.C. 114 (B.C. C.A.), ayant infirmé le rejet d'un appel interjeté à l'encontre d'une sentence arbitrale; POURVOI formé à l'encontre d'un jugement publié à *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 2010 BCCA 239, 2010 CarswellBC 1210, 319 D.L.R. (4th) 219, 7 B.C.L.R. (5th) 227 (B.C. C.A.), ayant infirmé la décision de rejeter la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts.

Rothstein J. **(McLachlin C.J.C. and LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring):**

1 When is contractual interpretation to be treated as a question of mixed fact and law and when should it be treated as a question of law? How is the balance between reviewability and finality of commercial arbitration awards under the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (now the *Arbitration Act*, hereinafter the "*AA*"), to be determined? Can findings made by a court granting leave to appeal with respect to the merits of an appeal bind the court that ultimately decides the appeal? These are three of the issues that arise in this appeal.

I. Facts

2 The issues in this case arise out of the obligation of Creston Moly Corporation (formerly Georgia Ventures Inc.) to pay a finder's fee to Sattva Capital Corporation (formerly Sattva Capital Inc.). The parties agree that Sattva is entitled to a finder's fee of US$1.5 million and is entitled to be paid this fee in shares of Creston, cash or a combination thereof. They disagree on which date should be used to price the Creston shares and therefore the number of shares to which Sattva is entitled.

3 Mr. Hai Van Le, a principal of Sattva, introduced Creston to the opportunity to acquire a molybdenum mining property in Mexico. On January 12, 2007, the parties entered into an agreement (the "Agreement") that required Creston to pay Sattva a finder's fee in relation to the acquisition of this property. The relevant provisions of the Agreement are set out in Appendix I.

4 On January 30, 2007, Creston entered into an agreement to purchase the property for US$30 million. On January 31, 2007, at the request of Creston, trading of Creston's shares on the TSX Venture Exchange ("TSXV") was halted to prevent speculation while Creston completed due diligence in relation to the purchase. On March 26, 2007, Creston announced it intended to complete the purchase and trading resumed the following day.

5 The Agreement provides that Sattva was to be paid a finder's fee equal to the maximum amount that could be paid pursuant to s. 3.3 of Policy 5.1 in the TSXV Policy Manual. Section 3.3 of Policy 5.1 is incorporated by reference into the Agreement at s. 3.1 and is set out in Appendix II of these reasons. The maximum amount pursuant to s. 3.3 of Policy 5.1 in this case is US$1.5 million.

6 According to the Agreement, by default, the fee would be paid in Creston shares. The fee would only be paid in cash or a combination of shares and cash if Sattva made such an election. Sattva made no such election and was therefore entitled to be paid the fee in shares. The finder's fee was to be paid no later than five working days after the closing of the transaction purchasing the molybdenum mining property.

7 The dispute between the parties concerns which date should be used to determine the price of Creston shares and thus the number of shares to which Sattva is entitled. Sattva argues that the share price is dictated by the Market Price definition at s. 2 of the Agreement, i.e. the price of the shares "as calculated on close of business day before the issuance of the press release announcing the Acquisition". The press release announcing the acquisition was released on March 26, 2007. Prior to the halt in trading on January 31, 2007, the last closing price of Creston shares was $0.15. On this interpretation, Sattva would receive approximately 11,460,000 shares (based on the finder's fee of US$1.5 million).

8 Creston claims that the Agreement's "maximum amount" proviso means that Sattva cannot receive cash or shares valued at more than US$1.5 million on the date the fee is payable. The shares were payable no later than five days after May 17, 2007, the closing date of the transaction. At that time, the shares were priced at $0.70 per share. This valuation is based on the price an investment banking firm valued Creston at as part of underwriting a private placement of shares on April 17, 2007. On this interpretation, Sattva would receive approximately 2,454,000 shares, some 9 million fewer shares than if the shares were priced at $0.15 per share.

9 The parties entered into arbitration pursuant to the *AA*. The arbitrator found in favour of Sattva. Creston sought leave to appeal the arbitrator's decision pursuant to s. 31(2) of the *AA*. Leave was denied by the British Columbia Supreme Court (2009 BCSC 1079 (B.C. S.C.) (CanLII) ("SC Leave Court")). Creston successfully appealed this decision and was granted leave to appeal the arbitrator's decision by the British Columbia Court of Appeal (2010 BCCA 239, 7 B.C.L.R. (5th) 227 (B.C. C.A.) ("CA Leave Court")).

10 The British Columbia Supreme Court judge who heard the merits of the appeal (2011 BCSC 597, 84 B.L.R. (4th) 102 (B.C. S.C.) ("SC Appeal Court")) upheld the arbitrator's award. Creston appealed that decision to the British Columbia Court of Appeal (2012 BCCA 329, 36 B.C.L.R. (5th) 71 (B.C. C.A.) ("CA Appeal Court")). That court overturned the SC Appeal Court and found in favour of Creston. Sattva appeals the decisions of the CA Leave Court and CA Appeal Court to this Court.

II. Arbitral Award

11 The arbitrator, Leon Getz, Q.C., found in favour of Sattva, holding that it was entitled to receive its US$1.5 million finder's fee in shares priced at $0.15 per share.

12 The arbitrator based his decision on the Market Price definition in the Agreement:

> What, then, was the "Market Price" within the meaning of the Agreement? The relevant press release is that issued on March 26 .... Although there was no closing price on March 25 (the shares being on that date halted), the "last closing price" within the meaning of the definition was the $0.15 at which the [Creston] shares closed on January 30, the day before trading was halted "pending news" .... This conclusion requires no stretching of the words of the contractual definition; on the contrary, it falls literally within those words. [para. 22]

13 Both the Agreement and the finder's fee had to be approved by the TSXV. Creston was responsible for securing this approval. The arbitrator found that it was either an implied or an express term of the Agreement that Creston would use its best efforts to secure the TSXV's approval and that Creston did not apply its best efforts to this end.

14 As previously noted, by default, the finder's fee would be paid in shares unless Sattva made an election otherwise. The arbitrator found that Sattva never made such an election. Despite this, Creston represented to the TSXV that the finder's fee was to be paid in cash. The TSXV conditionally approved a finder's fee of US$1.5 million to be paid in cash. Sattva first learned that the fee had been approved as a cash payment in early June 2007. When Sattva raised this matter with Creston, Creston responded by saying that Sattva had the choice of taking the finder's fee in cash or in shares priced at $0.70.

15 Sattva maintained that it was entitled to have the finder's fee paid in shares priced at $0.15. Creston asked its lawyer to contact the TSXV to clarify the minimum share price it would approve for payment of the finder's fee. The TSXV confirmed on June 7, 2007 over the phone and August 9, 2007 via email that the minimum share price that could be used to pay the finder's fee was $0.70 per share. The arbitrator found that Creston "consistently misrepresented or at the very least failed to disclose fully the nature of the obligation it had undertaken to Sattva" (para. 56(k)) and "that in the absence of an election otherwise, Sattva is entitled under that Agreement to have that fee paid in shares at $0.15" (para. 56(g)). The arbitrator found that the first time Sattva's position was squarely put before the TSXV was in a letter from Sattva's solicitor on October 9, 2007.

16 The arbitrator found that had Creston used its best efforts, the TSXV could have approved the payment of the finder's fee in shares priced at $0.15 and such a decision would have been consistent with its policies. He determined that there was "a substantial probability that [TSXV] approval would have been given" (para. 81). He assessed that probability at 85 percent.

17 The arbitrator found that Sattva could have sold its Creston shares after a four-month holding period at between $0.40 and $0.44 per share, netting proceeds of between $4,583,914 and $5,156,934. The arbitrator took the average of those two amounts, which came to $4,870,424, and then assessed damages at 85 percent of that number, which came to $4,139,860, and rounded it to $4,140,000 plus costs.

18 After this award was made, Creston made a cash payment of US$1.5 million (or the equivalent in Canadian dollars) to Sattva. The balance of the damages awarded by the arbitrator was placed in the

trust account of Sattva's solicitors.

III. Judicial History

A. British Columbia Supreme Court — Leave to Appeal Decision, 2009 BCSC 1079 (B.C. S.C.)

19 The SC Leave Court denied leave to appeal because it found the question on appeal was not a question of law as required under s. 31 of the *AA*. In the judge's view, the issue was one of mixed fact and law because the arbitrator relied on the "factual matrix" in coming to his conclusion. Specifically, determining how the finder's fee was to be paid involved examining "the TSX's policies concerning the maximum amount of the finder's fee payable, as well as the discretionary powers granted to the Exchange in determining that amount" (para. 35).

20 The judge found that even had he found a question of law was at issue he would have exercised his discretion against granting leave because of Creston's conduct in misrepresenting the status of the finder's fee to the TSXV and Sattva, and "on the principle that one of the objectives of the [*AA*] is to foster and preserve the integrity of the arbitration system" (para. 41).

B. British Columbia Court of Appeal — Leave to Appeal Decision, 2010 BCCA 239 (B.C. C.A.)

21 The CA Leave Court reversed the SC Leave Court and granted Creston's application for leave to appeal the arbitral award. It found the SC Leave Court "err[ed] in failing to find that the arbitrator's failure to address the meaning of s. 3.1 of the Agreement (and in particular the 'maximum amount' provision) raised a question of law" (para. 23). The CA Leave Court decided that the construction of s. 3.1 of the Agreement, and in particular the "maximum amount" proviso, was a question of law because it did not involve reference to the facts of what the TSXV was told or what it decided.

22 The CA Leave Court acknowledged that Creston was "less than forthcoming in its dealings with Mr. Le and the [TSXV]" but said that "these facts are not directly relevant to the question of law it advances on the appeal" (para. 27). With respect to the SC leave judge's reference to the preservation of the integrity of the arbitration system, the CA Leave Court said that the parties would have known when they chose to enter arbitration under the *AA* that an appeal on a question of law was possible. Additionally, while the finality of arbitration is an important factor in exercising discretion, when "a question of law arises on a matter of importance and a miscarriage of justice might be perpetrated if an appeal were not available, the integrity of the process requires, at least in the circumstances of this case, that the right of appeal granted by the legislation also be respected" (para. 29).

C. British Columbia Supreme Court — Appeal Decision, 2011 BCSC 597 (B.C. S.C.)

23 Armstrong J. reviewed the arbitrator's decision on a correctness standard. He dismissed the appeal, holding the arbitrator's interpretation of the Agreement was correct.

24 Armstrong J. found that the plain and ordinary meaning of the Agreement required that the

US$1.5 million fee be paid in shares priced at $0.15. He did not find the meaning to be absurd simply because the price of the shares at the date the fee became payable had increased in relation to the price determined according to the Market Price definition. He was of the view that changes in the price of shares over time are inevitable, and that the parties, as sophisticated business persons, would have reasonably understood a fluctuation in share price to be a reality when providing for a fee payable in shares. According to Armstrong J., it is indeed because of market fluctuations that it is necessary to choose a specific date to price the shares in advance of payment. He found that this was done by defining "Market Price" in the Agreement, and that the fee remained US$1.5 million in $0.15 shares as determined by the Market Price definition regardless of the price of the shares at the date that the fee was payable.

25 According to Armstrong J., that the price of the shares may be more than the Market Price definition price when they became payable was foreseeable as a "natural consequence of the fee agreement" (para. 62). He was of the view that the risk was borne by Sattva, since the price of the shares could increase, but it could also decrease such that Sattva would have received shares valued at less than the agreed upon fee of US$1.5 million.

26 Armstrong J. held that the arbitrator's interpretation which gave effect to both the Market Price definition and the "maximum amount" proviso should be preferred to Creston's interpretation of the agreement which ignored the Market Price definition.

27 In response to Creston's argument that the arbitrator did not consider s. 3.1 of the Agreement which contains the "maximum amount" proviso, Armstrong J. noted that the arbitrator explicitly addressed the "maximum amount" proviso at para. 23 of his decision.

D. British Columbia Court of Appeal — Appeal Decision, 2012 BCCA 329 (B.C. C.A.)

28 The CA Appeal Court allowed Creston's appeal, ordering that the payment of US$1.5 million that had been made by Creston to Sattva on account of the arbitrator's award constituted payment in full of the finder's fee. The court reviewed the arbitrator's decision on a standard of correctness.

29 The CA Appeal Court found that both it and the SC Appeal Court were bound by the findings made by the CA Leave Court. There were two findings that were binding: (1) it would be anomalous if the Agreement allowed Sattva to receive US$1.5 million if it received its fee in cash, but shares valued at approximately $8 million if Sattva took its fee in shares; and (2) the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement.

30 The Court of Appeal found that it was an absurd result to find that Sattva is entitled to an $8 million finder's fee in light of the fact that the "maximum amount" proviso in the Agreement limits the finder's fee to US$1.5 million. The court was of the view that the proviso limiting the fee to US$1.5 million "when paid" should be given paramount effect (para. 47). In its opinion, giving effect to the Market Price definition could not have been the intention of the parties, nor could it have been in accordance with good business sense.

IV. Issues

31 The following issues arise in this appeal:

(a) Is the issue of whether the CA Leave Court erred in granting leave under s. 31(2) of the *AA* properly before this Court?

(b) Did the CA Leave Court err in granting leave under s. 31(2) of the *AA*?

(c) If leave was properly granted, what is the appropriate standard of review to be applied to commercial arbitral decisions made under the *AA*?

(d) Did the arbitrator reasonably construe the Agreement as a whole?

(e) Did the CA Appeal Court err in holding that it was bound by comments regarding the merits of the appeal made by the CA Leave Court?

V. Analysis

A. The Leave Issue Is Properly Before This Court

32 Sattva argues, in part, that the CA Leave Court erred in granting leave to appeal from the arbitrator's decision. In Sattva's view, the CA Leave Court did not identify a question of law, a requirement to obtain leave pursuant to s. 31(2) of the *AA*. Creston argues that this issue is not properly before this Court. Creston makes two arguments in support of this point.

33 First, Creston argues that this issue was not advanced in Sattva's application for leave to appeal to this Court. This argument must fail. Unless this Court places restrictions in the order granting leave, the order granting leave is "at large". Accordingly, appellants may raise issues on appeal that were not set out in the leave application. However, the Court may exercise its discretion to refuse to deal with issues that were not addressed in the courts below, if there is prejudice to the respondent, or if for any other reason the Court considers it appropriate not to deal with a question.

34 Here, this Court's order granting leave to appeal from both the CA Leave Court decision and the CA Appeal Court decision contained no restrictions (2013 CanLII 11315). The issue — whether the proposed appeal was on a question of law — was expressly argued before, and was dealt with in the judgments of, the SC Leave Court and the CA Leave Court. There is no reason Sattva should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to this Court.

35 Second, Creston argues that the issue of whether the CA Leave Court identified a question of law is not properly before this Court because Sattva did not contest this decision before all of the lower courts. Specifically, Creston states that Sattva did not argue that the question on appeal was one of mixed fact and law before the SC Appeal Court and that it conceded the issue on appeal was a question of law before the CA Appeal Court. This argument must also fail. At the SC Appeal Court, it was not open to Sattva to reargue the question of whether leave should have been granted. The SC Appeal Court

was bound by the CA Leave Court's finding that leave should have been granted, including the determination that a question of law had been identified. Accordingly, Sattva could hardly be expected to reargue before the SC Appeal Court a question that had been determined by the CA Leave Court. There is nothing in the *AA* to indicate that Sattva could have appealed the leave decision made by a panel of the Court of Appeal to another panel of the same court. The fact that Sattva did not reargue the issue before the SC Appeal Court or CA Appeal Court does not prevent it from raising the issue before this Court, particularly since Sattva was also granted leave to appeal the CA Leave Court decision by this Court.

36 While this Court may decline to grant leave where an issue sought to be argued before it was not argued in the courts appealed from, that is not this case. Here, whether leave from the arbitrator's decision had been sought by Creston on a question of law or a question of mixed fact and law had been argued in the lower leave courts.

37 Accordingly, the issue of whether the CA Leave Court erred in finding a question of law for the purposes of granting leave to appeal is properly before this Court.

B. The CA Leave Court Erred in Granting Leave Under Section 31(2) of the AA

(1) Considerations Relevant to Granting or Denying Leave to Appeal Under the AA

38 Appeals from commercial arbitration decisions are narrowly circumscribed under the *AA*. Under s. 31(1), appeals are limited to either questions of law where the parties consent to the appeal or to questions of law where the parties do not consent but where leave to appeal is granted. Section 31(2) of the *AA*, reproduced in its entirety in Appendix III, sets out the requirements for leave:

> (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that
>
> (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
>
> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
>
> (c) the point of law is of general or public importance.

39 The B.C. courts have found that the words "may grant leave" in s. 31(2) of the *AA* give the courts judicial discretion to deny leave even where the statutory requirements have been met (*Student Assn. of the British Columbia Institute of Technology v. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122 (B.C. C.A.) ("*BCIT*"), at paras. 25-26). Appellate review of an arbitrator's award will only occur where the requirements of s. 31(2) are met and where the leave court does not exercise its residual discretion to nonetheless deny leave.

40 Although Creston's application to the SC Leave Court sought leave pursuant to s. 31(2)(a), (b) and (c), it appears the arguments before that court and throughout focused on s. 31(2)(a). The SC Leave Court's decision quotes a lengthy passage from *BCIT* that focuses on the requirements of s. 31(2)(a). The SC Leave Court judge noted that both parties conceded the first requirement of s. 31(2)(a): that the issue be of importance to the parties. The CA Leave Court decision expressed concern that denying leave might give rise to a miscarriage of justice — a criterion only found in s. 31(2)(a). Finally, neither the lower courts' leave decisions nor the arguments before this Court reflected arguments about the question of law being important to some class or body of persons of which the applicant is a member (s. 31(2)(b)) or being a point of law of general or public importance (s. 31(2)(c)). Accordingly, the following analysis will focus on s. 31(2)(a).

(2) The Result Is Important to the Parties

41 In order for leave to be granted from a commercial arbitral award, a threshold requirement must be met: leave must be sought on a question of law. However, before dealing with that issue, it will be convenient to quickly address another requirement of s. 31(2)(a) on which the parties agree: whether the importance of the result of the arbitration to the parties justifies the intervention of the court. Justice Saunders explained this criterion in *BCIT* as requiring that the result of the arbitration be "sufficiently important", in terms of principle or money, to the parties to justify the expense and time of court proceedings (para. 27). The parties in this case have agreed that the result of the arbitration is of importance to each of them. In view of the relatively large monetary amount in dispute and in light of the fact that the parties have agreed that the result is important to them, I accept that the importance of the result of the arbitration to the parties justifies the intervention of the court. This requirement of s. 31(2)(a) is satisfied.

(3) The Question Under Appeal Is Not a Question of Law

(a) When Is Contractual Interpretation a Question of Law?

42 Under s. 31 of the *AA*, the issue upon which leave is sought must be a question of law. For the purpose of identifying the appropriate standard of review or, as is the case here, determining whether the requirements for leave to appeal are met, reviewing courts are regularly required to determine whether an issue decided at first instance is a question of law, fact, or mixed fact and law.

43 Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law (*King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63 (Man. C.A.), at para. 20, *per* Steel J.A.; K. Lewison, *The Interpretation of Contracts* (5th ed. 2011 & Supp. 2013), at pp. 173-76; and G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 125-26). This rule originated in England at a time when there were frequent civil jury trials and widespread illiteracy. Under those circumstances, the interpretation of written documents had to be considered questions of law because only the judge could be assured to be literate and therefore capable of reading the contract (Hall, at p. 126; and Lewison, at pp. 173-74).

44 This historical rationale no longer applies. Nevertheless, courts in the United Kingdom continue to treat the interpretation of a written contract as always being a question of law (*Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945 (U.K. H.L.), at paras. 58 and 82-83; and Lewison, at pp. 173-77). They do this despite the fact that U.K. courts consider the surrounding circumstances, a concept addressed further below, when interpreting a written contract (*Prenn v. Simmonds*, [1971] 3 All E.R. 237 (U.K. H.L.); and *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (U.K. H.L.)).

45 In Canada, there remains some support for the historical approach. See for example *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (Alta. C.A.) (CanLII), at para. 10; *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84 (Man. C.A.), at para. 26; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221 (Alta. C.A.), at paras. 11-12; and *Costco Wholesale Canada Ltd. v. R.*, 2012 FCA 160, 431 N.R. 78 (F.C.A.), at para. 34. However, some Canadian courts have abandoned the historical approach and now treat the interpretation of written contracts as an exercise involving either a question of law or a question of mixed fact and law. See for example *WCI Waste Conversion Inc. v. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1 (P.E.I. C.A.), at para. 11; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98 (B.C. C.A.), at para. 13; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230 (B.C. C.A.), at para. 44; *Plan Group v. Bell Canada*, 2009 ONCA 548, 96 O.R. (3d) 81 (Ont. C.A.), at paras. 22-23 (majority reasons, *per* Blair J.A.) and paras. 133-35 (*per* Gillese J.A. in dissent, but not on this point); and *King*, at paras. 20-23.

46 The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 26 and 31-36.

47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744 (S.C.C.), at para. 27 *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 64-65 *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300 (Man. C.A.), at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 All E.R. 98 (U.K. H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

49 As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam Inc*. Questions of law "are questions about what the correct legal test is" (*Southam Inc.*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam Inc.*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).

50 With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

51 The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam Inc.* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal:

> If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is

> not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

52 Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

53 Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

54 However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:

> Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" .... [para. 36]

55 Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.

(b) The Role and Nature of the "Surrounding Circumstances"

56 I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the *Civil Code of Québec*.

57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62 (B.C. C.A.)).

58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

(c) Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule

59 It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.), at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at pp. 341-42, *per* Sopinka J.).

60 The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

61 Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (Ont. C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

(d) Application to the Present Case

62 In this case, the CA Leave Court granted leave on the following issue: "Whether the Arbitrator erred in law in failing to construe the whole of the Finder's Fee Agreement ..." (A.R., vol. 1, at p. 62).

63 As will be explained below, while the requirement to construe a contract as a whole is a question of law that could — if extricable — satisfy the threshold requirement under s. 31 of the *AA*, I do not think this question was properly extricated in this case.

64 I accept that a fundamental principle of contractual interpretation is that a contract must be construed as a whole (McCamus, at pp. 761-62; and Hall, at p. 15). If the arbitrator did not take the "maximum amount" proviso into account, as alleged by Creston, then he did not construe the Agreement as a whole because he ignored a specific and relevant provision of the Agreement. This is a question of law that would be extricable from a finding of mixed fact and law.

65 However, it appears that the arbitrator did consider the "maximum amount" proviso. Indeed, the CA Leave Court acknowledges that the arbitrator had considered that proviso, since it notes that he turned his mind to the US$1.5 million maximum amount, an amount that can only be calculated by referring to the TSXV policy referenced in the "maximum amount" proviso in s. 3.1 of the Agreement. As I read its reasons, rather than being concerned with whether the arbitrator ignored the maximum amount proviso, which is what Creston alleges in this Court, the CA Leave Court decision focused on how the arbitrator construed s. 3.1 of the Agreement, which included the maximum amount proviso (paras. 25-26). For example, the CA Leave Court expressed concern that the arbitrator did not address the "incongruity" in the fact that the value of the fee would vary "hugely" depending on whether it was taken in cash or shares (para. 25).

66 With respect, the CA Leave Court erred in finding that the construction of s. 3.1 of the Agreement constituted a question of law. As explained by Justice Armstrong in the SC Appeal Court decision, construing s. 3.1 and taking account of the proviso required relying on the relevant surrounding circumstances, including the sophistication of the parties, the fluctuation in share prices, and the nature of the risk a party assumes when deciding to accept a fee in shares as opposed to cash. Such an exercise raises a question of mixed fact and law. There being no question of law extricable from the mixed fact and law question of how s. 3.1 and the proviso should be interpreted, the CA Leave Court erred in granting leave to appeal.

67 The conclusion that Creston's application for leave to appeal raised no question of law would be sufficient to dispose of this appeal. However, as this Court rarely has the opportunity to address appeals of arbitral awards, it is, in my view, useful to explain that, even had the CA Leave Court been correct in finding that construction of s. 3.1 of the Agreement constituted a question of law, it should have

nonetheless denied leave to appeal as the application also failed the miscarriage of justice and residual discretion stages of the leave analysis set out in s. 31(2)(a) of the *AA*.

(4) May Prevent a Miscarriage of Justice

(a) Miscarriage of Justice for the Purposes of Section 31(2)(a) of the AA

68 Once a question of law has been identified, the court must be satisfied that the determination of that point of law on appeal "may prevent a miscarriage of justice" in order for it to grant leave to appeal pursuant to s. 31(2)(a) of the *AA*. The first step in this analysis is defining miscarriage of justice for the purposes of s. 31(2)(a).

69 In *BCIT*, Justice Saunders discussed the miscarriage of justice requirement under s. 31(2)(a). She affirmed the definition set out in *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (B.C. C.A.), which required the error of law in question to be a material issue that, if decided differently, would lead to a different result: "... if the point of law were decided differently, the arbitrator would have been led to a different result. In other words, was the alleged error of law material to the decision; does it go to its heart?" (*BCIT*, at para. 28). See also *Cusson v. Quan*, 2009 SCC 62, [2009] 3 S.C.R. 712 (S.C.C.), which discusses the test of whether "some substantial wrong or miscarriage of justice has occurred" in the context of a civil jury trial (para. 43).

70 Having regard to *BCIT* and *Quan*, I am of the opinion that in order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a) of the *AA*, an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case.

71 According to this standard, a determination of a point of law "may prevent a miscarriage of justice" only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of "may prevent a miscarriage of justice" because there would be no chance that the outcome of the appeal would cause a change in the final result of the case.

72 At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an error of law was made. However, some preliminary consideration of the question of law is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case.

73 *BCIT* sets the threshold for this preliminary assessment of the appeal as "more than an arguable point" (para. 30). With respect, once an arguable point has been made out, it is not apparent what more is required to meet the "more than an arguable point" standard. Presumably, the leave judge would have to delve more deeply into the arguments around the question of law on appeal than would be appropriate at the leave stage to find *more* than an arguable point. Requiring this closer examination of the point of law, in my respectful view, blurs the line between the function of the court considering the leave application and the court hearing the appeal.

74 In my opinion, the appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit. The arguable merit standard is often used to assess, on a preliminary

basis, the merits of an appeal at the leave stage (see for example *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262 (Man. C.A.), at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164 (Alta. C.A.) (CanLII), at para. 7). "Arguable merit" is a well-known phrase whose meaning has been expressed in a variety of ways: "a reasonable prospect of success" (*Quick Auto Lease Inc.*, at para. 5; and *Enns v. Hansey*, 2013 MBCA 23 (Man. C.A.) (CanLII), at para. 2); "some hope of success" and "sufficient merit" (*R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174 (P.E.I. C.A.), at para. 11); and "credible argument" (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270 (Sask. C.A. [In Chambers]), at para. 8). In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law. In order to decide whether the award should be set aside, a more thorough examination is necessary and that examination is appropriately conducted by the court hearing the appeal once leave is granted.

75 Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the applicable standard of review. As I will later explain, reasonableness will almost always apply to commercial arbitrations conducted pursuant to the *AA*, except in the rare circumstances where the question is one that would attract a correctness standard, such as a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise. Therefore, the leave inquiry will ordinarily ask whether there is any arguable merit to the position that the arbitrator's decision on the question at issue is unreasonable, keeping in mind that the decision-maker is not required to refer to all the arguments, provisions or jurisprudence or to make specific findings on each constituent element, for the decision to be reasonable (*N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), at para. 16). Of course, the leave court's assessment of the standard of review is only preliminary and does not bind the court which considers the merits of the appeal. As such, this should not be taken as an invitation to engage in extensive arguments or analysis about the standard of review at the leave stage.

76 In *BCIT*, Saunders J.A. considered the stage of s. 31(2)(a) of the *AA* at which an examination of the merits of the appeal should occur. At the behest of one of the parties, she considered examining the merits under the miscarriage of justice criterion. However, she decided that a consideration of the merits was best done at the residual discretion stage. Her reasons indicate that this decision was motivated by the desire to take a consistent approach across s. 31(2)(a), (b) and (c):

> Where, then, if anywhere, does consideration of the merits of the the appeal belong? Mr. Roberts for the Student Association contends that any consideration of the merits of the appeal belongs in the determination of whether a miscarriage of justice may occur; that is, under the second criterion. I do not agree. In my view, the apparent merit or lack of merit of an appeal is part of the exercise of the residual discretion, and applies equally to all three subsections, (*a*) through (*c*). Just as an appeal woefully lacking in merit should not attract leave under (*b*) (of importance to a class of people including the applicant) or (*c*) (of general or public importance), so too it should not attract leave under (*a*). Consideration of the merits, for consistency in the section as a whole, should be made as part of the exercise of residual discretion. [para. 29]

77 I acknowledge the consistency rationale. However, in my respectful opinion, the desire for a consistent approach to s. 31(2)(a), (b) and (c) cannot override the text of the legislation. Unlike s.

31(2)(b) and (c), s. 31(2)(a) requires an assessment to determine whether allowing leave to appeal "may prevent a miscarriage of justice". It is my opinion that a preliminary assessment of the question of law is an implicit component in a determination of whether allowing leave "may prevent a miscarriage of justice".

78 However, in an application for leave to appeal pursuant to s. 31(2)(b) or (c), neither of which contain a miscarriage of justice requirement, I agree with Justice Saunders in *BCIT* that a preliminary examination of the merits of the question of law should be assessed at the residual discretion stage of the analysis as considering the merits of the proposed appeal will always be relevant when deciding whether to grant leave to appeal under s. 31.

79 In sum, in order to establish that "the intervention of the court and the determination of the point of law may prevent a miscarriage of justice" for the purposes of s. 31(2)(a) of the *AA*, an applicant must demonstrate that the point of law on appeal is material to the final result and has arguable merit.

(b) Application to the Present Case

80 The CA Leave Court found that the arbitrator may have erred in law by not interpreting the Agreement as a whole, specifically in ignoring the "maximum amount" proviso. Accepting that this is a question of law for these purposes only, a determination of the question would be material because it could change the ultimate result arrived at by the arbitrator. The arbitrator awarded $4.14 million in damages on the basis that there was an 85 percent chance the TSXV would approve a finder's fee paid in $0.15 shares. If Creston's argument is correct and the $0.15 share price is foreclosed by the "maximum amount" proviso, damages would be reduced to US$1.5 million, a significant reduction from the arbitrator's award of damages.

81 As s. 31(2)(a) of the *AA* is the relevant provision in this case, a preliminary assessment of the question of law will be conducted in order to determine if a miscarriage of justice could have occurred had Creston been denied leave to appeal. Creston argues that the fact that the arbitrator's conclusion results in Sattva receiving shares valued at considerably more than the US$1.5 million maximum dictated by the "maximum amount" proviso is evidence of the arbitrator's failure to consider that proviso.

82 However, the arbitrator did refer to s. 3.1, the "maximum amount" proviso, at two points in his decision: paras. 18 and 23(a). For example, at para. 23 he stated:

> In summary, then, as of March 27, 2007 it was clear and beyond argument that under the Agreement:
>
> (a) Sattva was entitled to a fee equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange — section 3.1. It is common ground that the quantum of this fee is US$1,500,000.
>
> (b) The fee was payable in shares based on the Market Price, as defined in the Agreement, unless Sattva elected to take it in cash or a combination of cash and shares.

(c) The Market Price, as defined in the Agreement, was $0.15.

[Emphasis added.]

83 Although the arbitrator provided no express indication that he considered how the "maximum amount" proviso interacted with the Market Price definition, such consideration is implicit in his decision. The only place in the contract that specifies that the amount of the fee is calculated as US$1.5 million is the "maximum amount" proviso's reference to s. 3.3 of the TSXV Policy 5.1. The arbitrator acknowledged that the quantum of the fee is US$1.5 million and awarded Sattva US$1.5 million in shares priced at $0.15. Contrary to Creston's argument that the arbitrator failed to consider the proviso in construing the Agreement, it is apparent on a preliminary examination of the question that the arbitrator did in fact consider the "maximum amount" proviso.

84 Accordingly, even had the CA Leave Court properly identified a question of law, leave to appeal should have been denied. The requirement that there be arguable merit that the arbitrator's decision was unreasonable is not met and the miscarriage of justice threshold was not satisfied.

(5) Residual Discretion to Deny Leave

(a) Considerations in Exercising Residual Discretion in a Section 31(2)(a) Leave Application

85 The B.C. courts have found that the words "may grant leave" in s. 31(2) of the *AA* confer on the court residual discretion to deny leave even where the requirements of s. 31(2) are met (*BCIT*, at paras. 9 and 26). In *BCIT*, Saunders J.A. sets out a non-exhaustive list of considerations that would be applicable to the exercise of discretion (para. 31):

1. "the apparent merits of the appeal";

2. "the degree of significance of the issue to the parties, to third parties and to the community at large";

3. "the circumstances surrounding the dispute and adjudication including the urgency of a final answer";

4. "other temporal considerations including the opportunity for either party to address the result through other avenues";

5. "the conduct of the parties";

6. "the stage of the process at which the appealed decision was made";

7. "respect for the forum of arbitration, chosen by the parties as their means of resolving disputes"; and

8. "recognition that arbitration is often intended to provide a speedy and final dispute mechanism, tailor-made for the issues which may face the parties to the arbitration agreement".

86 I agree with Justice Saunders that it is not appropriate to create what she refers to as an "immutable checklist" of factors to consider in exercising discretion under s. 31(2) (*BCIT*, at para. 32). However, I am unable to agree that all the listed considerations are applicable at this stage of the analysis.

87 In exercising its statutorily conferred discretion to deny leave to appeal pursuant to s. 31(2)(a), a court should have regard to the traditional bases for refusing discretionary relief: the parties' conduct, the existence of alternative remedies, and any undue delay (*Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 S.C.R. 326 (S.C.C.), at pp. 364-67). Balance of convenience considerations are also involved in determining whether to deny discretionary relief (*MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 (S.C.C.), at para. 52). This would include the urgent need for a final answer.

88 With respect to the other listed considerations and addressed in turn below, it is my opinion that they have already been considered elsewhere in the s. 31(2)(a) analysis or are more appropriately considered elsewhere under s. 31(2). Once considered, these matters should not be assessed again under the court's residual discretion.

89 As discussed above, in s. 31(2)(a), a preliminary assessment of the merits of the question of law at issue in the leave application is to be considered in determining the miscarriage of justice question. The degree of significance of the issue to the parties is covered by the "importance of the result of the arbitration to the parties" criterion in s. 31(2)(a). The degree of significance of the issue to third parties and to the community at large should not be considered under s. 31(2)(a) as the *AA* sets these out as separate grounds for granting leave to appeal under s. 31(2)(b) and (c). Furthermore, respect for the forum of arbitration chosen by the parties is a consideration that animates the legislation itself and can be seen in the high threshold to obtain leave under s. 31(2)(a). Recognition that arbitration is often chosen as a means to obtain a fast and final resolution tailor-made for the issues is already reflected in the urgent need for a final answer.

90 As for the stage of the process at which the decision sought to be appealed was made, it is not a consideration relevant to the exercise of the court's residual discretion to deny leave under s. 31(2)(a). This factor seeks to address the concern that granting leave to appeal an interlocutory decision may be premature and result in unnecessary fragmentation and delay of the legal process (D. J. M. Brown and J. M. Evans, with the assistance of C. E. Deacon, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 3-67 to 3-76). However, any such concern will have been previously addressed by the leave court in its analysis of whether a miscarriage of justice may arise; more specifically, whether the interlocutory issue has the potential to affect the final result. As such, the above-mentioned concerns should not be considered anew.

91 In sum, a non-exhaustive list of discretionary factors to consider in a leave application under s. 31(2)(a) of the *AA* would include:

- conduct of the parties;
- existence of alternative remedies;

- undue delay; and
- the urgent need for a final answer.

92 These considerations could, where applicable, be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria of s. 31(2)(a) have been met. However, courts should exercise such discretion with caution. Having found an error of law and, at least with respect to s. 31(2)(a), a potential miscarriage of justice, these discretionary factors must be weighed carefully before an otherwise eligible appeal is rejected on discretionary grounds.

(b) Application to the Present Case

93 The SC Leave Court judge denied leave on the basis that there was no question of law. Even had he found a question of law, the SC Leave Court judge stated that he would have exercised his residual discretion to deny leave for two reasons: first, because of Creston's conduct in misrepresenting the status of the finder's fee issue to the TSXV and Sattva; and second, "on the principle that one of the objectives of the [*AA*] is to foster and preserve the integrity of the arbitration system" (para. 41). The CA Leave Court overruled the SC Leave Court on both of these discretionary grounds.

94 For the reasons discussed above, fostering and preserving the integrity of the arbitral system should not be a discrete discretionary consideration under s. 31(2)(a). While the scheme of s. 31(2) recognizes this objective, the exercise of discretion must pertain to the facts and circumstances of a particular case. This general objective is not a discretionary matter for the purposes of denying leave.

95 However, conduct of the parties is a valid consideration in the exercise of the court's residual discretion under s. 31(2)(a). A discretionary decision to deny leave is to be reviewed with deference by an appellate court. A discretionary decision should not be interfered with merely because an appellate court would have exercised the discretion differently (*R. c. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509 (S.C.C.), at paras. 18 and 30). An appellate court is only justified in interfering with a lower court judge's exercise of discretion if that judge misdirected himself or if his decision is so clearly wrong as to amount to an injustice (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651 (S.C.C.), at para. 15; and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297 (S.C.C.), at para. 117).

96 Here, the SC Leave Court relied upon a well-accepted consideration in deciding to deny discretionary relief: the misconduct of Creston. The CA Leave Court overturned this decision on the grounds that Creston's conduct was "not directly relevant to the question of law" advanced on appeal (at para. 27).

97 The CA Leave Court did not explain why misconduct need be directly relevant to a question of law for the purpose of denying leave. I see nothing in s. 31(2) of the *AA* that would limit a leave judge's exercise of discretion in the manner suggested by the CA Leave Court. My reading of the jurisprudence does not support the view that misconduct must be directly relevant to the question to be decided by the court.

98 In *Homex Realty & Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011 (S.C.C.), at pp. 1037-38, misconduct by a party not directly relevant to the question at issue before the court resulted in denial of a remedy. The litigation in *Homex* arose out of a disagreement regarding whether the purchaser of lots in a subdivision, Homex, had assumed the obligations of the vendor under a subdivision agreement to provide "all the requirements, financial and otherwise" for the installation of municipal services on a parcel of land that had been subdivided (pp. 1015-16). This Court determined that Homex had not been accorded procedural fairness when the municipality passed a by-law related to the dispute (p. 1032). Nevertheless, discretionary relief to quash the by-law was denied because, among other things, Homex had sought "throughout all these proceedings to avoid the burden associated with the subdivision of the lands" that it owned (p. 1037), even though the Court held that Homex knew this obligation was its responsibility (pp. 1017-19). This conduct was related to the dispute that gave rise to the litigation, but not to the question of whether the by-law was enacted in a procedurally fair manner. Accordingly, I read *Homex* as authority for the proposition that misconduct related to the dispute that gave rise to the proceedings may justify the exercise of discretion to refuse the relief sought, in this case refusing to grant leave to appeal.

99 Here, the arbitrator found as a fact that Creston misled the TSXV and Sattva regarding "the nature of the obligation it had undertaken to Sattva by representing that the finder's fee was payable in cash" (para. 56(k)). While this conduct is not tied to the question of law found by the CA Leave Court, it is tied to the arbitration proceeding convened to determine which share price should be used to pay Sattva's finder's fee. The SC Leave Court was entitled to rely upon such conduct as a basis for denying leave pursuant to its residual discretion.

100 In the result, in my respectful opinion, even if the CA Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the SC Leave Court's denial of leave to appeal in deference to that court's exercise of judicial discretion.

101 Although the CA Leave Court erred in granting leave, these protracted proceedings have nonetheless now reached this Court. In light of the fact that the true concern between the parties is the merits of the appeal — that is how much the Agreement requires Creston to pay Sattva — and that the courts below differed significantly in their interpretation of the Agreement, it would be unsatisfactory not to address the very dispute that has given rise to these proceedings. I will therefore proceed to consider the three remaining questions on appeal as if leave to appeal had been properly granted.

C. Standard of Review Under the AA

102 I now turn to consideration of the decisions of the appeal courts. It is first necessary to determine the standard of review of the arbitrator's decision in respect of the question on which the CA Leave Court granted leave: whether the arbitrator construed the finder's fee provision in light of the Agreement as a whole, particularly, whether the finder's fee provision was interpreted having regard for the "maximum amount" proviso.

103 At the outset, it is important to note that the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which sets out standards of review of the decisions of many statutory tribunals in British Columbia (see ss. 58 and 59), does not apply in the case of arbitrations under the *AA*.

104 Appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal. For example, for the most part, parties engage in arbitration by mutual choice, not by way of a statutory process. Additionally, unlike statutory tribunals, the parties to the arbitration select the number and identity of the arbitrators. These differences mean that the judicial review framework developed in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), and the cases that followed it is not entirely applicable to the commercial arbitration context. For example, the *AA* forbids review of an arbitrator's factual findings. In the context of commercial arbitration, such a provision is absolute. Under the *Dunsmuir* judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference (*Dunsmuir*, at para. 31).

105 Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. Both involve a court reviewing the decision of a non-judicial decision-maker. Additionally, as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties. For these reasons, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

106 *Dunsmuir* and the post-*Dunsmuir* jurisprudence confirm that it will often be possible to determine the standard of review by focusing on the nature of the question at issue (see for example *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), at para. 44). In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (*A.T.A.*, at para. 30). The question at issue here, whether the arbitrator interpreted the Agreement as a whole, does not fall into one of those categories. The relevant portions of the *Dunsmuir* analysis point to a standard of review of reasonableness in this case.

D. The Arbitrator Reasonably Construed the Agreement as a Whole

107 For largely the reasons outlined by Justice Armstrong in paras. 57-75 of the SC Appeal Court decision, in my respectful opinion, in determining that Sattva is entitled to be paid its finder's fee in shares priced at $0.15 per share, the arbitrator reasonably construed the Agreement as a whole. Although Justice Armstrong conducted a correctness review of the arbitrator's decision, his reasons amply demonstrate the reasonableness of that decision. The following analysis is largely based upon his reasoning.

108 The question that the arbitrator had to decide was which date should be used to determine the price of the shares used to pay the finder's fee: the date specified in the Market Price definition in the Agreement or the date the finder's fee was to be paid?

109 The arbitrator concluded that the price determined by the Market Price definition prevailed, i.e. $0.15 per share. In his view, this conclusion followed from the words of the Agreement and was "clear and beyond argument" (para. 23). Apparently, because he considered this issue clear, he did not offer extensive reasons in support of his conclusion.

110 In *N.L.N.U.*, Abella J. cites Professor David Dyzenhaus to explain that, when conducting a reasonableness review, it is permissible for reviewing courts to supplement the reasons of the original decision-maker as part of the reasonableness analysis:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added by Abella J.; para. 12.]
>
> (Quotation from D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304.)

Accordingly, Justice Armstrong's explanation of the interaction between the Market Price definition and the "maximum amount" proviso can be considered a supplement to the arbitrator's reasons.

111 The two provisions at issue here are the Market Price definition and the "maximum amount" proviso:

> **2. DEFINITIONS**
>
> **"Market Price"** for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

And:

> **3. FINDER'S FEE**
>
> 3.1 ... the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations.

[Emphasis added.]

112 Section 3.1 entitles Sattva to be paid a finder's fee in shares based on the "Market Price". Section 2 of the Agreement states that Market Price for companies listed on the TSXV should be "calculated on close of business day before the issuance of the press release announcing the Acquisition". In this case, shares priced on the basis of the Market Price definition would be $0.15 per share. The words "provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations" in s. 3.1 of the Agreement constitute the "maximum amount" proviso. This proviso limits the amount of the finder's fee. The maximum finder's fee in this case is US$1.5 million (see s. 3.3 of the TSXV Policy 5.1 in Appendix II).

113 While the "maximum amount" proviso limits the amount of the finder's fee, it does not affect the Market Price definition. As Justice Armstrong explained, the Market Price definition acts to fix the date at which one medium of payment (US$) is transferred into another (shares):

> The medium for payment of the finder's fee is clearly established by the fee agreement. The market value of those shares at the time that the parties entered into the fee agreement was unknown. The respondent analogizes between payment of the $1.5 million US finder's fee in shares and a hypothetical agreement permitting payment of $1.5 million US in Canadian dollars. Both agreements would contemplate a fee paid in different currencies. The exchange rate of the US and Canadian dollar would be fixed to a particulate date, as is the value of the shares by way of the Market Price in the fee agreement. That exchange rate would determine the number of Canadian dollars paid in order to satisfy the $1.5 million US fee, as the Market Price does for the number of shares paid in relation to the fee. The Canadian dollar is the form of the fee payment, as are the shares. Whether the Canadian dollar increased or decreased in value after the date on which the exchange rate is based is irrelevant. The amount of the fee paid remains $1.5 million US, payable in the number of Canadian dollars (or shares) equal to the amount of the fee based on the value of that currency on the date that the value is determined.
>
> (SC Appeal Court decision, at para. 71)

114 Justice Armstrong explained that Creston's position requires the Market Price definition to be ignored and for the shares to be priced based on the valuation done in anticipation of a private placement.

115 However, nothing in the Agreement expresses or implies that compliance with the "maximum amount" proviso should be reassessed at a date closer to the payment of the finder's fee. Nor is the basis for the new valuation, in this case a private placement, mentioned or implied in the Agreement. To accept Creston's interpretation would be to ignore the words of the Agreement which provide that the "finder's fee is to be paid in shares of the Company based on Market Price".

116 The arbitrator's decision that the shares should be priced according to the Market Price definition gives effect to both the Market Price definition and the "maximum amount" proviso. The arbitrator's interpretation of the Agreement, as explained by Justice Armstrong, achieves this goal by

reconciling the Market Price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.

117 As Justice Armstrong explained, setting the share price in advance creates a risk that makes selecting payment in shares qualitatively different from choosing payment in cash. There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both Creston and Sattva would have been aware of this as sophisticated business parties.

118 By accepting payment in shares, Sattva was accepting that it was subject to the volatility of the market. If Creston's share price had fallen, Sattva would still have been bound by the share price determined according to the Market Price definition resulting in it receiving a fee paid in shares with a market value of less than the maximum amount of US$1.5 million. It would make little sense to accept the risk of the share price decreasing without the possibility of benefitting from the share price increasing. As Justice Armstrong stated:

> It would be inconsistent with sound commercial principles to insulate the appellant from a rise in share prices that benefitted the respondent at the date that the fee became payable, when such a rise was foreseeable and ought to have been addressed by the appellant, just as it would be inconsistent with sound commercial principles, and the terms of the fee agreement, to increase the number of shares allocated to the respondent had their value decreased relative to the Market Price by the date that the fee became payable. Both parties accepted the possibility of a change in the value of the shares after the Market Price was determined when entering into the fee agreement.
>
> (SC Appeal Court decision, at para. 70)

119 For these reasons, the arbitrator did not ignore the "maximum amount" proviso. The arbitrator's reasoning, as explained by Justice Armstrong, meets the reasonableness threshold of justifiability, transparency and intelligibility (*Dunsmuir*, at para. 47).

E. Appeal Courts Are Not Bound by Comments on the Merits of the Appeal Made by Leave Courts

120 The CA Appeal Court held that it and the SC Appeal Court were bound by the findings made by the CA Leave Court regarding not simply the decision to grant leave to appeal, but also the merits of the appeal. In other words, it found that the SC Appeal Court erred in law by ignoring the findings of the CA Leave Court regarding the merits of the appeal.

121 The CA Appeal Court noted two specific findings regarding the merits of the appeal that it held were binding on it and the SC Appeal Court: (1) it would be anomalous if the Agreement allowed Sattva

to receive US$1.5 million if it received its fee in cash, but allowed it to receive shares valued at approximately $8 million if Sattva received its fee in shares; and (2) that the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement:

> The [SC Appeal Court] judge found the arbitrator had expressly addressed the maximum amount payable under paragraph 3.1 of the Agreement and that he was correct.
>
> This finding is contrary to the remarks of Madam Justice Newbury in the earlier appeal that, if Sattva took its fee in shares valued at $0.15, it would receive a fee having a value at the time the fee became payable of over $8 million. If the fee were taken in cash, the amount payable would be $1.5 million US. Newbury J.A. specifically held that the arbitrator did not note this anomaly and did not address the meaning of paragraph 3.1 of the Agreement.
>
> The [SC Appeal Court] judge was bound to accept those findings. Similarly, absent a five-judge division in this appeal, we must also accept those findings. [paras. 42-44]

122 With respect, the CA Appeal Court erred in holding that the CA Leave Court's comments on the merits of the appeal were binding on it and on the SC Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at para. 88). A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful (*Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310 (B.C. C.A.), at para. 27, leave to appeal refused, [2013] 3 S.C.R. viii (note) (S.C.C.)). This is true even where the determination of whether to grant leave involves, as in this case, a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal (*Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566 (Ont. C.A.), at para. 32).

123 Creston concedes this point but argues that the CA Appeal Court's finding that it was bound by the CA Leave Court was inconsequential because the CA Appeal Court came to the same conclusion on the merits as the CA Leave Court based on separate and independent reasoning.

124 The fact that the CA Appeal Court provided its own reasoning as to why it came to the same conclusion as the CA Leave Court does not vitiate the error. Once the CA Appeal Court treated the CA Leave Court's reasons on the merits as binding, it could hardly have come to any other decision. As counsel for Sattva pointed out, treating the leave decision as binding would render an appeal futile.

VI. Conclusion

125 The CA Leave Court erred in granting leave to appeal in this case. In any event, the arbitrator's decision was reasonable. The appeal from the judgments of the Court of Appeal for British Columbia dated May 14, 2010 and August 7, 2012 is allowed with costs throughout and the arbitrator's award is reinstated.

Appeals allowed.
Pourvois accueillis.

Appendix I

Relevant Provisions of the Sattva-Creston Finder's Fee Agreement

(a) "Market Price" definition:

2. DEFINITIONS

"Market Price" for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

(b) Finder's fee provision (which contains the "maximum amount" proviso):

3. FINDER'S FEE

3.1 ... the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations.

Appendix II

Section 3.3 of TSX Venture Exchange Policy 5.1: Loans, Bonuses, Finder's Fees and Commissions

3.3 Finder's Fee Limitations

The finder's fee limitations apply if the benefit to the Issuer is an asset purchase or sale, joint venture agreement, or if the benefit to the Issuer is not a specific financing. The consideration should be stated both in dollars and as a percentage of the value of the benefit received. Unless there are unusual circumstances, the finder's fee should not exceed the following percentages:

Benefit	Finder's Fee
On the first $300,000	Up to 10%
From $300,000 to $1,000,000	Up to 7.5%
From $1,000,000 and over	Up to 5%

As the dollar value of the benefit increases, the fee or commission, as a percentage of that dollar value should generally decrease.

Appendix III

Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (as it read on January 12, 2007) (now the Arbitration

Act)

Appeal to the court
31

(1) A party to an arbitration may appeal to the court on any question of law arising out of the award if

(a) all of the parties to the arbitration consent, or

(b) the court grants leave to appeal.

(2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that

(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,

(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(c) the point of law is of general or public importance.

(3) If the court grants leave to appeal under this section, it may attach conditions to the order granting leave that it considers just.

(4) On an appeal to the court, the court may

(a) confirm, amend or set aside the award, or

(b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

End of Document

TAB 7

Case Name:

Olivieri v. Sherman

Between
Nancy Olivieri, (Plaintiff/Appellant), and
Barry Sherman, Jack M. Kay and Apotex Inc.,
(Defendants/Respondents)

[2007] O.J. No. 2598

2007 ONCA 491

86 O.R. (3d) 778

284 D.L.R. (4th) 516

225 O.A.C. 227

159 A.C.W.S. (3d) 364

2007 CarswellOnt 4207

Docket: C45922

Ontario Court of Appeal
Toronto, Ontario

M. Rosenberg, E.E. Gillese and S.E. Lang JJ.A.

Heard: May 24, 2007.
Judgment: July 3, 2007.

(56 paras.)

Civil procedure -- Settlements -- Enforceability -- What constitutes -- Appeal by the plaintiff from a decision dismissing her motion to enforce an alleged settlement agreement -- Appellant had commenced various defamation actions -- Appellant sought $20 million in general damages and $10 million and aggravated and punitive damages -- Towards the end of the second day of mediation, the respondents made a handwritten counter-offer to the appellant on three sheets of

"flip chart" paper -- Appellant accepted counter-offer within specified 48-hour window -- Respondents thereafter claimed that there was no settlement agreement -- Appeal allowed -- Parties had a mutual intention to create a legally-binding agreement on all essential terms of the settlement -- Fact that there might currently be disagreement about whether the settlement had been breached did not mean that no concluded agreement ever existed -- Motion judge erred in deciding the issue as to whether there was a meeting of the minds based on the subjective intent of one side to the bargain rather than on an objective reading of the counter-offer.

Appeal by the plaintiff from a decision dismissing her motion to enforce an alleged settlement agreement. The appellant was a physician and medical researcher at the Hospital for Sick Children and the University of Toronto. The appellant and her colleagues conducted clinical trials to assess the efficacy and safety of an oral iron chelator called deferiprone. Apotex Inc. sponsored the research. The appellant developed concerns about deferiprone. She told Apotex of her concerns. In May 1996, Apotex terminated the clinical trials. The dispute underlying the appeal related to statements made by the appellant about deferiprone and the events that followed the termination of the trials, and the response by the respondent to those statements. The appellant commenced various defamation actions. On consent, the 60 Minutes action and National Post actions were consolidated into a single action, in which the appellant sought $20 million in general damages and $10 million and aggravated and punitive damages. Mediation began in November 2002. At the end of the first day, the appellant made three alternative offers to the respondents, each of which contained a term that the parties would enter into a non-disparagement agreement. Towards the end of the second day of mediation, the respondents made a handwritten counter-offer to the appellant on three sheets of "flip chart" paper. Most of the counter-offer was in the handwriting of the respondents' counsel. The appellant initialed the counter-offer. The appellant was given 48 hours to accept it. She did so within the 48-hour window, on November 5, 2004. On October 31, 2005, after the appellant reached a settlement with HSC, her counsel advised counsel for the respondents that the appellant was able to complete the terms of the settlement. The respondents, for the first time, claimed that there was no settlement agreement.

HELD: Appeal allowed. The parties had a mutual intention to create a legally-binding agreement on all essential terms of the settlement. The fact that there might currently be disagreement about whether the settlement had been breached did not mean that no concluded agreement ever existed. The motion judge erred in deciding the issue as to whether there was a meeting of the minds based on the subjective intent of one side to the bargain rather than on an objective reading of the counter-offer. Viewed objectively, there was nothing in the counter-offer to suggest that it was an "agreement to agree" or conditional in any respect. Instead, the terms were straightforward and unconditional.

Appeal From:

On appeal from the order of Justice Colin L. Campbell of the Superior Court of Justice dated

August 4, 2006, with reasons reported at [2006] O.J. No. 3217.

Counsel:

Sheila Block and Paul Michell for the appellant.

Katherine L. Kay and Adrian C. Lang for the respondents.

The judgment of the Court was delivered by

1 **E.E. GILLESE J.A.**:-- Dr. Nancy Olivieri was a physician and medical researcher at the Hospital for Sick Children ("HSC") and the University of Toronto.

2 In the 1980s, Dr. Olivieri pursued clinical research in thalassemia, a genetic blood disorder. Thalassemia patients require regular blood transfusions. A side effect is the build-up of excess iron. Patients take drugs called iron chelators to remove excess iron.

3 Dr. Olivieri and her colleagues conducted clinical trials to assess the efficacy and safety of an oral iron chelator called deferiprone. Apotex Inc., a major Canadian pharmaceutical manufacturer, sponsored the research. Dr. Barry M. Sherman is Apotex's chairman. Jack M. Kay is the president of Apotex. I will refer to Apotex, Dr. Sherman and Mr. Kay, collectively, as the "respondents".

4 Dr. Olivieri developed concerns about deferiprone. She told Apotex of her concerns.

5 Dr. Olivieri and Apotex disagreed on the underlying science and proper course of action in light of her concerns.

6 On May 24, 1996, Apotex terminated the clinical trials.

7 The dispute that underlies the present appeal relates to statements made by Dr. Olivieri about deferiprone and the events that followed the termination of the trials, and the response by the respondents to those statements.

8 Dr. Olivieri commenced various defamation actions including:

* The "60 Minutes action" against Apotex and Dr. Sherman;
* The "National Post action" against Mr. Kay and Apotex;[1]
* The "CBC action" against Dr. Sherman.[2]

9 In the 60 Minutes and National Post actions, Apotex counterclaimed against Dr. Olivieri for

defamation and injurious falsehood.

10 On consent, the 60 Minutes and National Post actions were consolidated into a single action, in which Dr. Olivieri sought $20 million in general damages and $10 million in aggravated and punitive damages, and Apotex sought $20 million in general and special damages.

11 Discoveries took place in 2002, 2003 and 2004. In the 60 Minutes action, the respondents' counsel examined Dr. Olivieri for some 29 days. Dr. Olivieri's counsel examined the respondents for approximately 20 days. The parties produced more than 10,000 documents.

12 Each party moved to compel answers to questions refused in discovery. On June 14, 2004, Master Albert ordered the parties to answer certain questions but declined to order them to answer other questions.

13 The parties appealed and cross-appealed the order of Master Albert. On September 17, 2004, Sanderson J. dismissed the respondents' appeal and allowed Dr. Olivieri's cross-appeal.

14 Master Albert also directed a joint mediation in the 60 Minutes and CBC actions. The parties agreed to George Adams, Q.C. as mediator.

15 The mediation took place on November 2 and 3, 2004. Dr. Olivieri attended with her counsel Paul Michell (60 Minutes action) and Christopher Ashby (CBC action). Dr. Spino and Dr. Sherman attended for the respondents, along with their counsel, David Brown, Adrian Lang, and Jessica Bookman. A CBC representative attended with counsel.

16 The mediation began on November 2, 2004, with a plenary session of all parties and counsel. The parties and counsel then separated into three rooms (Dr. Olivieri; respondents; CBC defendants), where they remained for the rest of the day. Mr. Adams conducted "shuttle diplomacy" among the parties. No other plenary session ever took place.

17 At the end of the first day, Dr. Olivieri made three alternative offers to the respondents, each of which contained a term that the parties would enter into a non-disparagement agreement.

18 On the second day of the mediation, the parties reconvened in their separate rooms. Towards the end of that day, the respondents made a handwritten counter-offer to Dr. Olivieri on three sheets of "flip chart" paper (the "counter-offer"); most of the counter-offer was in the handwriting of the respondents' counsel. Dr. Spino initialled the counter-offer on behalf of the respondents. Dr. Olivieri also initialled the counter-offer.

19 The counter-offer contained a public part (Part A) and a confidential part (Part B). A redacted copy of the counter-offer reads as follows:

PRIVILEGED AND CONFIDENTIAL

Outline of Proposed Settlement Between Nancy Olivieri; and Apotex Inc., Jack M. Kay, and Barry Sherman

Part A - To be made public

1. Joint settlement statement - all litigation dismissed - claims and counterclaims.
2. Filing of consent dismissals.
3. Statement by Dr. Olivieri:

   "Dr. Olivieri acknowledges that research over the last five years has revealed that Deferiprone will assist some patients in the treatment of thalassemia and wishes Apotex well in this important work."

4. Statements by both parties: Olivieri and Apotex/Sherman/Kay:

   a. Mutual expressions of regret for language that they used in past years about each other.
   b. Agreement by same parties not to disparage each other in the future:

      i. Apotex/Sherman/Kay will not disparage Olivieri and her supporters;
      ii. Olivieri will not disparage Apotex, clinicians, researchers who use deferiprone, or deferiprone; and
      iii. Parties will only express future views about deferiprone in scientific forum.

5. All of the above to be contained in a press release.

Part B - To be confidential

1. [Deleted for confidentiality reasons]
2. Olivieri to provide Apotex with data listed in paragraph 160 of the statement of defence and counterclaim. Apotex can use this for regulatory purposes but no

consequences to Olivieri.

3. Full and final mutual releases of all claims/potential claims existing as at settlement date, including all actions commenced by Olivieri [or] by Apotex.

20 By the conclusion of the mediation on November 3, 2004, Dr. Olivieri had not accepted the counter-offer because she wanted time to consult with HSC about her legal fees. She was given 48 hours within which to accept the counter-offer.

21 The following day (November 4, 2004), Mr. Michell e-mailed a transcription of the counter-offer to Mr. Brown and sought permission to send a copy to HSC's counsel on a confidential basis.

22 Mr. Brown replied by e-mail that afternoon, advising that the respondents did not consent. He did not suggest there was any need for agreement on subsequent documents.

23 Other written communication was exchanged between counsel by letter and e-mail on November 4, 2005; in one e-mail from Mr. Brown to Mr. Michell it was noted that Dr. Olivieri would not be able to complete the settlement until she had resolved outstanding issues with HSC.

24 Dr. Olivieri decided to accept the counter-offer and so instructed her counsel. On November 5, 2004 - that is, within the 48-hour window - Mr. Michell so advised Mr. Brown by telephone. He also confirmed Dr. Olivieri's acceptance by letter (sent by FAX) that day, again attaching a transcription of the counter-offer.

25 As well, Mr. Michell wrote to Ms. Lang on November 5, 2004, enclosing full-sized copies of the three "flip chart" pages. Again, there was nothing in her response to suggest that the agreement was conditional or subject to further documentation.

26 On December 10, 2004, Sanderson J. ordered the respondents to pay costs of $7,050 plus GST and disbursements to Dr. Olivieri, forthwith. The respondents did not pay this order until July 2006, more than a year and a half later.

27 There was no further communication between counsel for almost a year.

28 On October 31, 2005, after Dr. Olivieri reached a settlement with HSC, her counsel advised counsel for the respondents that Dr. Olivieri was able to complete the terms of the settlement. The respondents, for the first time, claimed that there was no settlement agreement. They maintained that the counter-offer represented a consensus on certain principles but that a final settlement was subject to further documentation agreed on by all parties, particularly the non-disparagement agreement. They also alleged that Dr. Olivieri had continued to disparage Apotex publicly after the "settlement" had been concluded.

29 Dr. Olivieri brought a motion to enforce the alleged settlement agreement. The respondents

opposed the motion on the basis that either the parties had no meeting of the minds about the meaning of disparagement or that Dr. Olivieri had repeatedly breached the agreement by continuing to disparage Apotex.

30 By order dated August 4, 2006, Campbell J. dismissed the motion (the "Order").

31 Dr. Olivieri appeals.

32 I would allow the appeal. As I explain below, the parties had a mutual intention to create a legally binding agreement and agreed on all the essential terms of the settlement; the fact that there may now be disagreement about whether the settlement has been breached does not mean that no concluded agreement ever existed.

33 As will be seen, there is some confusion about what was decided below in respect of the respondents' alternative position that if there were a concluded agreement, Dr. Olivieri had either breached or repudiated it. Consequently, the Order and the reasons of the motion judge will be set out in some detail before the issues are analysed.

THE ORDER UNDER APPEAL

34 The Order is very short. There are two paragraphs by way of preamble. The first recites that Dr. Olivieri made a motion for an order enforcing a settlement agreement and requiring the parties to comply with the terms of that agreement. The second lists the evidence considered. The full text of the balance of the Order reads as follows:

> 1. **THIS COURT ORDERS** that the motion be and hereby is dismissed.
> 2. **THIS COURT FURTHER ORDERS** that the parties may make submissions on costs.

THE DECISION BELOW

35 At paras. 13 and 21 of the reasons, the motion judge states his conclusion that there had been no meeting of the minds between the parties sufficient to give rise to an enforceable agreement. In his view, the agreement was conditional on further elaboration and negotiation of the word "disparage" in para. 4(b) of Part A of the counter-offer and of the word "scientific" in para. 4(b)(iii) of the same.

36 In relation to "disparage", the motion judge held that elaboration was essential to Apotex. In paras. 17 and 21, he stated:

> [17] I conclude that at least Apotex anticipated that what would be said or not said by Dr. Olivieri within the general and broad use of the word 'disparage' would be further detailed in additional documentation that would be an essential part of the settlement agreement. Dictionary definitions of the word "disparage"

> contain other words of general meaning such as to "discredit" or to "denigrate" that lack precision, particularly for ongoing public appearances.
>
> ...
>
> [21] ... A more detailed delineation of what would be regarded as 'disparaging conduct' I conclude was regarded by the parties, particularly Apotex, as an essential term of the agreement, one which was not finalized ...

37 In para. 16 of the reasons, the motion judge said this, in respect of para. 4(b)(iii) of Part A:

> [16] The pleadings in the action are replete with concerns by both parties but Apotex in particular, regarding public statements made. In the context of the history between the parties and particularly the wording of Item 4(b)(iii), that "parties will only express future views about deferiprone in scientific forum" (emphasis added), anticipates further elaboration as to what is meant by the word "scientific."

38 Further, the motion judge reasoned that additional documentation was required in relation to para. 2 of Part B of the counter-offer. At para. 18 of the reasons, he wrote:

> [18] In addition, in the context of the pleadings and allegations, I conclude that Apotex would require the documentation provided for in [para. 2 of Part B] to be specifically part of the settlement package. It has never been provided. This history of the dealings between Dr. Olivieri and the Defendants from at least 1995 shows that the public utterances each about the other were central to their dispute and to the resolution of it.

39 At para. 22 of the reasons, the motion judge stated that in view of his disposition, "a trial will be required" should the parties not reach a new settlement agreement. He went on in para. 23 to say, "The central issue in the trial will be the meaning attributable to the statements that were and continue to be made by the parties about each other in public forums".

ANALYSIS

40 This appeal raises two issues:

(1) was there a concluded settlement agreement? and
(2) if there was, did Dr. Olivieri breach or repudiate it?

Was There a Concluded Settlement Agreement?

41 A settlement agreement is a contract. Thus, it is subject to the general law of contract regarding offer and acceptance. For a concluded contract to exist, the court must find that the parties: (1) had a mutual intention to create a legally binding contract; and (2) reached agreement on all of the essential terms of the settlement: *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.) at 103-4.

42 There is no question but that the first requirement was met: the counter-offer was drafted during the course of a court-directed mediation involving multi-million dollar law suits and in which all parties were represented by experienced legal counsel. It is apparent that the parties intended to enter into a binding legal agreement to resolve all of the outstanding legal proceedings.

43 In respect of the second requirement, the motion judge found that there was no meeting of the minds in respect of all of the essential terms of the contract. It will be recalled that he held that the counter-offer was conditional on elaboration of the words "disparage" and "scientific" in para. 4(b) of Part A of the counter-offer. In coming to this view, the motion judge relied on the evidence of the respondents. But, the respondents' evidence was based on discussions they and their counsel had with Mr. Adams during the mediation. Dr. Spino admitted that the respondents and their counsel never discussed the counter-offer with Dr. Olivieri or her counsel during the mediation, or told them that the counter-offer was conditional upon finalizing documentation. There was no evidence that all parties shared the view that further negotiation, elaboration or agreement was necessary.

44 A determination as to whether a concluded agreement exists does not depend on an inquiry into the actual state of mind of one of the parties or on the parole evidence of one party's subjective intention. See *Lindsey v. Heron & Co.* (1921), 64 D.L.R. 92 (Ont. S.C. (App.Div.)). Where, as here, the agreement is in writing, it is to be measured by an objective reading of the language chosen by the parties to reflect their agreement. As was stated by Middleton J.A. in *Lindsey* at 98-9, quoting Corpus Juris, vol. 13 at 265:[3]

> The apparent mutual assent of the parties essential to the formation of a contract, must be gathered from the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject.

45 Accordingly, in my view, it was an error in principle for the motion judge to decide this issue based on the subjective intent of one side to the bargain rather than on an objective reading of the counter-offer.

46 Viewed objectively, there is nothing in the counter-offer to suggest that it was "an agreement to agree" or conditional in any respect. Nothing in the counter-offer, either directly or indirectly,

suggests that its terms are subject to further elaboration, documentation or agreement. Had it been intended that the terms were to be conditional, one would have expected to see language that expressly made one or more terms "subject to" further agreement.

47 Instead, the terms of the counter-offer are straightforward and unconditional: Part A of the counter-offer contains the public part of the settlement agreement. It provides that: (1) the parties will issue a joint settlement statement that all litigation is dismissed; and (2) file consent dismissals; (3) Dr. Olivieri will issue a statement in the terms set out; (4) both parties will provide statements in which they express mutual regret for language used in the past about the other, agree not to disparage each other in the future, and to express views about deferiprone only in scientific forums; and that a press release will contain the foregoing. Part B, the confidential part of the settlement agreement, requires Dr. Olivieri to provide Apotex with the data listed in para. 160 of the statement of defence and counterclaim and that both parties will execute full and final mutual releases.[4]

48 The counter-offer was not made "subject to" agreement on any of the specified documents or terms: the press release, provision of data and mutual releases were the mechanics required to complete the settlement agreement. As was stated in *Fieguth v. Acklands Ltd.* (1989), 59 D.L.R. (4th) 114 at 121 (B.C.C.A.),[5] the first question to be asked when deciding whether a settlement was concluded is whether the parties reached an agreement on all essential terms. It is only thereafter that the question of completion of the agreement is considered.

49 I acknowledge that there can be sufficient uncertainty about the meaning of words or terms in an agreement that it will be held to be unenforceable: see *Bawitko Investments* at 104. However, in my view, the language used in the counter-offer does not suffer from that problem. As the motion judge observed, the dictionary meaning of "disparage" is to "discredit" or "denigrate". While there may be disagreement about whether the conduct of one of the parties amounts to disparagement, that does not mean that the agreement is conditional nor does it require elaboration of the meaning of the word. For similar reasons, the word "scientific" needs no elaboration.

50 The policy of the courts is to encourage the settlement of litigation: *Stonehocker v. King*, [1993] O.J. No. 2653 (Gen. Div.). The courts "should not be too astute to hold" that there is not the requisite degree of certainty in any of an agreement's essential terms: *Canada Square Corp. v. Versafood Services Ltd.* (1982), 34 O.R. (2d) 250 (C.A.).

51 In conclusion, as the motion judge applied the incorrect test when determining whether an enforceable settlement agreement had been entered into, his conclusion must be set aside. Applying the objective principle of contract formation, I conclude that the parties reached agreement on all of the essential terms of the settlement agreement, as reflected in the counter-offer. Consequently, the appellant is entitled to a declaration that the parties entered into an enforceable settlement agreement on November 5, 2004.

Was the Settlement Agreement Breached?

52 On the motion below, the respondents' alternative position was that if there were a concluded settlement agreement between the parties, Dr. Olivieri has repudiated or breached it. There is some confusion about whether the motion judge decided this issue.

53 For the following reasons, it appears to me that he did not:

* the order appealed from makes no mention of this issue. It says only that the motion for enforcement of the settlement agreement was dismissed;
* the motion judge makes only one reference to the matter. In para. 16 of the reasons, he recites the respondents' position on the issue;
* the respondents did not argue, on the motion, for the trial of this issue; and,
* there was very little evidence on this issue. The appellant says that the only evidence was that on one occasion the appellant was misquoted in a newspaper article and that she had written to correct the misquotation.

54 Accordingly, I do not understand the issue of alleged repudiation or breach of the agreement to have been decided. The record does not permit this court to make such a determination.

55 These comments are made without prejudice to the respondents' right to take such steps as they deem appropriate to pursue their allegations that Dr. Olivieri has breached or repudiated the settlement agreement.

DISPOSITION

56 For these reasons, I would allow the appeal, set aside the Order and grant the motion, with costs to the appellant fixed at $37,000, all inclusive. In setting costs at $37,000, I have accepted the figure agreed on by the parties and understand that it is the costs of the appeal alone. The appellant is entitled to her costs of the motion below, as well. If the parties are unable to resolve that matter, they may make brief written submissions to the court within fourteen days of the date of the release of these reasons.

E.E. GILLESE J.A.
M. ROSENBERG J.A.:-- I agree.
S.E. LANG J.A.:-- I agree.

1 The National Post and certain of its employees were also defendants but Dr. Olivieri settled with them.

2 The CBC and certain of its employees were also defendants but Dr. Olivieri settled with

them.

3 See also *Eli Lilly & Co. v. Novapharm Ltd.*, [1998] 2 S.C.R. 129 at paras. 54-5.

4 For confidentiality reasons, no mention is made of para. 1 of Part B of the counter-offer.

5 Followed in *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, [1995] O.J. No. 721 (Gen. Div.), aff'd [1995] O.J. No. 3773 (C.A.).

TAB 8

Case Name:

Catanzaro v. Kellogg's Canada Inc.

Between
Claudia Catanzaro, Nick Catanzaro and
Alessia Catanzaro as represented by
her Litigation Guardian, Claudia Catanzaro, Plaintiffs, and
Kellogg's Canada Inc., Defendant

[2014] O.J. No. 4642

2014 ONSC 5691

Court File No. CV-08-1377-00

Ontario Superior Court of Justice

J.M. Fragomeni J.

Heard: August 29, 2014.
Judgment: September 30, 2014.

(26 paras.)

[Editor's note: An addendum was released by the Court October 9, 2014. See [2014] O.J. No. 4770.]

Civil litigation -- Civil procedure -- Settlements -- Approval -- Enforceability -- Application by defendant for order enforcing settlement, approving settlement against infant defendant and dismissing action dismissed -- Plaintiffs commenced action in 2008 after they found moldy piece of chicken in box of defendant's cereal -- In September 2011, plaintiffs accepted defendants offer to settle, but did not bring motion to approve settlement and dismiss action, and after retaining new counsel resiled from settlement -- Parties agreed to settle action, but settlement could not be approved because materials were not in compliance with Rule 7.08(4).

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, Rule 4.06(1)(e), Rule 7.08, Rule 7.08(1), Rule 7.08(4), Rule 7.08(5), Rule 49.09, Rule 49.09(a)

Counsel:

Mark Wiffen, for the Plaintiffs.

Sean Murtha, for the Defendant.

ENDORSEMENT

1 J.M. FRAGOMENI J.:-- The defendant, Kellogg's Canada Inc. seeks the following relief:

(1) an order enforcing settlement pursuant to Rule 49.09 of the *Rules of Civil Procedure*;

(2) an order approving the settlement as against the infant plaintiff, Alessia Catanzaro, pursuant to Rule 7.08 of the *Rules of Civil Procedure*;

(3) an order dismissing the action against Kellogg's

Position of the Defendant

2 The defendant sets out the following chronology of events in support of its position:

* This action relates to an alleged incident dated September 27, 2008, wherein a moldy piece of chicken was found.

* The Plaintiffs Claudia Catanzaro, Nick Catanzaro and Alessia Catanzaro issued a Statement of Claim on April 28, 2008.

* The Defendant served a Notice of Intent to Defend on July 4, 2008, and served a Statement of Defence on August 25, 2008.

* On September 29, 2011, Mr. Michael White, counsel for the Defendant served an offer to settle on the Plaintiffs' counsel, Ms. Judy Hamilton.

* On September 30, 2011, Ms. Hamilton communicated to Mr. White that

the Plaintiffs had accepted the offer to settle.

* On November 24, 2011, Ms. Hamilton provided Mr. White with draft motion materials to have the court approve the settlement in regard to the infant plaintiff, Alessia Catanzaro, and to have the action in its entirety dismissed as against the Defendant.

* On January 9, 2012, Tara Cassidy, then a student-at-law working with Ms. Hamilton, wrote to the Trial Coordinator's Office and informed that court that the action had been settled.

* Despite repeated written promises from Ms. Hamilton to Mr. White to bring a motion in front of the court to have the settlement in regard to the infant plaintiff approved and the entire action dismissed, this was never done.

* On November 8, 2012, more than one year after the settlement was entered into, Mr. White was served with a Notice of Change of Lawyer from the Plaintiffs' current counsel, Mr. Wiffen. Mr. Wiffen informed Mr. White by letter dated November 8, 2012 that his clients intended on resiling the settlement agreement they had entered into, and were going to proceed with this action.

Position of the Plaintiffs

3 The plaintiffs submit the following:

* That the infant settlement should not be approved as there is no evidence that it is in the best interests of the minor;

* the court should exercise its discretion to refuse to enforce the settlement as it would be unjust to do so;

* the matter should be returned to the trial list so that the matter can proceed to trial on the merits.

Nature of the Allegations

4 This action relates to a claim with respect to a box of Vanilla Rice Krispies cereal which was purchased by the plaintiffs in September 2007. The plaintiffs have claimed that they discovered a moldy piece of chicken in the cereal box.

Trial Record

5 On February 1, 2011, Justice MacKenzie ordered a timetable to be instituted in the action as follows:

(1) examinations for discovery be completed by May 30, 2011;

(2) motions arising from discoveries to be completed by July 30, 2011;

(3) mediation (if necessary) to be completed by August 30, 2011;

(4) the action was to be set down for trial by September 1, 2011, failing which the action would be dismissed.

6 The trial record was served on August 25, 2011.

Chronology of Settlement Discussions

July 29, 2011 e-mail from plaintiffs' counsel to defendant's counsel, in part:

> Given your stance on reasonable foreseeability with respect to Mrs. Catanzaro, would Kelloggs consider an offer with respect to Alessia's damages for having consumed the contaminated product?

August 16, 2011 email from defendant's counsel to plaintiffs' counsel:

> I look forward to hearing from you further to the receipt of your client's instructions.

August 30, 2011 email plaintiffs to defendant:

> I am meeting with my clients today and will advise you thereafter.

September 14, 2011 email plaintiffs to defendant:

> My client is conducting a further investigation into matters which relate to the proceeding after which she will be able to advise with respect to her instructions going forward. I will try to get firm instructions from her by early next week.

September 21, 2011 email defendant to plaintiffs:

> Please confirm your client's instructions this week.

September 23, 2011 email plaintiffs to defendant:

> I have had several conversations with my client this week, but have yet to obtain instructions in writing. Since Mr. works nights, he has not had the opportunity to discuss with Mrs. And so they would like the weekend. She is taking Monday off so that they can come in the morning and give me instructions.

September 29, 2011 email defendant to plaintiffs:

> I will need your clients offer to consent to an Order dismissing the action on a without cost basis no later than 5 p.m. tomorrow in order for me to recommend our client's acceptance.
>
> The reason for this is our trial preparation and expert costs will significantly increase going forwards...

September 30, 2011 email plaintiffs to defendant:

> My clients have agreed to settle the action on the basis of a without costs dismissal.

> Please advise if this is satisfactory and whether you will be preparing the documentation.

October 3, 2011 email defendant to plaintiffs:

> Our client has accepted your clients offer to consent to the dismissal of the action against our client on a without costs basis.
>
> We will forward to you the consent and draft dismissal Order to you shortly.

Notice of Motion for Infant Settlement Approval

7 The plaintiffs proceeded with a motion to approve Alessia's settlement. The notice of motion was to be dated in November 2011. In support of that motion and in accordance with the Rules, affidavits were prepared to be signed by plaintiffs' counsel, Judy Hamilton and Claudia Catanzaro, the mother and litigation guardian for Alessia, born July 13, 1996. Both affidavits were drafted but neither affidavit was signed and sworn to.

Draft Affidavit of Counsel, Judy Hamilton

8 In her unsworn affidavit Ms. Hamilton sets out the following, in part:

> 7. A Statement of Claim was issued on April 28, 2008. The nature of the injuries described by the Plaintiffs is as follows:
>
> Following this event, the Plaintiffs became increasingly upset. Alessia has had diarrhea for a week following the incident and was experiencing difficulty with sleeping.
>
> Claudia and Nick also experienced severe anxiety and emotional distress over the incident which caused them untold hardship and grief.
>
> Claudia and Nick also suffered nervous shock on a severe basis. They have been severely and adversely affected by the event and are no long a whole person.

The plaintiffs, since the incident, required ongoing counselling and cognitive behavioural therapy to assist them in overcoming their aversion and avoidance to eating cereal.

10. I have reviewed the Affidavit of Claudia Cantanzaro in support of this motion and participated in the negotiation and conclusion of the settlement of the action as against the Defendant Kellogg.

11. Based on the facts and issues in dispute between the parties, I recommended to the Plaintiffs, Nick and Claudia that their claims and claims of Infant Plaintiff in this action be settled as against the Defendant Kellogg.

15. The settlement was arrived at as a compromise between myself and the solicitor for the Defendant Kellogg. I state and verily believe it to be true, that the aforementioned settlement is reasonable under the circumstances.

16. More specifically, the settlement as against the Defendant Kellogg is appropriate because there is significant risk that the Plaintiffs will not be able to establish liability in this case. As well, the case of *Mustapha v. Culligan of Canada Ltd.*, regarding compensable damages from psychological injury has greatly reduced the quantum and type of damages recoverable from a tainted food incident. The reasonable range of estimates of damage if the Plaintiffs are successful is conservative. Counsel for Kellogg has also stated that if the Plaintiffs are unsuccessful at trial they may pursue them for their costs. Therefore these matters were considered when assessing the risk of proceeding to trial.

17. At this point, it is in the interests of the Plaintiffs that this matter be resolved. Any further steps will increase the Defendant Kellogg's costs and exposes the Plaintiff to significant risks that are not warranted given the likelihood and quantum of any damages.

18. The Infant Plaintiff's Litigation Guardian, Claudia Catanzaro, has instructed me to settle the claim against Kellogg on the basis set out herein.

9 In her unsworn affidavit Mrs. Catanzaro states the following, in part:

> 10. We have agreed to settlement of our action as against the Defendant Kellogg. The decision to settle the claim was made after a thorough consideration of the Defendant's potential liability and the reasonable range of estimates of damage if we are successful.
>
> 11. Based on the facts and issues in dispute between the parties, Ms. Hamilton recommended to me that the action be settled against the Defendant Kellogg on the following terms:
>
> a. Without costs dismissal of the action of Claudia Catanzaro, Nick Cantanzaro and Alessia Catanzaro, as represented by her Litigation Guardian, Claudia Catanzaro against Kellogg Canada Inc.
>
> b. Releases are to be exchanged as between the Parties to this action.
>
> 12. I state and verily believe it be to true, that the aforementioned settlement is reasonable under the circumstances.
>
> 13. More specifically, the settlement as against the Defendant Kellogg is appropriate because it is unclear if we will be able to establish liability in this case. As well, when this action was first issued, there was a very favorable case regarding compensation damages from psychological injury that has since had its trial damage award overturned. The reasonable range of estimates of damage if we are successful is conservative. Counsel of Kellogg has also stated that if we are unsuccessful at trial they may pursue us for their costs. Therefore these matters were considered when assessing the risk of proceeding to trial.
>
> 14. At this point, it is in the interests of myself and the other Plaintiffs that this matter be resolved. Any further steps will increase the Defendant Kellogg's costs and exposes us to significant risks that are not warranted given the likelihood and quantum of any damages.
>
> 15. I verily believe that the action of Alessia as against the Defendant

> Kellogg, should be dismissed on the basis aforementioned, as it is fair and reasonable under the circumstances.
>
> 16. After weighing the advice given to me by my solicitors, and after consideration of the offer made, I believe that it is in the best interests of Alessia, the minor Plaintiff, to settle this action as against the Defendant Kellogg, on the basis set forth in the Affidavit of Judy Hamilton, filed.

10 By fax dated January 9, 2012 counsel for the plaintiffs advised the trial office that the matter "has now been settled. We are currently in the process of bringing the required motion to have the settlement approved."

> The following e-mails follows:
>
> February 14, 2012 email defendant to plaintiffs:
>
> > Please confirm when you will be bringing your motion to have the judgment dismissing the action.
>
> February 21, 2012 email plaintiffs to defendant:
>
> > Just waiting for the client to come in to swear the affidavit.
>
> November 8, 2012 email new plaintiffs' counsel to defendant, in part:
>
> > We have been retained by the plaintiffs...
> >
> > We are in the process of reviewing the file. In the meantime, we understand that the plaintiffs' previous counsel communicated an acceptance of a previous settlement offer by your client. The plaintiffs advise me that they disclaim any such settlement, and intend to proceed with their action.

Issues and the Law

> Issue: Is there a settlement?

11 Rule 49.09(a) of the *Rules of Civil Procedure* states:

> 49.09 Where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may,
>
> (a) make a motion to a judge for judgment in the terms of the accepted offer, and the judge may grant judgment accordingly; or ...

12 In *Cellular Rental Systems v. Bell Mobility Cellular Inc.*, [1995] O.J. No. 721 (Gen. Div.) at para. 17 (aff'd [1995] O.J. No. 3773 (C.A.) the Court stated:

> 17 An agreement to settle a claim is a contract. To establish the existence of a contract, the parties' expression of agreement must demonstrate a mutual intention to create a legally binding relationship and contain agreement on all of its essential terms: see Canada Square Corp. v. VS Services Ltd. (1981), 34 O.R. (2d) 250 (C.A.); and Bawitko Investments Ltd. v. Kernels Popcorn Ltd. (1991), 79 D.L.R. (4th) 97 (Ont. C.A.).

13 There is no evidence that the plaintiffs' counsel did not have the authority to settle the case. In *Davis v. Kalkhoust*, [1986] O.J. No. 1464 (Ont. H.C.), the court set out the following at pages 3 and 4:

> Counsel for the Plaintiffs urged upon me the decision of Henry J. in Atkins v. Holubeshen 43 C.P.C., 166 upheld by the Divisional Court at 50 C.P.C. 94. In that case, Mr. Justice Henry set aside an exparte order dismissing the action. That case however, can be distinguished from the one with which I am dealing. As Madam Justice Van Camp said in delivering the Judgment of the Divisional Court (at p. 95) "the consent given to the exparte order dismissing the action had been given without authority of the Plaintiff - in circumstances which should have alerted the Defendant to such want of authority" (emphasis mine). That is not the case here. The solicitor had been retained. He had apparent authority to bind his client. No want of authority was indicated to the Defendant Purvis' counsel. Under the circumstances I feel bound by the decision in Scherer v. Paletta (supra) and the motion is disallowed, with costs to the Defendant Purvis.

14 In the case at bar the parties agreed to settle the action as set out in their email communications. Counsel for the plaintiffs then proceeded to prepare the required motion and affidavits to have the infant settlement approved and the entire action dismissed.

15 In *Homewood v. Ahmed*, [2003] O.J. No. 4677 (S.C.J.) the court stated the following at para. 55:

> 55 The Plaintiff merely "changed his mind", because of "the change in his circumstances", after the settlement had been concluded in accordance with his instructions.

16 I am satisfied that the parties agreed to settle this action in accordance with the terms set out in the plaintiffs' motion for infant settlement approval, namely:

> An Order for a without costs dismissal of the action of Claudia Catanzaro, Nick Catanzaro and Alessia Catanzaro, as represented by her Litigation Guardian, Claudia Catanzaro, as against the Defendant Kellogg Canada Inc. ("Kellogg"), improperly named in the Statement of Claim as "Kellogg's Canada Inc."

Issue: Should the settlement be approved?

17 Rule 7.08(1) and (4) state:

> 7.08 (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge.
>
> ...
>
> (4) On a motion or application for the approval of a judge under this rule, there shall be served and filed with the notice of motion or notice of application,
>
> (a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement;
>
> (b) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer's position in respect of the proposed settlement;
>
> (c) where the person under disability is a minor who is over the age of sixteen years, the minor's consent in writing, unless the judge orders otherwise; and

(d) a copy of the proposed minutes of settlement.

18 Rule 7.08(5) states:

> (5) On a motion or application for the approval of a judge under this rule, the judge may direct that the material referred to in subrule (4) be served on the Children's Lawyer or on the Public Guardian and Trustee as the litigation guardian of the party under disability and may direct the Children's Lawyer or the Public Guardian and Trustee, as the case may be, to make an oral or written report stating any objections he or she has to the proposed settlement and making recommendations, with reasons, in connection with the proposed settlement.

19 Although plaintiffs' previous counsel prepared the necessary motion and affidavits that motion was never filed nor were the affidavits properly sworn. Rule 4.06(1)(e) states:

> An Affidavit used in a proceeding shall,
>
> (e) be signed by the deponent and sworn or affirmed before a person authorized to administer oaths or affirmations. R.R.O. 1990, Reg. 194, r. 4.06 (1); O. Reg. 575/07, s. 1.

20 The test to be applied in determining whether the court should approve a settlement for an infant pursuant to Rule 7.08 is to protect the infant and ensure that the settlement is in the best interests of the party (see *Wu Estate v. Zurich Insurance Co.*, [2006] O.J. No. 1939.

21 In *Burns Estate v. Fallion* 2007 CarswellOnt 5910 Justice Pierce set out the following at para. 12 to 18:

12

> Is the order for service unnecessary? The defendant cites *Poulin et al. v. Nadon et al.*, [1950] O.R. 219 (Ont. C.A.) a decision which was codified by Rule 7.08. As the court suggests, the practice of judicial approval of infant settlements is an old one. At page 223 the court observed that a settlement agreed to by the infant's next friend (or litigation guardian as she is now called) is valid and binding on the infant by virtue of the court's approval, and not because of the agreement of the next friend. (See page 223) The court's approval also acts as a protection for the opposing party.

13

> The court held that the solicitor for the plaintiff should file an affidavit setting out his opinion that the settlement benefits the infant. A similar affi-

davit was required by the next friend. (See page 224) The court added that if liability was disputed that would be an important consideration for the court in determining whether to approve the settlement.

14 At page 223 the court concluded:

> "... one important duty of the trial judge in these matters is to see that the proceedings before him on the application for approval become part of the record. They are an important part of the judicial proceedings in the action leading up to the judgment of the court, and should be a matter of record. ..."

15 Thus we see that the function of the court in approving infant settlements should be as transparent as the court proceeding itself.

16 The plaintiff relies on *Horodynski Farms Inc. v. Zeneca Corp. (c.o.b. Zeneca Agro)*, [2006] O.J. No. 3716 (Ont. C.A.). This case is not on point. In *Horodynski* a case had been dismissed, appealed and there was a motion to admit fresh evidence that was subject to litigation privilege. The court held that Rule 31.06(3) applied to the discovery stage of litigation which was closed. These are not the circumstances in the case at bar.

17 The defendant argues that there is no privilege in a communication to the court mandated by law regarding an infant settlement. He submits that Rule 37.07 has primarily application to *ex parte* orders. He also submits that the court relies on counsel with respect to infant settlements; that it has a duty not to approve settlements where there is insufficient evidence.

18 I agree with this submission. The policy of the protection of the interests of children and other persons under disability requires full and frank disclosure of the merits of a settlement. Necessarily this calls for a candid opinion by counsel. As well, the litigation guardian must understand the reasons for settlement and accept them.

22 The procedural difficulty facing the defendant is that there is no motion before me with the

required material pursuant to Rule 7.08(4). A notice of motion and draft unsworn affidavits not filed with the court are not in compliance with the Rule and this court cannot rely on that material to approve an infant settlement.

23 In all of these circumstances I cannot approve the settlement reached by the parties pursuant to Rule 7.08(4). Although I am satisfied that a settlement was reached pursuant to Rule 7.08(4) the court cannot approve it.

24 As a result of these findings it is not necessary to determine whether the settlement ought to be set aside for any other reasons.

25 An order shall issue restoring the matter to the trial list.

26 The parties shall file written submissions on costs within 10 days.

J.M. FRAGOMENI J.

Case Name:

Catanzaro v. Kellogg's Canada Inc.

Between
Claudia Catanzaro, Nick Catanzaro and
Alessia Catanzaro as represented by
her Litigation Guardian, Claudia Catanzaro,
Plaintiffs (Appellants), and
Kellogg's Canada Inc., Defendant (Respondent)

[2015] O.J. No. 5930

2015 ONCA 779

Docket: C59545

Ontario Court of Appeal

E.A. Cronk, G.J. Epstein and G. Huscroft JJ.A.

Heard: November 12, 2015.
Judgment: November 16, 2015.

(13 paras.)

Civil litigation -- Civil procedure -- Settlements -- Enforceability -- Setting aside, grounds -- Appeal by parents of child who sustained damages from discovering mouldy chicken in cereal from order enforcing settlement of their claims against manufacturer dismissed -- Refusing to enforce settlement was discretion to be exercised only rarely -- Judge entitled to find parents failed to establish circumstances surrounding settlement, pursuant to which manufacturer agreed to dismissal of action without costs, warranting setting aside of agreement -- Parents failed to convince court mother too busy and stressed to execute settlement on their behalf -- Ontario Rules of Civil Procedure, Rule 49.09.

Appeal by Catanzaro's parents from an order enforcing a settlement of their claims in an action relating to damages their daughter suffered after a mouldy piece of chicken was found in a box of Kellogg's cereal the Catanzaros purchased. Kellogg's served an offer to settle, offering its consent to an order dismissing the action without costs. The Catanzaros, in their personal capacities and on

behalf of their daughter, accepted the offer in September 2011, but resiled from it in November 2012. Kellogg's successfully moved for an order enforcing the settlement against the Catanzaros only, the judge finding that the Catanzaros failed to meet their onus to establish that the settlement should be set aside because Mrs. Catanzaro entered into it when she was busy and stressed.

HELD: Appeal dismissed. The judge did not err in rejecting the Catanzaros' position that the settlement should not be enforced because Mrs. Catanzaro was too busy and stressed out to execute it. The judge properly exercised his discretion to enforce the settlement, in light of the policy of the court to promote settlement and the fact that refusing to enforce a settlement was a discretion that should be exercised rarely.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 7.08(4), Rule 49.09

Appeal From:

On appeal from the amended order of Justice Joseph M. Fragomeni of the Superior Court of Justice, dated October 9, 2014 with reasons reported at 2014 ONSC 5691 and additional reasons reported at 2014 CanLII 59211.

Counsel:

Mark Wiffen, for the appellants.

Michael White, for the respondent.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT:-- Claudia Catanzaro and Nick Catanzaro appeal from the order of the motion judge enforcing a settlement of their claims in this action.

2 By statement of claim issued April 28, 2008, the Catanzaros and their daughter, Alessia Catanzaro, through her litigation guardian, Claudia Catanzaro, sued the respondent, Kellogg's Canada Inc. for damages suffered after a mouldy piece of chicken was allegedly found in a box of cereal the Catanzaros had purchased.

3 On September 29, 2011, Mr. White, counsel for Kellogg's, served an offer to settle on the

plaintiffs' counsel, Ms. Hamilton. In the offer, Kellogg's agreed to consent to an order dismissing the action without costs. On September 30, 2011, Ms. Hamilton informed Mr. White that her clients had accepted the offer. On November 24, 2011, Ms. Hamilton provided Mr. White with draft motion materials to have the court approve the infant settlement relating to Alessia Catanzaro and dismiss the action. On January 9, 2012, Ms. Hamilton's office notified the court that the matter had been settled.

4 On November 8, 2012, new counsel for the plaintiffs notified Mr. White that his clients were resiling from the settlement agreement and intended to proceed with the action.

5 Kellogg's moved to enforce the settlement pursuant to rule 49.09 of the *Rules of Civil Procedure,* to approve the settlement as against the infant plaintiff, Alessia Catanzaro, and to dismiss the action.

6 The Catanzaros resisted the motion on the basis that the infant settlement was not in the best interests of their daughter and that the court should exercise its discretion to refuse to enforce the settlement on the basis it would be unjust to do so given Ms. Catanzaro had accepted the offer on behalf of the plaintiffs in haste and at a time when she was depressed.

7 The motion judge ordered the settlement be enforced as it affected the Catanzaros. She found that Ms. Hamilton had the authority to settle the case, that the Catanzaros had agreed to settle on the terms set out in the offer and that the Catanzaros had not met their onus of establishing that the settlement (as it related to them) ought to be set aside. The motion judge dismissed the motion in relation to the infant on the basis that it was not supported by the material required under rule 7.08(4).

8 On appeal, the Catanzaros, relying on this court's decision in *Milios v. Zagas* (1998), 38 O.R. (3d) 218, submit that the motion judge erred by failing to consider the circumstances surrounding the acceptance of the settlement -- circumstances they say support their position that the settlement should be set aside.

9 We do not agree. The policy of the courts is to promote settlement. The discretion to refuse to enforce a settlement should be exercised rarely. In our view the evidence before the motion judge did not support refusing to enforce the settlement.

10 The factors in the *Milios* case this court relied upon in allowing the plaintiffs to resile from their settlement agreement -- mistake, significant compromise and prompt notification of the mistake -- are not present in this case. While the various factors identified in *Milios* were relevant to the motion judge's analysis, the critical factors the Catanzaros relied on to support their argument that the settlement should not be enforced were that Ms. Catanzaro accepted the offer in haste and was under stress at the time. These factors were considered and expressly rejected by the motion judge: the evidence simply did not support either assertion. We see no error in this finding.

11 In our view, the record supports the motion judge's conclusion that, on the basis of the evidence the Catanzaros adduced, they were unable to satisfy their onus of demonstrating that the circumstances surrounding their acceptance of the offer to settle were such that they should be allowed to resile from their settlement agreement.

12 The exercise of the motion judge's discretion to enforce the settlement is entitled to deference. There is no reason to interfere.

13 The appeal is dismissed. The respondent is entitled to costs in the agreed-upon amount of $2,500, including disbursements and applicable taxes.

E.A. CRONK J.A.
G.J. EPSTEIN J.A.
G. HUSCROFT J.A.

TAB 9

Case Name:

Gregory v. Gill

RE: John Davidson Gregory, Applicant, and
Ryan Lindan Gill, Daniella Miletin-Gill,
Lauren Ashleigh Beaton, Aaron Mosha
Glazer and First National Financial GP Corporation, Respondents

[2016] O.J. No. 3457

2016 ONSC 4227

Court File No.: CV-16-552210

Ontario Superior Court of Justice

C.J. Brown J.

Heard: June 24, 2016.
Judgment: June 28, 2016.

(22 paras.)

[Editor's note: An addendum was released by the Court August 9, 2016. See [2016] O.J. No. 4195.]

Civil litigation -- Civil procedure -- Settlements -- Releases -- Motion by respondents to settle terms of release allowed -- Parties were neighbours who settled acrimonious title and encroachment property dispute -- Applicant sought to include wife in release contemplated by settlement -- Respondents alleged wife's inclusion was not contemplated during negotiations, as she was not on title and was non-party to litigation -- Although there was no evidence of initial intent to include applicant's wife in release, ongoing hostility and threat of potential lawsuit against wife justified her inclusion to achieve finality between parties.

Real property law -- Proceedings -- Practice and procedure -- Settlements -- Motion by respondents to settle terms of release allowed -- Parties were neighbours who settled acrimonious title and encroachment property dispute -- Applicant sought to include wife in release contemplated by settlement -- Respondents alleged wife's inclusion was not contemplated during negotiations, as she was not on title and was non-party to litigation -- Although there was no evidence of initial intent to include applicant's wife in release, ongoing hostility and threat of potential lawsuit against

wife justified her inclusion to achieve finality between parties.

Motion by the respondents to settle the terms of a release. The applicant, Gregory, and his wife, Horton, were the next door neighbours of the respondents, the Gills. The properties shared a common wall. The applicant had resided in the property from 1983 onward. The respondents purchased their property in 2014. The applicant entered an agreement to sell his property in 2016. An acrimonious dispute arose between the parties regarding title and encroachment. Two weeks prior to completion of the sale of the applicant's property, the parties reached a settlement agreement. The settlement included a term providing for a mutual release. The parties were unable to agree on wording. The applicant sought to include Horton, despite her status as a non-party to the litigation and the fact that she was not on title to their home. The respondents took the position that Horton's inclusion in the release was not contemplated by the parties at the time of settlement.

HELD: Motion allowed. Counsel failed to act reasonably in the course of negotiating the mutual release. The evidence established no initial intention to include Horton in the release. However, given the hostility between the parties, and the threat of a potential lawsuit against Horton, it was important that the release achieve finality. The request to include Horton was reasonable. The parties were directed to include Horton and to release all parties to the date of signing.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 49.09

Counsel:

Mark Wainberg, for the Applicant.

Howard D Gerson, for the Respondents Gill and Miletin-Gill.

ENDORSEMENT

1 C.J. BROWN J.:-- The applicant, John Davidson Gregory, and his wife, Lynn Horton, reside at 667 Euclid Avenue in Toronto and are neighbours of the respondents, Ryan Lindan Gill and Daniella Miletin-Gill, who reside at 665 Euclid Avenue. The properties share a party wall.

2 The applicant has resided in the property since 1983 and the respondents purchased the neighbouring property in 2014.

3 The application was brought to address a title/encroachment dispute between the parties

affecting the properties owned by them, in advance of the sale of the applicant's property, scheduled to close June 21, 2016. The property did close on that day and the applicants had moved from the property at the time of the motion.

4 On June 2, 2016, the parties settled the application and so advised the court on June 3, 2016.

5 Paragraph 7 of the offer to settle provides as follows:

> 7. The applicant and the Gill respondents to sign a mutual release in a form satisfactory to their lawyers acting reasonably.

6 The parties have been unable to reach an agreement as regards the wording of a mutual release. As a result, the respondent brings this motion pursuant to rule 49.09 for an order enforcing the agreement to settle the application by settling the terms of the mutual release required under the terms of settlement.

7 At the opening of court on June 24, I suggested to counsel that they continue negotiations as regards the terms of a mutual release prior to their being heard. They both left the courtroom, but were unable to arrive at an agreement.

8 The issue involves the proper parties to the release. The applicant wishes to include his wife, Lynn Horton, although she was not a party to the encroachment application. She was not included in the application as she was not on title as regards the matrimonial home. Her affidavit in support of this motion states that she was involved in all of the major decisions in the proceedings and that she was contacted by Mr. Gerson, on behalf of the respondents, as regards a settlement. There was no cross-examination on the affidavit and, accordingly, her sworn evidence is uncontroverted.

9 It is the position of counsel for the respondent, that it was not contemplated by the parties at the time of settlement that she be included in a mutual release; that she was not a party to the application; that she was not represented by Mr. Wainberg during the settlement negotiations; that the settlement does not provide for her to be a party to the mutual release and that the settlement only provides for a mutual release between the applicant and the Gill respondents. I note that Lynn Horton did retain Mr. Wainberg for the purpose of negotiating the terms of the release following settlement of the application. Pursuant to correspondence from Mr. Gerson on June 2, 2016, he stated to Mr. Wainberg "you will confirm the form of mutual release acceptable to the applicant".

10 As regards the release, and who should be included as parties to the mutual release, Mr. Gerson relies upon the cases of *Disera v Bernardi*, 2014 ONSC 4500, paragraphs 27 and 38; *Zelsman v Meridian Credit Union*, 2011 ONSC 1680, paragraphs 2, 3a, 41, 42, 45 and *Martenfeld v Collins Barrow Toronto LLP*, [2014] O.J. No 4195.

11 It is the position of Mr. Wainberg that, the moving party, having brought this motion under rule 49.09, has not satisfied his burden under the rule. He states that while the rule requires that a

party may bring a motion for judgment in the terms of the accepted offer where the other party to an accepted offer to settle fails to comply with the terms of the offer, in this case, the parties have not failed to comply with the terms of the offer, but have simply not been able to arrive at a mutual agreement as regards the release, acting reasonably.

12 After much back and forth correspondence between counsel as regards the mutual release following settlement of the application, Mr. Gerson, on June 13, sent a revised draft of the draft release with changes tracked, which included Lynn Horton as well as the applicant and was to be effective through the date of the release. In that e-mail, he indicated that he had not received instructions from his client regarding the final form of release he was forwarding to Mr. Wainberg.

13 The purchasers of 667 Euclid, Lauren Ashleigh Beaton and Aaron Mosha Glazer, were also included as respondents to the application, but did not wish to be included in the release.

14 Following June 13, it appears that matters unraveled and, thereafter, Mr. Gerson advised Mr. Wainberg that his clients were only willing to execute the mutual release between the parties to the application to the date of the settlement, June 3, and not to the date of release, as previously agreed. By July 15, Mr. Gerson sent another e-mail stating "On Monday, June 13, I sent you a revised draft of your draft release with changes tracked (which changes you have accepted) and which included Ms. Horton for the sake of achieving finality". However, due to the allegations concerning his client and "malicious complaints" about his clients, he would no longer agree to a release effective through the date of release, but would only agree to a release of claims to June 3, to preserve his clients' rights to bring a lawsuit against the applicant and Lynn Horton.

15 The background evidence indicates that the parties have had a stormy relationship as neighbours. Most recently, following the settlement of the application, there have been accusations as against the applicant and Lynn Horton that they made unfounded allegations against the Gills to the respondent purchasers, Beaton and Glazer, and also, as regards Lynn Horton, with respect to a threatened suit for "malicious interference" by Ms. Horton with the Gill's construction workers concerning compliance with an Ontario Municipal Board Order regarding 665 Euclid Avenue. The incident apparently arose after settlement. Ms. Horton's explanation of the incident is contained in her affidavit at paragraph 7. Again, the evidence contained in the affidavit was not cross-examined upon and, as such, is uncontroverted.

16 As a result of these allegations and a threatened potential lawsuit against Ms. Horton, the mutual release is important to the applicant and Lynn Horton because, as they state in their affidavits in support of this motion, they "want a "clean break" from the Gills.

17 I am not satisfied that the lawyers have, in fact, acted reasonably throughout concerning a mutual release. I do note that there have been numerous negotiations back and forth and that both had agreed, to the June 13 release, sent by Mr. Gerson which included both the applicant and Lynn Horton up to the time of the release. Agreement was withdrawn, as Mr. Gerson explains, given the fact that the respondents do not wish to provide a release that may release Ms. Horton from any

potential action regarding "malicious interference". He states that he has received no instruction from his clients at this juncture to commence an action against her, but does not want to preclude this.

18 It is clear from all of the evidence before me that the relationship between the "neighbours" has been unpleasant and stormy, and not one of cordial neighbours throughout. In part, as a result of these relations, the applicant and Ms. Horton finally determined that they would sell their home, which they have done. They no longer live in that home, but have moved. According to their affidavits, upon which there was no cross-examination, they did not wish to live next to the Gills any longer. They wished to make a "clean break" and to bring finality to the relationship.

19 It appears from the evidence that there was not an initial intention or expressed intention to include Ms. Horton in the release. I note, again, that she was not a party to the application and she is not on title. Only the owners of the subject properties, including the subsequent purchasers of 667 Euclid and the bank were named. However, given all of the circumstances, and the previous proceedings in this dispute between the "neighbours", the applicant seeks to have his wife, who was not a party to the application, included in the release to make a clean break with the Gills and to bring finality to the matter.

20 This wish on the part of the applicant was originally communicated by Mr. Wainberg to Mr. Gerson who agreed on June 13 that Ms. Horton be included as a means to "bring finality" to the issues.

21 The request to include her in the release is reasonable, given all the circumstances, as was the agreement by the respondent on June 13 to do so. It is, in my view, reasonable that the mutual agreement now be concluded in those terms. Thus, the mutual release should include both the applicant and Lynn Horton and should release all parties and Ms. Horton to the date of the signing of the final release, as counsel had originally agreed on June 13, 2016.

22 In all of the circumstances of this case, I make no order as to costs. Each party is to bear their own costs.

C.J. BROWN J.

TAB 10

Case Name:

Garland v. Consumers' Gas Co.

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

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

[2004] A.C.S. no 21

2004 SCC 25

2004 CSC 25

[2004] 1 S.C.R. 629

[2004] 1 R.C.S. 629

237 D.L.R. (4th) 385

319 N.R. 38

J.E. 2004-931

186 O.A.C. 128

43 B.L.R. (3d) 163

9 E.T.R. (3d) 163

2004 CanLII 25

130 A.C.W.S. (3d) 32

2004 CarswellOnt 1558

2004 CarswellOnt 1559

File No.: 29052.

Supreme Court of Canada

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

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

(91 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Restitution -- Unjust enrichment -- Late payment penalty -- Customers of regulated gas utility claiming restitution for unjust enrichment arising from late payment penalties levied by utility in excess of interest limit prescribed by s. 347 of Criminal Code -- Whether customers have claim for unjust enrichment -- Defences that can be mounted by utility to resist claim -- Whether other ancillary orders necessary.

Summary:

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

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

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

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

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

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

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

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

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

Cases Cited

Applied: Peter v. Beblow, [1993] 1 S.C.R. 980; explained: Pettkus v. Becker, [1980] 2 S.C.R. 834; Peel (Regional Municipality) v. Canada, [1992] 3 S.C.R. 762; referred to: Garland v. Consumers' Gas Co., [1998] 3 S.C.R. 112; Sprint Canada Inc. v. Bell Canada (1997), 79 C.P.R. (3d) 31; Ontario Hydro v. Kelly (1998), 39 O.R. (3d) 107; Mahar v. Rogers Cablesystems Ltd. (1995), 25 O.R. (3d) 690; Berardinelli v. Ontario Housing Corp., [1979] 1 S.C.R. 275; Sharwood & Co. v. Municipal Financial Corp. (2001), 53 O.R. (3d) 470; Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd., [1976] 2 S.C.R. 147; RBC Dominion Securities Inc. v. Dawson (1994), 111 D.L.R. (4th) 230; Rathwell v. Rathwell, [1978] 2 S.C.R. 436; Reference re Goods and Services Tax, [1992] 2 S.C.R. 445; Mack v. Canada (Attorney General) (2002), 60 O.R. (3d) 737; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961; Transport North American Express Inc. v. New Solutions Financial Corp., [2004] 1 S.C.R. 249, 2004 SCC 7; Oldfield v. Transamerica Life Insurance Co. of Canada, [2002] 1 S.C.R. 742, 2002 SCC 22; Lipkin Gorman v. Karpnale Ltd., [1992] 4 All E.R. 512; Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63; Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Litchfield, [1993] 4 S.C.R. 333; Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307; R. v. Jorgensen, [1995] 4 S.C.R. 55; Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721; Amax Potash Ltd. v. Government of Saskatchewan, [1977]

2 S.C.R. 576.

Statutes and Regulations Cited

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

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

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

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

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

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

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

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History and Disposition:

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

allowed.

Counsel:

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

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

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

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

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

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

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

The judgment of the Court was delivered by

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

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

I. Facts

3 The respondent Consumers' Gas Company Limited, now known as Enbridge Gas Distribution Inc., is a regulated utility which provides natural gas to commercial and residential customers throughout Ontario. Its rates and payment policies are governed by the Ontario Energy Board ("OEB" or "Board") pursuant to the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13 ("*OEBA*"), and the *Municipal Franchises Act*, R.S.O. 1990, c. M.55. The respondent cannot sell gas or charge for gas-related services except in accordance with rate orders issued by the Board.

4 Consumers' Gas bills its customers on a monthly basis, and each bill includes a due date for the

payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time.

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

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

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

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

II. Relevant Statutory Provisions

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

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

subject of the proceeding is in accordance with the order.

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

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

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

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

> **347.** (1) Notwithstanding any Act of Parliament, every one who
>
> (*a*) enters into an agreement or arrangement to receive interest at a criminal rate, or
>
> (*b*) receives a payment or partial payment of interest at a criminal rate,
>
> is guilty of
>
> (*c*) an indictable offence and is liable to imprisonment for a term not exceeding five years, or
>
> (*d*) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

III. Judicial History

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

10 As this case raised no factual disputes, all parties agreed that summary judgment was the proper procedure on the motion. Winkler J. found that the appellant's claim could not succeed in

law and that there was no serious issue to be tried. In so finding, he held that the "regulated industries defence" was not a complete defence to the claim. On his reading of the relevant case law, the dominant consideration was whether the express statutory language afforded a degree of flexibility to provincial regulators. Section 347 affords no such flexibility, so the defence is not available.

11 Nor, in Winkler J.'s view, did s. 15 of the *Criminal Code* act as a defence. Section 15 was a provision of very limited application, originally enacted to ensure that persons serving the Monarch *de facto* could not be tried for treason for remaining faithful to the unsuccessful claimant to the throne. While it could have a more contemporary application, it was limited on its face to actions or omissions occurring pursuant to the authority of a sovereign power. As the OEB was not a sovereign power, it did not apply.

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

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

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

15 Having reached those conclusions, Winkler J. declined to make a preservation order, as

requested by the appellant, allowed the respondent's motion for summary judgment and dismissed the appellant's action. By endorsement, he ordered costs against the appellant.

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

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

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

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

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

20 In case that conclusion was wrong, McMurtry C.J.O. went on to find that there was a juristic reason for any presumed enrichment. Under this aspect of the test, moral and policy questions were open for consideration, and it was necessary to consider what was fair to both the plaintiff and the

defendant. It was therefore necessary to consider the statutory regime within which the respondent operated. McMurtry C.J.O. noted that the respondent was required by statute to apply the LPPs; it had been ordered to collect them and they were taken into account when the OEB made its rate orders. He found that it would be contrary to the equities in this case to require the respondent to repay all the LPP charges collected since 1981. Such an order would affect all of the respondent's customers, including the vast majority who consistently pay on time.

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

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

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

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

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

wrongdoing.

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

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

> Are s. 18 of the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13, and s. 25 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, constitutionally inoperative by reason of the paramountcy of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46?

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

IV. Issues

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

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

2. Can the respondent avail itself of any defence?

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

3. Other orders sought by the appellant

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

V. Analysis

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

A. *Unjust Enrichment*

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

(a) Enrichment of the Defendant

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

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

33 The majority of the Court of Appeal for Ontario disagreed. McMurtry C.J.O. found that while

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

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

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

36 I agree with the analysis of Borins J.A. on this point. The law on this question is relatively clear. Where money is transferred from plaintiff to defendant, there is an enrichment. Transfer of money so clearly confers a benefit that it is the main example used in the case law and by commentators of a transaction that meets the threshold for a benefit (see *Peel, supra*, at p. 790; *Sharwood & Co. v. Municipal Financial Corp.* (2001), 53 O.R. (3d) 470 (C.A.), at p. 478; P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (1990), at p. 38; Lord Goff and G. Jones, *The Law of Restitution* (6th ed. 2002), at p. 18). There simply is no doubt that Consumers' Gas received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The availability of those funds constitutes a benefit to Consumers' Gas. We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme.

37 While the respondent rightly points out that the language of "received and retained" has been used with respect to the benefit requirement (see, for example, *Peel, supra*, at p. 788), it does not make sense that it is a requirement that the benefit be retained permanently. The case law does, in fact, recognize that it might be unfair to award restitution in cases where the benefit was not retained, but it does so after the three steps for a claim in unjust enrichment have been made out by recognizing a "change of position" defence (see, for example, *Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd.*, [1976] 2 S.C.R. 147; *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230 (Nfld. C.A.)). Professor J. S. Ziegel, in his comment on the Ontario Court of Appeal decision in this case, "Criminal Usury, Class Actions and Unjust Enrichment in Canada"

(2002), 18 *J. Cont. L.* 121, at p. 126, suggests that McMurtry C.J.O.'s reliance on the regulatory framework of the LPP in finding that a benefit was not conferred "was really a change of position defence". I agree with this assessment. Whether recovery should be barred because the benefit was passed on to the respondent's other customers ought to be considered under the change of position defence.

(b) Absence of Juristic Reason

(i) *General Principles*

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

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

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

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

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

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

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

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

44 The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus, supra*), a disposition of law (*Pettkus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic

reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

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

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

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

(ii) *Application*

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

49 Disposition of law is well established as a category of juristic reason. In *Rathwell, supra*, Dickson J. gave as examples of juristic reasons "a contract or disposition of law" (p. 455). In *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 ("*GST Reference*"), Lamer C.J. held that a valid statute is a juristic reason barring recovery in unjust enrichment. This was affirmed in *Peter, supra*, at p. 1018. Most recently, in *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737, the Ontario Court of Appeal held that the legislation which created the Chinese head tax provided a juristic reason which prevented recovery of the head tax in unjust enrichment. In the leading

Canadian text, *The Law of Restitution, supra*, McCamus and Maddaugh discuss the phrase "disposition of law" from *Rathwell, supra*, stating, at p. 46:

> ... it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law.

It seems clear, then, that valid legislation can provide a juristic reason which bars recovery in restitution.

50 Consumers' Gas submits that the LPPs were authorized by the Board's rate orders which qualify as a disposition of law. It seems to me that this submission is predicated on the validity and operability of this scheme. The scheme has been challenged by the appellant on the basis that it conflicts with s. 347 of the *Criminal Code* and, as a result of the doctrine of paramountcy, is consequently inoperative. In the *GST Reference, supra*, Lamer C.J. held that legislation provides a juristic reason "unless the statute itself is *ultra vires*" (p. 477). Given that legislation that would have been *ultra vires* the province cannot provide a juristic reason, the same principle should apply if the provincial legislation is inoperative by virtue of the paramountcy doctrine. This position is contemplated by Borins J.A. in his dissent when he wrote, at para. 149:

> In my view, it would be wrong to say that the rate orders do not provide [Consumers' Gas] with a defence under s. 18 of the *OEBA* because they have been rendered inoperative by the doctrine of federal paramountcy, and then to breathe life into them for the purpose of finding that they constitute a juristic reason for [Consumers' Gas's] enrichment.

51 As a result, the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative. If the OEB orders are constitutionally valid and operative, they provide a juristic reason which bars recovery. Conversely, if the scheme is inoperative by virtue of a conflict with s. 347 of the *Criminal Code*, then a juristic reason is not present. In my view, the OEB rate orders are constitutionally inoperative to the extent of their conflict with s. 347 of the *Criminal Code*.

52 The OEB rate orders require the receipt of LPPs at what is often a criminal rate of interest. Such receipt is prohibited by s. 347 of the *Criminal Code*. Both the OEB rate orders and s. 347 of the *Criminal Code* are *intra vires* the level of government that enacted them. The rate orders are *intra vires* the province by virtue of s. 92(13) (property and civil rights) of the *Constitution Act, 1867*. Section 347 of the *Criminal Code* is *intra vires* the federal government by virtue of s. 91(19) (interest) and s. 91(27) (criminal law power).

53 It should be noted that the Board orders at issue did not require Consumers' Gas to collect the LPPs within a period of 38 days. One could then make the argument that this was not an express operational conflict. But to my mind this is somewhat artificial. I say this because at bottom it is a

necessary implication of the OEB orders to require payment within this period. In that respect it should be treated as an express order for purposes of the paramountcy analysis. Consequently, there is an express operational conflict between the rate orders and s. 347 of the *Criminal Code* in that it is impossible for Consumers' Gas to comply with both provisions. Where there is an actual operational conflict, it is well settled that the provincial law is inoperative to the extent of the conflict (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961). As a result, the Board orders are constitutionally inoperative. Because the Board orders are constitutionally inoperative, they do not provide a juristic reason. It therefore falls to Consumers' Gas to show that there was a juristic reason for the enrichment outside the established categories in order to rebut the *prima facie* case made out by the appellant.

54 The second stage of juristic reason analysis requires a consideration of reasonable expectations of the parties and public policy considerations.

55 When the reasonable expectations of the parties are considered, Consumers' Gas's submissions are at first blush compelling. Consumers' Gas submits, on the one hand, that late payers cannot have reasonably expected that there would be no penalty for failing to pay their bills on time and, on the other hand, that Consumers' Gas could reasonably have expected that the OEB would not authorize an LPP scheme that violated the *Criminal Code*. Because Consumers' Gas is operating in a regulated environment, its reliance on OEB orders should be given some weight. An inability to rely on such orders would make it very difficult, if not impossible, to operate in this environment. At this point, it should be pointed out that the reasonable expectation of the parties regarding LPPs is achieved by restricting the LPPs to the limit prescribed by s. 347 of the *Criminal Code* and also would be consistent with this Court's decision in *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, 2004 SCC 7.

56 Consumers' Gas's reliance on the orders would not provide a defence if it was charged under s. 347 of the *Criminal Code* because the orders are inoperative to the extent of their conflict with s. 347. However, its reliance on the orders is relevant in the context of determining the reasonable expectations of the parties in this second stage of the juristic reason analysis.

57 Finally, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, a criminal should not be permitted to keep the proceeds of his crime (*Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22, at para. 11; *New Solutions, supra*). Borins J.A. focussed on this public policy consideration in his dissent. He held that, in light of this Court's decision in *Garland No. 1*, allowing Consumers' Gas to retain the LPPs collected in violation of s. 347 would let Consumers' Gas profit from a crime and benefit from its own wrongdoing.

58 In weighing these considerations, from 1981-1994, Consumers' Gas's reliance on the inoperative OEB orders provides a juristic reason for the enrichment. As the parties have argued,

there are three possible dates from which to measure the unjust enrichment: 1981, when s. 347 of the *Criminal Code* was enacted, 1994, when this action was commenced, and 1998, when this Court held in *Garland No. 1* that the LPPs were limited by s. 347 of the *Criminal Code*. For the period between 1981 and 1994, when the current action was commenced, there is no suggestion that Consumers' Gas was aware that the LPPs violated s. 347 of the *Criminal Code*. This mitigates in favour of Consumers' Gas during this period. The reliance of Consumers' Gas on the OEB orders, in the absence of actual or constructive notice that the orders were inoperative, is sufficient to provide a juristic reason for Consumers' Gas's enrichment during this first period.

59 However, in 1994, when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in charging the LPPs. This possibility became a reality when this Court held that the LPPs were in excess of the s. 347 limit. Consumers' Gas could have requested that the OEB alter its rate structure until the matter was adjudicated in order to ensure that it was not in violation of the *Criminal Code* or asked for contingency arrangements to be made. Its decision not to do this, as counsel for the appellant pointed out in oral submissions, was a "gamble". After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs.

60 Moreover, once this Court held that LPPs were offside, for purposes of unjust enrichment, it is logical and fair to choose the date on which the action for redress commenced. Awarding restitution from 1981 would be unfair to the respondent since it was entitled to reasonably rely on the OEB orders until the commencement of this action in 1994. Awarding restitution from 1998 would be unfair to the appellant. This is because it would permit the respondent to retain LPPs collected in violation of s. 347 after 1994 when it was no longer reasonable for the respondent to have relied on the OEB orders and the respondent should be presumed to have known the LPPs violated the *Criminal Code*. Further, awarding restitution from 1998 would deviate from the general rule that monetary remedies like damages and interest are awarded as of the date of occurrence of the breach or as of the date of action rather than the date of judgment.

61 Awarding restitution from 1994 appropriately balances the respondent's reliance on the OEB orders from 1981-1994 with the appellant's expectation of recovery of monies that were charged in violation of the *Criminal Code* once the serious possibility that the OEB orders were inoperative had been raised. As a result, as of the date this action was commenced in 1994, it was no longer reasonable for Consumers' Gas to rely on the OEB orders to insulate them from liability in a civil action of this type for collecting LPPs in contravention of the *Criminal Code*. Thus, after the action was commenced in 1994, there was no longer a juristic reason for the enrichment of the respondent, so the appellant is entitled to restitution of the portion of monies paid to satisfy LPPs that exceeded an interest rate of 60 percent, as defined in s. 347 of the *Criminal Code*.

B. *Defences*

62 Having held that the appellant's claim for unjust enrichment is made out for LPPs paid after 1994, it remains to be determined whether the respondent can avail itself of any defences raised. It is only necessary to consider the defences for the period after 1994, when the elements of unjust enrichment are made out, and thus I will not consider whether the defences would have applied if there had been unjust enrichment before 1994. I will address each defence in turn.

(a) Change of Position Defence

63 Even where the elements of unjust enrichment are made out, the remedy of restitution will be denied where an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned (*Storthoaks, supra*). In this case, the respondent says that any "benefit" it received from the unlawful charges was passed on to other customers in the form of lower gas delivery rates. Having "passed on" the benefit, it says, it should not be required to disgorge the amount of the benefit (a second time) to overcharged customers such as the appellant. The issue here, however, is not the ultimate destination within the regulatory system of an amount of money equivalent to the unlawful overcharges, nor is this case concerned with the net impact of these overcharges on the respondent's financial position. The issue is whether, as between the overcharging respondent and the overcharged appellant, the passing of the benefit on to other customers excuses the respondent of having overcharged the appellant.

64 The appellant submits that the defence of change of position is not available to a defendant who is a wrongdoer and that, since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. I agree. The rationale for the change of position defence appears to flow from considerations of equity. G. H. L. Fridman writes that "[o]ne situation which would appear to render it inequitable for the defendant to be required to disgorge a benefit received from the plaintiff in the absence of any wrongdoing on the part of the defendant would be if he has changed his position for the worse as a result of the receipt of the money in question" (*Restitution* (2nd ed. 1992), at p. 458). In the leading British case on the defence, *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 512 (H.L.), Lord Goff stated (at p. 533):

> [I]t is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these [where the defendant has changed his or her position]? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.

65 If the change of position defence is intended to prevent injustice from occurring, the whole of the plaintiff's and defendant's conduct during the course of the transaction should be open to scrutiny in order to determine which party has a better claim. Where a defendant has obtained the

enrichment through some wrongdoing of his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff. In this case, the respondent cannot avail itself of this defence because the LPPs were obtained in contravention of the *Criminal Code* and, as a result, it cannot be unjust for the respondent to have to return them.

66 Thus, the change of position defence does not help the respondent in this case. Even assuming that the respondent would have met the other requirements set out in *Storthoaks, supra*, the respondent cannot avail itself of the defence because it is not an "innocent" defendant given that the benefit was received as a result of a *Criminal Code* violation. It is not necessary, as a result, to discuss change of position in a comprehensive manner and I leave a fuller development of the other elements of this defence to future cases.

(b) Section 18/25 of the *Ontario Energy Board Act*

67 The respondent raises a statutory defence found formerly in s. 18 and presently in s. 25 of the 1998 *OEBA*. The former and the present sections are identical, and read:

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

I agree with McMurtry C.J.O. that this defence should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and we do not have to consider the constitutionality of the section.

68 McMurtry C.J.O. was correct in his holding that legislative provisions purporting to restrict a citizen's rights of action should attract strict construction (*Berardinelli, supra*). In this case, I again agree with McMurtry C.J.O. that the legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, despite the broad wording of the section. Section 18/25, thus, cannot provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. As a consequence, like McMurtry C.J.O., I find the argument on s. 18/25 to be unpersuasive.

69 Because I find that it could not have been the intention of the legislature to bar civil claims stemming from acts that offend the *Criminal Code*, on a strict construction, s. 18/25 cannot protect Consumers' Gas from these types of claims. If the provincial legislature had wanted to eliminate the possibility of such actions, it should have done so explicitly in the provision. In the absence of such explicit provision, s. 18/25 must be read so as to exclude from its protection civil actions arising from violations of the *Criminal Code* and thus does not provide a defence for the respondent in this case.

(c) Exclusive Jurisdiction and Collateral Attack

70 McMurtry C.J.O. was also correct in his holding that the OEB does not have exclusive jurisdiction over this dispute. While the dispute does involve rate orders, at its heart it is a private law matter under the competence of civil courts and consequently the Board does not have jurisdiction to order the remedy sought by the appellant.

71 In addition, McMurtry C.J.O. is correct in holding that this action does not constitute an impermissible collateral attack on the OEB's order. The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.

72 Moreover, the appellant's case lacks other hallmarks of collateral attack. As McMurtry C.J.O. points out at para. 30 of his reasons, the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum. In this case, the appellant is not bound by the Board's orders, therefore the rationale behind the rule is not invoked. The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.

73 In this case, the appellant is not the object of the orders and thus there can be no concern that he is seeking to avoid the orders by bringing this action. As a result, a threat to the integrity of the system does not exist because the appellant is not legally bound to follow the orders. Thus, this action does not appear, in fact, to be a collateral attack on the Board's orders.

(d) The Regulated Industries Defence

74 The respondent submits that it can avail itself of the "regulated industries defence" to bar recovery in restitution because an act authorized by a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state and, as a result, the collection of LPPs pursuant to orders issued by the OEB cannot be considered to be contrary to the public interest and thus cannot be contrary to s. 347 of the *Criminal Code*.

75 Winkler J. held that the underlying purpose of the defence, regulation of monopolistic industries in order to ensure "just and reasonable" rates for consumers, would be served in the circumstances and as a result the defence would normally apply. However, because of the statutory language of s. 347, Winkler J. determined that the defence was not permitted in this case. He wrote, at para. 34, "[t]he defendant can point to no case which allows the defence unless the federal statute in question uses the word 'unduly' or the phrase 'in the public interest'". Absent such recognition in the statute of "public interest", he held, no leeway for provincial exceptions exist.

76 I agree with the approach of Winkler J. The principle underlying the application of the defence is delineated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356:

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

Estey J. reached this conclusion after canvassing the cases in which the regulated industries defence had been applied. Those cases all involved conflict between federal competition law and a provincial regulatory scheme, but the application of the defence in those cases had to do with the particular wording of the statutes in question. While I cannot see a principled reason why the defence should not be broadened to apply to cases outside the area of competition law, its application should flow from the above enunciated principle.

77 Winkler J. was correct in concluding that, in order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. But s. 347 does not contain the required indication for exempting a provincial scheme.

78 This view is further supported by this Court's decision in *R. v. Jorgensen*, [1995] 4 S.C.R. 55. In that case, the accused was charged with "'knowingly' selling obscene material 'without lawful justification or excuse'" (para. 44). The accused argued that the Ontario Film Review Board had approved the videotapes, therefore it had a lawful justification or excuse. This Court considered

whether approval by a provincial body could displace a criminal charge. Sopinka J., for the majority, held that in order to exempt acts taken pursuant to a provincial regulatory body from the reach of the criminal law, Parliament must unequivocally express this intention in the legislative provision in issue (at para. 118):

> While Parliament has the authority to introduce dispensation or exemption from criminal law in determining what is and what is not criminal, and may do so by authorizing a provincial body or official acting under provincial legislation to issue licences and the like, an intent to do so must be made plain.

79 The question of whether the regulated industries defence can apply to the respondent is actually a question of whether s. 347 of the *Criminal Code* can support the notion that a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state. In the previous cases involving the regulated industries defence, the language of "the public interest" and "unduly" limiting competition has always been present. The absence of such language from s. 347 of the *Criminal Code* precludes the application of this defence in this case.

(e) *De Facto* Doctrine

80 Consumers' Gas submits that because it was acting pursuant to a disposition of law that was valid at the time -- the Board orders -- they should be exempt from liability by virtue of the *de facto* doctrine. This argument cannot succeed. Consumers' Gas is not a government official acting under colour of authority. While the respondent points to the Board orders as justification for its actions, this does not bring the respondent into the purview of the *de facto* doctrine because the case law does not support extending the doctrine's application beyond the acts of government officials. The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. As a result, Consumers' Gas cannot rely on the *de facto* doctrine to resist the plaintiff's claim.

81 Furthermore, the *de facto* doctrine attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation that is simply regulated by a government authority is not supported by the case law and in my view does not further the underlying purpose of the doctrine. In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court held, at p. 756, that:

> There is only one true condition precedent to the application of the doctrine: the *de facto* officer must occupy his or her office under colour of authority.

It cannot be said that Consumers' Gas was a *de facto* officer acting under colour of authority when it charged LPPs to customers. Consumers' Gas is a private corporation acting in a regulatory context, not an officer vested with some sort of authority. When charging LPPs, Consumers' Gas is engaging in commerce, not issuing a permit or passing a by-law.

82 In rejecting the application of the *de facto* doctrine here, I am cognizant of the passage in *Reference re Manitoba Language Rights*, at p. 757, cited by the intervener Toronto Hydro and which, at first glance, appears to imply that the *de facto* doctrine might apply to private corporations:

> ... the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. [Emphasis added.]

83 While this passage appears to indicate that "private bodies corporate" are protected by the doctrine, it must be read in the context of the entire judgment. Earlier, at p. 755, the Court referred to the writings of Judge A. Constantineau in *The De Facto Doctrine* (1910), at pp. 3-4. The following excerpt from that passage is relevant:

> The de facto doctrine is a rule or principle of law which ... recognizes the existence of, and protects from collateral attack, public or private bodies corporate, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies ... . [Emphasis added.]

In this passage, I think it is clear that the Court's reference to "private bodies corporate" is limited to issues affecting the creation of the corporation, for example where a corporation was incorporated under an invalid statute. It does not suggest that the acts of the corporation are shielded from liability by virtue of the *de facto* doctrine.

84 This view finds further support in the following passage from the judgment (at p. 755) :

> That the foundation of the principle is the more fundamental principle of the rule of law is clearly stated by Constantineau in the following passage (at pp. 5-6):
>
> > Again, the doctrine is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large, since any other rule would lead to such uncertainty and confusion, as to break up the order and quiet of all civil administration. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to challenge the authority of and refuse obedience to the government of the state and the numerous functionaries through whom it exercises its various powers, or refuse to recognize municipal bodies and their officers, on the ground of irregular existence or defective titles, insubordination and disorder of the worst kind would be encouraged, which might at any time culminate in anarchy.

The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. In sum, I find no merit in Consumers' Gas's argument that the *de facto* doctrine shields it from liability and as a result this doctrine should not be a bar to the appellant's recovery.

C. *Other Orders Requested*

(a) Preservation Order

85 The appellant, Garland, requests an "*Amax*-type" preservation order on the basis that the LPPs continue to be collected at a criminal rate during the pendency of this action, and these payments would never have been made but for the delays inherent in litigation (*Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576). In my view, however, a preservation order is not appropriate in this case. Consumers' Gas has now ceased to collect the LPPs at a criminal rate. As a result, if a preservation order were made, there would be no future LPPs to which it could attach. Even with respect to the LPPs paid between 1994 and the present, to which such an order could attach, a preservation order should not be granted for three further reasons: (1) such an order would serve no practical purpose, (2) the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and (3) *Amax* can be distinguished from this case.

86 First, the appellant has not alleged that Consumers' Gas is an impecunious defendant or that there is any other reason to believe that Consumers' Gas would not satisfy a judgment against it. Even if there were some reason to believe that Consumers' Gas would not satisfy such a judgment, an *Amax*-type order allows the defendant to spend the monies being held in the ordinary course of business -- no actual fund would be created. So the only thing that a preservation order would achieve would be to prevent Consumers' Gas from spending the money earned from the LPPs in a non-ordinary manner (for example, such as moving it off-shore) which the appellant has not alleged is likely to occur absent the order.

87 Second, the respondent submits that by seeking a preservation order the appellant is attempting to avoid Rule 45.02 of the Ontario *Rules of Civil Procedure*, the only source of jurisdiction in Ontario to make a preservation order. The *Rules of Civil Procedure* apply to class proceedings and do not permit such an order in these circumstances. Rule 45.02 provides that, "[w]here the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just" (emphasis added). The respondent submits that the appellant is not in fact claiming a specific fund here. In the absence of submissions by the appellant on this issue, I am of the view that the appellant has not satisfied the criteria set out in the Ontario *Rules of Civil Procedure* and that this Court could refuse to grant the order requested on this basis.

88 Finally, the appellant's use of *Amax, supra*, as authority for the type of order sought is without merit. The appellant has cited the judgment very selectively. The portion of the judgment the appellant cites in his written submissions reads in full (at p. 598) :

> Apart from the Rules this Court has the discretion to make an order as requested by appellants directing the Province of Saskatchewan to hold, as stakeholder, such sums as are paid by the appellants pursuant to the impugned legislation but with the right to use such sums in the interim for Provincial purposes, and with the obligation to repay them with interest in the event the legislation is ultimately held to be *ultra vires*. Such an order, however, would be novel, in giving the stakeholder the right to spend the moneys at stake, and I cannot see that it would serve any practical purpose. [Emphasis added.]

The Court in *Amax* went on to refuse to make the order. So while the appellant is right that the Court in *Amax* failed to reject the hypothetical possibility of making such an order in the future, it seems to me that in this case, as in *Amax*, such an order would serve no practical purpose. For these reasons, I find there is no basis for making a preservation order in this case.

(b) Declaration That the LPPs Need Not Be Paid

89 The appellant also seeks a declaration that the LPPs need not be paid. Given that the respondent asserts that the LPP is no longer charged at a criminal rate, issuing such a declaration would serve no practical purpose and as a result such a declaration should not be made.

(c) Costs

90 The appellant is entitled to his costs throughout. This should be understood to mean that, regardless of the outcome of any future litigation, the appellant is entitled to his costs in the proceedings leading up to and including *Garland No. 1* and this appeal. In addition, in oral submissions counsel for the Law Foundation of Ontario made the point that in order to reduce costs in future class actions, "litigation by installments", as occurred in this case, should be avoided. I agree. On this issue, I endorse the comments of McMurtry C.J.O., at para. 76 of his reasons:

> In this context, I note that the protracted history of these proceedings cast some doubt on the wisdom of hearing a case in instalments, as was done here. Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

VI. Disposition

91 For the foregoing reasons, I would allow the appeal with costs throughout, set aside the judgment of the Ontario Court of Appeal, and substitute therefor an order that Consumers' Gas repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 after the action was commenced in 1994 in an amount to be determined by the trial judge.

Solicitors:

Solicitors for the appellant: McGowan Elliott & Kim, Toronto.

Solicitors for the respondent: Aird & Berlis, Toronto.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitors for the intervener Toronto Hydro-Electric System Limited: Ogilvy Renault, Toronto.

Solicitor for the intervener the Law Foundation of Ontario: Mark M. Orkin, Toronto.

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

TAB 11

Most Negative Treatment: Distinguished
Most Recent Distinguished: Total Energy Services Inc. v. Tamarack Valley Energy Ltd. | 2011 ABQB 787, 2011 CarswellAlta 2231, [2012] A.W.L.D. 1105, [2012] A.W.L.D. 1107, 64 Alta. L.R. (5th) 181, 530 A.R. 248, 209 A.C.W.S. (3d) 836 | (Alta. Q.B., Dec 12, 2011)

1971 CarswellOnt 790
Ontario Court of Appeal

Champlain Ready-Mixed Concrete v. Beaupre

1971 CarswellOnt 790, [1971] 3 O.R. 568, 21 D.L.R. (3d) 164

Champlain Ready-Mixed Concrete v. Beaupre

Jessup, J.A.

Oral reasons: May 25, 1971
Docket: None given.

Counsel: H.A.L. Emerson, for appellant, plaintiff
M. Teplitsky, for respondent, defendant

Subject: Corporate and Commercial

Headnote

Creditors and Debtors --- Payment by debtor — Part payment
Satisfaction of account by payment of lesser sum — No express acceptance of part performance — Mercantile Law Amendment Act, R.S.O. 1960, c. 238, s. 16.

Defendant debtor sent plaintiff a cheque for $500 endorsed "$500 has been accepted by [plaintiff] as payment in full". Plaintiff crossed out the words "in full", inserted "on account, balance $430.85" and cashed the cheque. In an action for the balance, defendant relied on s. 16 of the Act which provided: "part performance of an obligation either before or after a breach thereof when expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation." Held, the action should be allowed. Defendant had not proved an express acceptance of part performance by plaintiff. While a creditor's silence could be some evidence of an express acceptance, it was not a factor which singly governed the rights of the parties. In any event there was evidence that plaintiff had sent defendant a revised billing and the alteration of the endorsement would have been noticed when the cheque was returned to defendant.

1971 CarswellOnt 790, [1971] 3 O.R. 568, 21 D.L.R. (3d) 164

***Jessup, J.A.* (orally):**

1 This is an appeal from a judgment rendered in the Sixth Division Court of the County of Simcoe dismissing the plaintiff's action with costs.

2 The facts can be stated quite briefly. The defendant was indebted to the plaintiff in the amount of $930.85 for concrete supplied by the plaintiff to the defendant. In February of 1970 the defendant wrote to the plaintiff advising that he was in financial difficulties and stating that he proposed a settlement with his creditors on the basis of 50 cents on the dollar. Subsequently, there was a discussion by telephone with a representative of the plaintiff in which the representative of the plaintiff said he would look into the situation with other creditors of the defendant. Having done so, the representative of the plaintiff had another telephone discussion with the defendant in which he advised the defendant that the proposal was not acceptable.

3 Shortly afterwards the defendant sent to the plaintiff a cheque for $500 on the reverse of which he had typed the following endorsement "$500.00 has been accepted by Mr. Coldwell as payment in full". When the cheque was received by the plaintiff, Mr. Coldwell for the plaintiff "x'd" out by typewriter the words "in full" and added to the endorsement made by the defendant the words "on account, balance $430.85".

4 There was evidence given on behalf of the plaintiff that subsequently some two weeks later a bill was sent to the defendant for the balance owing on the account of $430.85. The defendant said that he heard nothing with respect to the balance he owed until he received the Division Court summons. The plaintiff, of course, cashed the cheque after altering the endorsement, as I have mentioned, and the action in the Division Court was for the sum of $400 representing the balance of $430.85 with an abandonment of the $30.85 which was in excess of jurisdiction.

5 In these circumstances, the rights of the parties are governed by s. 16 of the *Mercantile Law Amendment Act*, R.S.O. 1960, c. 238 [now R.S.O. 1970, c. 272], which provides:

> 16. Part performance of an obligation either before or after a breach thereof when expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation.

6 It is quite clear on the facts that the cheque for $500 was not rendered in pursuance to an agreement for part performance within the meaning of s. 16 and the only question, therefore, is whether on the evidence it can be held that there was an express acceptance by the plaintiff of the cheque in partial payment tendered by the defendant.

7 In the course of his judgment the learned trial Judge said:

> In my view, if a party receives a cheque marked "payment in full", the cheque may be cashed and a claim made for the balance owing, but it is incumbent upon the creditor to forthwith write the debtor and advise him that the cheque is not being accepted as payment in full.

With the greatest respect for the learned trial Judge, I do not find support in the authorities for that statement of law. It is a question of fact in every case, whether or not there has been express acceptance of part performance in satisfaction of an obligation; and while the silence of a creditor may be some evidence which is to be considered with all the other evidence in deciding whether or not there has been express acceptance, in my view it is not a factor which is singly governing the rights of the parties.

8 In any event, in this case the evidence of the plaintiff was that a revised billing had been sent out at the end of the month and the endorsement on the cheque having been altered, its alteration would have necessarily come to the attention of the defendant when the cheque was returned to him from his bank. A defendant, pleading s. 16 of the *Mercantile Law Amendment Act*, has in my opinion a heavy onus. He must prove an express acceptance of part performance. In my view, on the facts of this case, that onus was not met.

9 In the result, I think the appeal must be allowed and the judgment below set aside. In its place a judgment will go for the plaintiff for $400 and costs to include a counsel fee of $25. The plaintiff is entitled to its costs of this appeal.

10 *Appeal allowed; judgment for plaintiff.*

End of Document

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 SEARS CANADA INC., et al.

Court File No.: CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

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(Motion Returnable May 7, 2019)

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