Court File No. CV-18-00611214-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee,
J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES MCBURNEY, DEBORAH ROSATI and DONALD ROSS

Defendants

BOOK OF AUTHORITIES OF THE ESL PARTIES
(Motion to Strike Returnable April 17-18, 2019)

March 29, 2019

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TO: **THE SERVICE LIST**

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21. *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77

Secondary sources

22. Robert W. V. Dickerson, John L. Howard and Leon Getz, *Proposals for a New Business Corporations Law for Canada*, vol. 1 (Ottawa: Information Canada, 1971)

23. Jassmine Girgis, "The Oppression Remedy: Clarifying Part II of the BCE Test" (2018) 96-3 Can. Bar Rev. 484

24. Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004)

25. P. M. Vasudev, "Corporate Stakeholders in Canada—An Overview and a Proposal" (2015) 45-1 Ottawa L. Rev.137

COURT FILE NO.: 391/08
DATE: 20090430

2009 CanLII 22544 (ON SCDC)

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Swinton, Low and Karakatsanis JJ.

B E T W E E N:	)	
	)	
1413910 ONTARIO INC. carrying on business as BULLS EYE STEAKHOUSE & GRILL	)	*Geoff R. Hall* and *Julie K. Parla*, for the Applicant/Respondent in Appeal
	)	
Applicant/Respondent in Appeal	)	
	)	
- and -	)	
	)	
HILARY MARIAN MCLENNAN	)	*Melvyn L. Solmon*, for the Respondent/Appellant in Appeal
Respondent/ Appellant	)	
	)	
	)	
	)	**HEARD at Toronto:** April 2, 2009

LOW J.

[1] Hilary Marian McLennan (the appellant) appeals from the judgment of C. Campbell J. dated November 28, 2008. The judgment arises from an application brought by the respondent, 1413910 Ontario Inc. (hereinafter "Bulls Eye") for an oppression remedy under s. 248(2) of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B. 16, as amended (the OBCA).

[2] The hearing under s. 248(2) was bifurcated. The application judge released his decision on July 4, 2008 finding that there had been oppression of Bulls Eye in the conduct of the affairs of Select Restaurant Plaza Corporation. A hearing as to remedy followed on November 13, 2008 and reasons were released on November 28, 2008 requiring the appellant to pay to Bulls Eye the sum of $786,683.36.

THE FACTS

[3] The appellant is the widow, estate trustee and sole beneficiary of the estate of John Keith McLennan, who died in 1998. John Keith McLennan was the sole shareholder of J.K. McLennan

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Developments Limited (Developments). Developments was the sole shareholder of Select Restaurant Plaza Corporation (Select). After the death of John Keith McLennan, the appellant became an officer and director of Developments. She appointed her brother, Victor McCullough, to be president of Select. Thus the appellant indirectly had control of and owned the shares of Select.

[4] Select's asset was a commercial plaza in which Bulls Eye was a tenant. On June 19, 2003, Select terminated Bulls Eye's lease in the plaza.

[5] Bulls Eye sued Select for a declaration that the termination of lease was wrongful and for damages. On February 13, 2004, a declaration of wrongful termination was granted on a summary judgment motion by Matlow J. The assessment of damages was deferred to trial of an issue. Select appealed the judgment granting the declaration. The declaration was upheld. The trial for assessment of damages took place in April, 2006 and, on June 30, 2006, judgment issued in favour of Bulls Eye in the amount of $699,465.48. Select appealed from the judgment assessing damages. Its appeal was quashed with costs.

[6] Between the judgment of February 13, 2004 declaring wrongful termination and the judgment of June 30, 2006 quantifying damages with interest and costs, Select's plaza was sold on July 19, 2005 for $10,225,000.00. Within days, the entire net proceeds of the sale of $3,818,132.91 (after paying out the registered mortgage and executions and various sums to lawyers) were paid out to the appellant and were put into her personal bank account. There were no assets remaining in Select to satisfy Bulls Eye's judgment when its damages were quantified in June, 2006.

[7] Prior to the closing of the sale of the plaza, Bulls Eye had been apprehensive that a circumstance of this kind might arise. On May 26, 2005, Bulls Eye had brought a motion to the court seeking the appointment of a receiver to control the sale and its proceeds or alternatively for an order requiring Select to pay into court the sum of $600,000 pending the outcome of the assessment of Bulls Eye's damages for wrongful termination of lease.

[8] The evidence from Select on Bulls Eye's motion for appointment of a receiver is central to the determination by the application judge of Bulls Eye's application for an oppression remedy.

[9] Select responded to Bulls Eye's motion for a receiver by filing the affidavit of Victor McCullough, president of Select and the appellant's brother. In his affidavit, McCullough stated that there would be almost $2,000,000 in equity after paying out encumbrances.

[10] McCullough was cross-examined. In response to the question, "What are the legal obligations of Select with respect to application of the proceeds of the sale of the Plaza?", the answer was "To pay all of the creditors as required by law."

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[11] In response to the question as to what debts Select had, the answer was "Mortgages, executions, accrued salary of McCullough in the amount of approximately $1,200,000. All other creditors are being paid currently."

[12] In response to the question, "What does Select intend to do with the approximately $2 million of equity following sale of the Plaza?", the answer was "No plans."

[13] In response to the question, "Does Select plan on keeping the money in a bank account or in cash?", the answer was "the money would be kept in a bank account or invested."

[14] There was no disclosure that there was any intention to pay out all of the net proceeds of the sale to the appellant and no disclosure that the net proceeds would be paid out almost immediately following the closing of the sale.

[15] The motion for the appointment of a receiver was heard by Dunnet J. who dismissed it on the basis that there was no evidence that the defendants were removing assets from the jurisdiction and no persuasive evidence that the defendants were dissipating their assets.

THE APPLICATION AND THE ORDER APPEALED FROM

[16] As there were no assets remaining in Select to satisfy its judgment, Bulls Eye brought an application under s. 248(2) of the OBCA for relief.

[17] Section 248 (1) to (3) of the OBCA provide:

> 248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
>
> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
>
> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

> (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
>
> ….
>
> (j) an order compensating an aggrieved person;
>
> ….

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[18] In his reasons finding that Bulls Eye had been subject to oppression, Campbell J. held that while Bulls Eye was not a judgment creditor, it was a creditor in that it had a legal right to damages. He held that while ordinarily the oppression remedy would not be available to a creditor simply by virtue of the fact that there was debt owing to him by the corporation, this case was exceptional, in that Bulls Eye was led to have a reasonable expectation, based on the evidence adduced and the answers given on cross-examination and filed on the receiver motion before Dunnet J., that its judgment would be paid out of the proceeds of sale of Select's plaza. Accordingly, Bulls Eye was a complainant within the meaning of the statute.

ISSUES RAISED ON APPEAL AND THE STANDARD OF REVIEW

[19] The appellant's position is that the application judge erred in law in granting a remedy under s. 248(2) of the OBCA because Bulls Eye was not a creditor. The appellant argues that the application judge erred in finding that Bulls Eye's had a reasonable expectation that Select would have assets to satisfy its judgment and that the defeat of those expectations amounted to oppression. The appellant argues that the application judge erred in fashioning a remedy that resulted in Bulls Eye obtaining a priority ahead of other unsecured creditors. The appellant argues that the application judge erred in finding that the appellant did not have an equitable mortgage for a sum comprising $1,533,330.61 paid to Canada Life on May 22, 2003, $666,969.39 paid to the city of Mississauga on May 22, 2003, and a further $65,827.35 paid to Canada Life. The appellant argues that the application judge erred in rejecting her assertions that she was owed $1,353,000, being 22% of the amount she paid to settle the litigation over the estate of her late husband, and that Victor McCullough, her brother, was owed $1,200,000 by Select for management fees and $90,000 for other funds advanced.

[20] There is no dispute concerning the standard of review. Questions of law are reviewed on a standard of correctness. Questions of fact and questions of mixed fact and law will be interfered with only if there is a palpable and overriding error unless, in the case of the latter, there is some extricable error in principle amounting to an error in law (see *Housen v. Nikolaisen*, [2002] 2 S.C. R. 235).

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WAS BULLS EYE A CREDITOR UNDER THE OBCA WHEN APPELLANT HAD THE PROCEEDS OF SALE PAID TO HERSELF?

[21] Whether a person having a judgment declaring a business corporation liable to him in damages in an amount to be assessed at a trial of the issue is a creditor of the corporation for purposes of s. 248(2) of the OBCA is a question of law.

[22] The culminating act amounting to oppression was the payment of the entire net proceeds of sale of Select's real property to the appellant. At the date of that act, Bulls Eye had a judgment establishing Select`s liability to pay damages in such amount as may be found by the trial judge but it did not yet have its damages quantified and reduced to a judgment. The appellant's argument is that in the absence of having obtained a judgment for a specific sum, Bulls Eye was not a creditor at the time of the payment to the appellant in July 2005 and therefore could not be a complainant under s. 248(2) of the OBCA.

[23] Section 245 of the OBCA defines complainant as follows:

> "complainant" means,
>
> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
>
> (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

[24] While creditors are not necessarily complainants simply by virtue of the existence of a debtor/creditor relationship with a business corporation, a creditor may be a proper person to make an application for an oppression remedy in the discretion of the court. At the time of the launching of the application under s. 248(2), Bulls Eye had a judgment for a specific sum of money and was clearly a creditor. It is not seriously disputed that it was open to the application judge to entertain its application to be a complainant and to seek relief under s. 248(2).

[25] More difficult is the question of whether Bulls Eye was a creditor at the time of the acts held to constitute oppression, that is, from May, 2005 through July, 2005.

[26] The application judge was alive to the variety of meanings of the term "creditor".

[27] He held that although Bulls Eye was not a "judgment creditor" in the sense of holding an enforceable judgment for a sum certain, referring to *Stephen v. Stewart* (1943), 59 B.C. R. 297, that was not an end of the matter. In coming to the conclusion that Bulls Eye was a creditor for

purposes of the s. 248(2) application, the application judge relied on the more comprehensive and fundamental definition in *Black's Law Dictionary*, 6th ed. at p. 388:

> … The word is susceptible of latitudinous construction. In its broad sense the word means one who has any legal liability upon a contract, express or implied, or in tort; in its narrow sense, the term is limited to one who holds a demand which is certain and liquidated. In statutes the term has various special meanings, dependent upon context, purpose of statute, etc.
>
> The term "creditor," within the common-law and statutes that conveyances with intent to defraud creditors shall be void, includes every one having right to require the performance of any legal obligation, contract, or guaranty, or a legal right to damages growing out of contract or tort, includes not merely the holder of a fixed and certain present debt, but every one having a right to require the performance of any legal obligation, contract or guaranty, or a legal right to damages arising out of contract or tort, and includes one entitled to damages for breach of contract to convey real estate, notwithstanding the abandonment of his action for specific performance.

[28] There is no definition of "creditor" in the OBCA.

[29] Unless there is a compelling reason in the context of an oppression remedy application for construing the word in its technical sense of a "judgment creditor" or in the sense of a person to whom an obligor owes a liquidated sum certain whether reduced to a judgment or not, it is preferable to look to the context in which the term appears and to the purpose of the legislation itself.

[30] There is, in my view, no compelling reason to hold that the term creditor should be construed in the narrow sense. It is by mere happenstance that there was a significant hiatus between the issuance of the declaration establishing liability and the judgment quantifying it. As of the date when the judgment for liability issued, a relationship arose in which Select owed an obligation to Bulls Eye and Bulls Eye was owed an obligation by Select. While those parties could reasonably disagree as to the monetary extent of the liability, it was clear that they were in a particular relationship of proximity and that the manner of conduct of the obligor's affairs could have significant consequences on the obligee.

[31] Section 248(2) of the OBCA gives recognition to the fact that there are a number of classes of persons who have a legitimate stake in the manner in which the affairs of a business corporation are conducted, creditors among them, and it prevents those having power and control over the affairs of a business corporation from exercising that power with impunity.

[32] The question that arises on the particular facts of this case is whether a person who has been adjudged to be entitled to as yet unquantified damages from the corporation is entitled to

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less protection from the unbridled exercise of power by those in control of the corporation than a person who is owed a liquidated amount, whether reduced to a judgment or not.

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[33] When one examines the list of persons whose interests are recognized in s. 248(2) -- "security holder, creditor, director or officer", it is apparent that the kinds of interests recognized and protected are (a) varied, (b) not necessarily pecuniary and (c) if pecuniary, not necessarily grounded in a present and crystallized loss.

[34] The oppression remedy is designed to address, where oppression is found, the imbalance of power on the part of those in control with the vulnerability on the part of those having a genuine stake in the affairs of corporation but no control over its conduct. In my view, a person to whom the corporation owes an obligation affirmed by judgment but as yet unquantified by assessment of damages, is in no less vulnerable position vis à vis the corporation and has no less a legitimate stake or interest in the manner in which the affairs of the corporation are conducted than one to whom a liquidated sum is owed.

[35] There is no case on point. Neither *Royal Trust Corp. of Canada v. Hordo*, [1993] O.J. No. 1560, nor *Awad v. Dover Investments Inc*., [2004] O.J. No. 3847 (S.C.J.) referred to by the appellant are of assistance.

[36] In my view, the application judge was correct in concluding that Bulls Eye became a creditor at the time of the liability determination in February 2004 and in informing his decision by reference to the broader and more fundamental construction of the term "creditor". It is that construction which harmonizes with the purpose and intent of the oppression remedy in the statute.

DID THE APPLICATION JUDGE ERR IN FINDING OPPRESSION?

[37] The appellant next argues that the application judge erred in finding that Bulls Eye had a reasonable expectation that there would be funds available to meet its judgment and that the thwarting of that expectation constituted oppression. This is a question of mixed fact and law. There is no dispute that as a matter of law, the expectation must be objectively reasonable. As stated in *Re BCE Inc*., 2008 SCC 69 at para. 62,

> As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations..

[38] The application judge wrote, at paragraph 20 of the reasons,

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> What is clear from the material filed is that neither the Applicant nor the Court was told of that intention at the time of the Receivership motion in May of 2005, and indeed the statements made would lead any rational person to believe that of the proceeds from the sale, there would be sufficient funds kept in Select to satisfy any judgment.

[39] It is clear from the above paragraph that the application judge applied the correct principle, that is, the objective test, and in my view, he was correct in the conclusion that the expectation was objectively reasonable.

[40] The appellant argues that application judge erred in holding that there had been oppression. Whether conduct is oppressive is essentially a finding of fact.

[41] The conduct was egregious in the extreme. It was a concerted effort by the appellant, with the assistance of her brother Victor McCullough, to evade payment of Select's obligation to Bulls Eye. The accomplishment of that objective involved placing misleading statements before the court on Bulls Eye's receivership motion to persuade (successfully) that there would be about $2,000,000 kept in the company, either banked or invested, and that there was no danger of dissipation of assets. The only reasonable inference that can be drawn from the facts as they unfolded is that the appellant's plan was to do exactly what the court and Bulls Eye were assured would not be done, namely to strip the company of its assets. There is no reasonable basis for interfering with the application judge's findings on the evidence that there had been oppressive conduct.

DID THE APPLICATION JUDGE ERR RESPECTING REMEDY?

[42] The balance of the appellant's arguments go to remedy. The appellant urges that even if the application judge was correct that Bulls Eye was a creditor and a proper complainant and that there had been oppressive conduct warranting a remedy, Bulls Eye should not be awarded more than it would recover as one creditor among others, sharing *pro rata* with unsecured creditors but behind secured creditors in the assets of the corporation.

[43] On the assumption that the principle is the correct one to have applied, the result is determined by the findings of fact as to what were and were not valid debts of Select and, if the total of debt owed exceeded the total paid out to the appellant, what, if any portion of Select's debt to the appellant were secured.

[44] The appellant argues that Select owed her $1,533,330.61 paid to Canada Life on May 22, 2003, $666,969.39 paid to the city of Mississauga on May 22, 2003, and a further $65,827.35 paid to Canada Life all secured by way of equitable mortgage together with interest thereon totaling $585,739.84 based on a rate of 12% (totaling $2,266,127.35). Bulls Eye agrees that the three principal sums above were debts owed by Select to the appellant but does not accept that

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they were secured by an equitable mortgage. Bulls Eye also does not accept that the interest payable is 12% and asserts that the proper total interest is $157,118.18.

[45] At the remedy phase of the hearing, the appellant had an opportunity to adduce evidence of other debts owed by Select and she did so.

[46] The application judge rejected the appellant's claim that Select owed her $1,353,000, an amount consisting of 22% of the total settlement paid by her to settle litigation concerning her late husband's estate. There is no reasonable basis for interfering with this finding. It was not an amount paid by the appellant on behalf of Select or to protect Select's interests. It was an amount paid by the appellant to protect her own interest in her late husband's estate and was clearly not a debt owed by Select to her.

[47] The application judge also rejected for want of proof the allegation that Select owed $1,200,000 to Victor McCullough for management fees (at the rate of $200,000 per year) plus $90,000 for other funds advanced by him. His reasons for rejection of these claims lie in the lack of credibility in the evidence about them as well as in the absence of evidence that would reasonably be expected to exist if the debts were genuine. There is no basis for interfering with these findings of fact. It is not for this court on appeal to re-weigh the evidence and the evidence before the application judge amply supports his conclusion.

[48] Had the application judge accepted all of the alleged debts as valid, the total amount of Select's debt would have been $7,345,021.

[49] The total of the debts alleged to be owing by Select but rejected by the application judge as valid debt was $3,793,688 (some but not all of which was the subject of appeal). The application judge also rejected the appellant's claim for interest on the "equitable mortgage" at 12% of $585,739.84, substituting the sum of $157,118, calculated at the same rate applicable to the debt to Bulls Eye, resulting in a further reduction of $428,621. The debts recognized as valid totaled $2,423,244, owed by Select to the appellant (not taking into account personal expenses of the appellant of $130,311 paid by Select).

[50] In light of the fact that the net proceeds from the sale of Select's real property was $3,818,132, there were ample funds after deduction of the debt properly owed by Select to the appellant to pay the judgment to Bulls Eye in full with interest. Even if interest were allowed on the debt to appellant at the rate of 12% there would be sufficient funds to pay the Bulls Eye judgment in full. It is therefore academic and unnecessary to deal with the argument that the application judge erred in finding that there was no equitable mortgage securing the indebtedness to the appellant.

[51] For the foregoing reasons, the appeal is dismissed.

[52] We are not persuaded that substantial indemnity costs are warranted in this appeal. Costs are to the respondent, fixed at $15,000.

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Low J.

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Swinton J.

____

Karakatsanis J.

Released: April 30, 2009

COURT FILE NO.: 391/08
DATE: 20090430

2009 CanLII 22544 (ON SCDC)

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Swinton, Low and Karakatsanis JJ.

B E T W E E N:

1413910 ONTARIO INC. carrying on business as BULLS EYE STEAKHOUSE & GRILL

Applicant/Respondent in Appeal

- and -

HILARY MARIAN MCLENNAN

Respondent/ Appellant

REASONS FOR JUDGMENT

Low J.

Released: April 30, 2009

CITATION: Arend v. Boehm, 2017 ONSC 3582
COURT FILE NO.: CV-16-11653-00CL
DATE: 20171114

2017 ONSC 3582 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
KARSTEN AREND, HANSJOERG WAGNER AND BITRUSH CORP.	*Alistair Crawley*, *Clarke Tedesco* and *April Engelberg*, for the Applicants
Applicants	
– and –	
WERNER BOEHM, ALFRED DOBIAS AND MEZZACAP INVESTMENTS LTD. AND ELFRIEDE SIXT	No one for the Respondents, although properly served.
Respondents	
	HEARD: May 31 and June 5, 2017

L. A. PATTILLO J.:

Introduction

[1] The Applicants, Karsten Arend ("Arend"), Hansjoerg Wagner ("Wagner") and BitRush Corp. ("BitRush") (collectively the "Applicants"), seek various relief in this Application pursuant to s. 248 of the *Business Corporations Act*, R.S.O. 1990 c. B.16 (the "OBCA") including:

1) A declaration that the respondent Werner Boehm ("Boehm"), in his capacity as CEO of BitRush has acted oppressively, in breach of his fiduciary duty to BitRush;

2) Orders transferring shares of BitRush from the respondent MezzaCap Investments Ltd. ("MezzaCap Investments") to Dr. Joachim Dr. Kalcher ("Dr. Dr. Kalcher") and HSRC Investments Pte. Ltd. ("HSRC") to whom the shares are owed; and

3) An order that MezzaCap Investments' remaining shares in BitRush be cancelled.

2017 ONSC 3582 (CanLII)

[2] At the outset of the hearing of the Application, the Respondents Boehm, Alfred Dobias ("Dobias") and Elfriede Sixt ("Sixt") (collectively the "Individual Respondents") each brought motions to stay or dismiss the Application on the ground that an Ontario court has no jurisdiction to hear the matter or, in the alternative, is not the most appropriate forum. They also sought to set aside service of the <u>Amended</u> Notice of Application and stay the proceedings on the basis that it was not authorized by the *Rules of Civil Procedure* and the Application was frivolous or vexatious or otherwise abusive (the "Jurisdiction Motions").

[3] Although the Individual Respondents were not represented by counsel, they each filed material in respect of their respective Jurisdiction Motions and participated in the hearing before me by conference telephone call. Following submissions, I reserved my decision on the Jurisdiction Motions and directed that the argument proceed on the Application. In that regard, neither the Individual Respondents nor MezzaCap Investments filed material in the Application. Further, the Individual Respondents advised during the Jurisdiction Motions that they intended to make no submissions on the Application. They did, however, listen to the completion of the argument by conference telephone.

[4] By written reasons released June 12, 2017 and reported at 2017 ONSC 3424, I dismissed the Jurisdiction Motions. For the reasons that follow, I allow the Application in part.

<u>The Facts</u>

[5] The Applicants have filed affidavits from Arend, Wagner, Dr. Dr. Kalcher and Peter Lukesch, the former CEO of BitRush and the CEO of Streetwear Corporation ("Streetwear"). As noted, none of the Respondents filed any responding material in the Application. The following is a factual overview from the material filed by the Applicants, which I accept as true.

1) The Parties

[6] BitRush is an Ontario corporation with its head office in Toronto. BitRush is engaged in the development and implementation of various cryptographic technologies and blockchain based solutions. While its principal focus is on implementing a cryptographic payment system for the internet, it is also involved in developing online advertising services and gaming technologies for the internet. BitRush was publically traded on the Canadian Securities Exchange

and the Frankfurt Exchange. On December 2, 2016, the Ontario Securities Commission issued a cease trade order against its shares.

[7] Arend is a Canadian who resides in Ontario and is engaged in the business of consulting and investing in mining and technology companies. He is a shareholder of BitRush and has been a member of its board of directors (the “Board”) and its president since April, 2016.

[8] Wagner is a Permanent Resident of Singapore and is an experienced former senior executive and investor in the hi-tech industry. He is a shareholder of BitRush and has been a director of the company since June 2016. Wagner is also a director and part owner of HSRC, a Singapore corporation, which also owns shares in BitRush. HSRC is reported in BitRush’s public filings as owning 21% of its shares.

[9] MezzaCap Investments is a United Kingdom corporation which is owned and controlled by some combination of Boehm and/or Dobias. Boehm is the sole director of MezzaCap Investments. The evidence establishes and I find that Boehm is the directing mind of MezzaCap Investments. MezzaCap Investments owns approximately 51% of BitRush’s shares as at September 30, 2016.

[10] Boehm is an Austrian citizen but resides in the United Kingdom. He is a former marketing manager of IBM and has been involved in internet technology companies since at least 1998. Boehm was the directing mind behind the formation of BitRush in July 2015. He was Chief Executive Officer of BitRush from December 24, 2015 until his termination on December 7, 2016. As noted, Boehm is also the sole director of MezzaCap Investments.

[11] Dobias is a resident of Austria and was a member of BitRush’s Board until he resigned in on February 22, 2017.

[12] Sixt is also a resident of Austria. She is an accountant and has acted as BitRush’s accountant from 2015 until she was terminated on December 13, 2016.

2) BitRush

[13] BitRush was formed in July 2015 through a reverse takeover (“RTO”) initiated and implemented by Boehm through MezzaCap Investments. Streetwear, an Ontario public corporation, acquired 100% of the shares of MezzaCap GmbH, from MezzaCap Investments, in exchange for approximately 2/3 of the shares of Streetwear (83,287,265 shares). Streetwear subsequently changed its name to BitRush on or about September 2, 2015.

[14] The main driver behind the RTO was the representation by Boehm to representatives of Streetwear that MezzaCap GmbH owned a universal payment service based on cryptocurrency payment system called ANOON (the “ANNON Technology”) and it had cryptocurrency websites which generated advertising revenues through various bitcoin related strategies which were valued in excess of $2 million.

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[15] BitRush is publically traded on the Canadian Securities Exchange and the Frankfurt Exchange. It has 127 million shares outstanding and approximately 2,000 shareholders.

[16] BitRush has three main businesses that are or will be built around the ANOON Technology: the ANNON payment processing service; gaming technologies and online advertising services operated by its subsidiary AdBit Efficient Marketing Limited ("AdBit").

3) Dr. Kalcher

[17] Dr. Kalcher is an Austrian citizen. ANOON and its predecessors, BitCore, P2Nex, BlockNexus and ANON were developed by Dr. Kalcher. Dr. Kalcher became the Acting Chief Technology Officer of BitRush.

[18] In 2013, Dr. Kelcher who had been developing a platform to be used for crowdfunding and crowd investing on the internet called CrowdLauncher, entered into an agreement with Boehm to set up a company for the development, marketing and sale of CrowdLauncher. The company, which became MezzaCap GmbH, was to be owned 20% by Dr. Kalcher through his company kb-spirit, 20% by Dobias and 60% by MezzaCap Investments. As part of the agreement, Dr. Kalcher agreed to license the CrowdLauncher technology to MezzaCap GmbH. The agreement was never reduced to writing. Subsequently and despite repeated assurances to him from Boehm, no share transfers ever took place to Dr. Kalcher and MezzaCap GmbH never obtained a license from Dr. Kalcher for the technology.

[19] At the time that BitRush was formed, Boehm advised Dr. Kalcher that he would be provided with 5,000,000 shares of BitRush which was approximately 4% of the company's shares. Dr. Kalcher's understanding was that it was to secure his support for the BitRush initiative. He was told by Boehm that the shares had been placed in escrow with BitRush's transfer agent in Toronto but only 500,000 were immediately tradable and the balance would be released to him at the rate of 15% every six months. Dr. Kalcher subsequently received only 500,000 shares and learned that no shares were ever deposited into escrow in his name and that the shares he did receive came from MezzaCap Investments. Once again the agreement was never reduced to writing.

4) Wagner and HRSC's Investment in BitRush

[20] In August 2015, Wagner purchased and received 2 million shares of BitRush. Those shares are not in issue. In February 2016, Boehm approached Wagner for a further investment in BitRush or MezzaCap Investments. It was subsequently agreed between HSRC, MezzaCap Investments and BitRush that HSRC would invest in BitRush on the following terms:

a) MezzaCap Investments would sell to HSRC 18 million shares of BitRush for consideration of $1 CAD and HRSC's commitment to support the development of BitRush through the provision of technical and infrastructure support;

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b) BitRush would sell to HSRC a private placement of 7 million BitRush shares for $700,000 CAD; and

c) Wagner would be appointed to the BitRush Board.

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[21] In late February 2016, HSRC signed a subscription agreement with BitRush for 7 million BitRush shares for $700,000.00 CDN (approximately $500,000 US).

[22] On March 8, 2016, HSRC wired $500,000 USD to BitRush. On March 17, 2016, BitRush transferred 6,650,000 BitRush shares to HSRC. The reduced number of shares resulted from BitRush only receiving $665,000 CDN based on the then current exchange rate. Wagner testified that Boehm assured him that MezzaCap Investments would provide HSRC with the outstanding 350,000 shares but it never did.

[23] Further, although HSRC also provided the promised technical and infrastructure support to BitRush, MezzaCap Investments only transferred 12,493,090 of the agreed 18 million BitRush shares leaving a shortfall of 5,506,910 shares from what was agreed to.

[24] Further, it was not until June 20, 2016 and substantial effort on his part that Wagner was appointed to BitRush's Board.

[25] In an email dated November 29, 2016, Boehm purported to unilaterally terminate BitRush's and MezzaCap Investments obligations to provide HSRC with the outstanding BitRush shares "for several reasons we have already discussed."

5) The Events of the Fall of 2016

a) Dr. Kalcher

[26] On October 28, 2016, Arend had a conversation with Dr. Kalcher to better understand the ANOON technology. During the conversation, Dr. Kalcher asked about the 4,500,000 shares of BitRush that he'd been promised by Boehm and asked when they would be transferred to him, and if Arend had been instructed to transfer them. Arend responded that he had no knowledge about the shares or the transfer. Dr. Kalcher also became extremely upset when he learned that Sixt was closely involved with BitRush as he had had a very negative business experience with her in the past and Boehm had promised him at the outset that she would not be involved in the MezzaCap GmbH venture.

[27] Shortly thereafter, Dr. Kalcher confronted Boehm about his outstanding 4,500,000 shares in BitRush and his concealment of Sixt's involvement. On November 2, 2016, Dr. Kalcher wrote to Boehm and advised him that he was resigning from BitRush and proposed that BitRush make him a proposal if it wanted to continue using the ANOON technology. Boehm did not advise the Board of this development. On November 4, 2016, Dr. Kalcher sent an email to the Board advising them of his resignation.

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[28] On November 25, 2016, Dr. Kalcher sent a further email to BitRush's Board providing it with two options: BitRush could purchase the ANOON technology for €875,000 or he would shut the ANOON technology down on December 23, 2016.

[29] On November 28, 2016, Boehm sent an email to the Board alleging that Dr. Kalcher had never previously made claims to be compensated for the ANOON technology and that his sudden fallout with Dr. Kalcher was because Boehm was unwilling to work with various individuals who he felt were involved in money laundering (a potential investment opportunity that Boehm had originated). In fact the Board had already decided not to work with the individuals in question.

[30] By email dated November 24, 2016, Sixt advised the Board that BitRush's third quarter financial statements as of September 30, 2016 were due on November 29, 2016 and that if the financials were not filed on or before that date, BitRush's shares would be cease traded by the OSC.

[31] On November 29, 2016, Sixt emailed draft third quarter financial statements she had prepared to the Board. The statements were to be filed, as certified by the CEO and CFO, that day. Note 1 to the financial statements, entitled "Nature of Operations and Going Concern" briefly set out the company's business, its intended focus and the fact that as at December 31, 2015, it had not yet achieved profitable operations and continued to be dependent on external financing to meet its financial obligations. The note then stated:

> These conditions indicate the existence of material uncertainty that may cost [*sic*] significant doubt upon the ability of the company as a going concern. This doubts [*sic*] are substantially increased by a failed private placement effort announced as of 6th September 2016 and due to the fact the Corporation has been experiencing a blackmailing effort since end of October 2016 by its former CTO Joachim Dr. Kalcher. There are severe indications that HSRC Investments Inc. – a minor shareholder of the Corporation – are in close contact with Joachim Dr. Kalcher and that the purpose of this blackmailing effort is to use ANOON for money laundering activities. These incidents have induced BitRush's major shareholder, MezzaCap Investments Ltd, to terminate its shareholder agreement with HSRC Investment Inc. and to take the necessary legal actions against them. Appropriate legal steps have already been taken.

[32] Arend was extremely concerned about the impact of the proposed disclosure concerning Dr. Kalcher and HSRC on BitRush. He viewed Dr. Kalcher's position concerning the use of the ANNON Technology as a legitimate business issue and not blackmail. Further, BitRush had terminated any discussions with the individuals Boehm was alleging were involved in money laundering. Accordingly, he edited Note 1 of the draft financial statements to remove the allegations against both Dr. Kalcher and HSRC and indicated that there was a dispute over the ownership of the technology. He then sent the revised draft financial statements by email later on November 29, 2016 to the Board and Boehm and Sixt requesting, despite his concerns about her

performance, that the Board appoint Sixt CFO for the purposes of certifying the financial statements and that Boehm and Sixt certify them. Wagner agreed to Sixt's appointment but there was no response from Dobias.

[33] Despite frequent email correspondence between Arend, Boehm and Sixt on November 29, 2016, neither Boehm nor Sixt responded to Arend's request for them to sign the revised financial statements. Arend filed the revised third quarter financial statements, uncertified, at 9:44 p.m. on November 29, 2016. As a result of BitRush's failure to file certified financial statements, the OSC issued a Cease Trade Order against BitRush on December 2, 2016.

[34] On December 6, 2016, MezzaCap Investments filed a criminal complaint against Dr. Kalcher with the prosecutor's office in Austria alleging the same improper conduct against him as Boehm and Sixt had raised in the notes to the financial statements. The complaint was dismissed on January 19, 2017, following a preliminary investigation.

b) AdBit

[35] In the fall of 2016, BitRush was contemplating a venture between its subsidiary AdBit and a third party software supplier to raise capital for the development of the business. Unbeknownst to the Board, Boehm was acting behind the scenes to appropriate AdBit for the benefit of MezzaCap Investments. On November 18, 2016, without the authorization or knowledge of the Board, Boehm amended AdBit's company register in the UK to transfer the shares of AdBit from BitRush to MezzaCap Investments.

[36] Also on November 18, 2016, Bohem advised the principals of the third party that he, Sixt and some new investors were running AdBit and that they were ready to proceed.

[37] On November 20, 2016, without advising the Board of any of his actions concerning AdBit, Boehm proposed to the Board that BitRush sell AdBit to MezzaCap Investments for $100,000 CAD in order to resolve its short term cash situation until the issues with Dr. Kalcher were "cleared". The Board rejected Boehm's proposal as being completely inappropriate and not a realistic proposal.

c) The Special Committee

[38] On December 7, 2016, BitRush's Board formed a Special Committee comprised of Arend and Wagner to investigate the circumstances leading to the Cease Trade Order and the ownership of the ANOON technology. The Board also terminated Boehm as CEO for acting in a manner that was contrary to the interests of BitRush. On December 13, 2016, the Board terminated Sixt.

[39] As a result of its investigation, in addition to Boehm's actions concerning his dispute with Dr. Kalcher leading to the Cease Trade Order, the Special Committee also learned:

i. Boehm had failed to fulfil agreements to provide MezzaCap GmbH and subsequently BitRush shares to Dr. Kalcher in exchange for a license to

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use the ANOON Technology and to compensate him for the development of the ANOON Technology resulting in BitRush having no rights to the ANOON Technology and putting the very core of BitRush's business at risk;

ii. That between August 2015 and September 2016, there were a number of largely unsupported transfers of funds from BitRush to MezzaCap GmbH (an Austrian company controlled by Boehm and subsequently renamed BitRush GmbH in June of 2016), totaling $561,373 CAD;

iii. In October/November 2016, Boehm had taken steps to misappropriate AdBit for MezzaCap Investments, as detailed above;

iv. Subsequent to his termination from BitRush, Boehm maintained an active presence on the former BitRush website and associated blogs and chat boards. He also has taken steps to form a new company in the UK called BitRush Limited and appears to be operating the website www.bitrush.org which is described as a "new online trading platform".

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The Relief Requested

[40] The Applicants' Amended Notice of Application seeks multiple relief against the Respondents pursuant to the oppression remedy in s. 248 of the OBCA. Besides orders requiring Boehm and Sixt to return certain BitRush property, cease dealing with BitRush's assets and cease operating certain websites, the principal relief requested is as follows:

a) Orders pursuant to s. 248(3)(d) of the OBCA requiring MezzaCap Investments to transfer a total of 21,157,453 shares in BitRush to Dr. Kalcher and 5,865,910 shares in BitRush to HRSC as was agreed between the respective party, BitRush and MezzaCap Investments (Boehm).

b) An Order for the issuance of 350,000 shares from BitRush's treasury to HRSC, also as agreed between HRSC, MezzaCap Investments and BitRush (Boehm).

c) An Order, based on the "material misrepresentations" of Boehm and MezzaCap Investments at the time of the formation of BitRush, cancelling MezzaCap Investments' remaining shares in BitRush;

d) In lieu of an order requiring the respondents to return $561,373 CAD to BitRush which was improperly transferred to MezzaCap GmbH (now BitRush GmbH), cancellation of 6,237,478 shares of BitRush owned by the respondents constituting $561,373 worth of BitRush shares at today's market price.

[41] The Applicants have obtained interim orders from this court dated March 20 and April 12, 2017 requiring the respondents to deliver to BitRush the corporate assets and property that

continues to be in their possession and control and to cease dealing with BitRush's assets, communicating with BitRush's customers or holding themselves out as an officer or director of BitRush and its subsidiaries. None of the respondents have complied with the orders.

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The Oppression Remedy

[42] The oppression remedy is set out in s. 248 of the OBCA. In particular, s 248(2) provides:

> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
>
> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
>
> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

[43] An oppression claim is to be brought by "complainant" (s. 248(1)) which is defined in s. 245 of the OBCA as follows:

> "complainant" means,
>
> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
>
> (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

[44] Section 248(3) of the OBCA gives the court broad remedial powers to remedy oppressive conduct. It sets out in a non-exhaustive list, a number of remedies available to the court if oppression is found.

[45] In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, the Supreme Court of Canada set out what is required to establish the oppression remedy in s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985 c. C-44, the wording of which is identical to s.

248 of the OBCA. At para. 56, the court stated that in considering whether an oppression claim has been made out, it is necessary to determine whether the reasonable expectations of the claimant have been breached and, if so, whether the breach is oppressive, unfairly prejudicial or unfairly disregarded the interests of the claimant.

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[46] The reasonable expectations of the claimant are to be determined both objectively and contextually: *BCE*, para. 62. Not all breaches of a claimant's reasonable expectations will give rise to the oppression remedy. The court must be satisfied that the conduct resulting in the breach falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of a claimant's interest: *BCE*, para. 89; s. 5(2) of Schedule 3 of the Act.

[47] In *BCE*, at paras. 90 to 94, the court discusses the concepts of oppression, unfair prejudice and unfairly disregarding relevant interests. The concepts are on a scale of wrongful conduct extending from abusive behavior at one end to unfair conduct at the other. Oppression is a "wrong of the most serious sort." It involves wrongful or improper conduct in respect of the corporation's affairs which smacks of bad faith: para. 92. Unfair prejudice is less serious than oppression and involves conduct that results in unfair consequences: para. 93. Unfair disregard is less serious again and involves, for example, ignoring shareholder interests as being of no importance: para. 94.

i. Complainant

[48] The first issue to determine is whether the Applicants meet the criteria of "complainant" as defined in s. 245 of the OBCA. The acts complained of in the Application by Boehm and MezzaCap Investments concern the business and affairs of BitRush. Arend is a director and officer of BitRush and Wagner is a director and shareholder. They qualify as "complainants" under subsections (a) and (b) of the definition. As will become apparent, however, when I come to discuss reasonable expectations, the reasonable expectations of both Arend and Wagner are no different than those of all shareholders.

[49] Can BitRush qualify as a complainant? Subsection (3) of the definition provides that the court has a discretion to permit that status to any other person who is a "proper person" to make an application.

[50] In *Olympia & York Developments Ltd. (Trustee of) v. Olympia* (2003) 180 O.A.C. 158, [2003] O.J. No. 5242 (C.A.) at para. 45, Goudge J.A. on behalf of the Court stated:

> 45 It may be that the finding in that case is simply that in the circumstances there the trustee in bankruptcy would not be given a remedy under s. 248 and therefore ought not to be accorded standing as a complainant. If, however, that case sets out the absolute prohibition contended for by the appellants, as I tend to think it does, then despite the great respect due its author I would disagree. The simple reason is that s. 245(c) confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence

> oppression proceedings under s. 248. This provision is designed to provide the court with flexibility in determining who should be a complainant in any particular case that accompanies the court's flexibility in determining if there has been oppression and in fashioning an appropriate remedy. The overall flexibility provided is essential for the broad remedial purpose of these oppression provisions to be achieved. Given the clear language of s. 245(c) and its purpose, I think that where the bankrupt is a party to the allegedly oppressive transaction, the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

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[51] Two Alberta decisions, considering a similar definition of "complainant" have held that a corporation may be a complainant in an oppression action: *Gainers Inc. v. Pocklington*, September 10, 1992, Alta. Q.B. Action No. 9103 14818; *Calmont Leasing Ltd. v. Kredl*, [1993] 7 W.W.R. 428 (Alta. Q.B.) at paras. 127-128.

[52] In *Fiber Connections Inc. v. SVCM Capital Ltd.*, [2005] O.J. No. 3899 (S.C.J.), the court rejected the respondent's submission that a corporation should not be considered a "complainant" because "the interests of the Corporation are not mentioned" in s. 248. Finally, in *Pantheon Inc. v. Frank*, 2009 CarswellOnt 9046 (S.C.J.), Wilton-Siegel J. dealt with a Rule 21 motion to strike an oppression claim for no cause action on the ground that the corporate plaintiff had no status as a complainant. After reviewing *Olympia & York*, *Calmont* and *Gainers*, the learned judge concluded at para. 125 that the common rationale for permitting a corporation to bring an oppression action was because it was in substance a representative action on behalf of all shareholders (except the defendants) or creditors in the case of a bankruptcy. He then continued at para. 128:

> 128 However, while I strongly incline to the view that the cases reflect a requirement that a corporate plaintiff prosecuting an oppression remedy must have actual authority to represent all of the shareholders (or creditors in the case of a trustee in bankruptcy) other than the defendants, I cannot say that, on the current state of the law, it is plain and obvious that a corporate plaintiff must satisfy this requirement in order to qualify as a "proper person". The fact that an alternative remedy is available under securities legislation is not, as a matter of law, sufficient to exclude the corporation as a possible complainant. Accordingly, the motion for relief striking the oppression claim against the JLL Nominees in its entirety is dismissed. It is not plain and obvious that, as a matter of law, Patheon cannot be a "proper person" for the purposes of the definition of "complainant" in section 238 of the CBCA. This question is one that is properly left to be determined on a full factual record at trial or on a summary judgment motion.

[53] Given the circumstances of this case and the relief being sought, I am satisfied that BitRush is a "proper person" to bring an oppression claim under s. 248 of the OBCA. The Application seeks to remedy certain acts directly caused by Bohem (and MezzaCap Investments) for the benefit of all shareholders. Further, and while "actual authority" from all shareholders as mentioned by Wilton-Siegel J. may be required in some cases, in my view it will depend on the circumstances. In this case where the shares are widely held, MezzaCap Investments, which is controlled by Boehm, owns the majority of BitRush's shares and where Arend and Wagner, the remaining members of the Board, are also Applicants, I do not consider actual authority to be required.

ii. Oppression

[54] The Applicants submit that the business and affairs of BitRush have been carried on by Bohem, in a manner that was oppressive, unfairly prejudicial to and disregarded the interests of the shareholders of BitRush and in breach of his fiduciary duty to BitRush.

[55] There is no question that Boehm, who is the directing mind of MezzaCap Investments, was the driving force behind the RTO and the creation of BitRush in July 2015. Although he never became a director of BitRush and only became CEO in December 2015, the evidence establishes that at all material times he was the directing mind of BitRush, operating the company with impunity by intimidating and threatening BitRush's former directors who eventually resigned due to his conduct. The delay in Boehm becoming CEO was only because of criminal proceedings against him in Austria which were dismissed in December 2015.

[56] I am satisfied from the facts that I have found that the business and affairs of BitRush as directed by Boehm both before and after he became CEO, were carried on in a manner which was oppressive, unfairly prejudicial and/or disregarded the best interests of BitRush and its shareholders. Further Boehm's actions were a breach of his fiduciary duty to BitRush.

[57] Boehm's conduct in failing to provide BitRush with the ANOON technology, attempting to transfer the shares of AdBit to MezzaCap Investments in November 2016 and transferring monies from BitRush to companies controlled by him in Austria was conduct of the most serious sort. It was clearly oppressive within the meaning of that term. Further, Boehm's conduct clearly breached the reasonable expectations of BitRush and its shareholders which were that as the person in charge of running BitRush, he would direct the business and affairs of BitRush and conduct himself in a proper and legal manner.

[58] The ANNOON technology is fundamental to BitRush's existence. As Wagner deposed, "The ANOON Technology is, effectively, the entire business of BitRush". Not only did Bohem fail to ensure that BitRush was entitled to use the ANOON technology from the very inception of BitRush, he never took any steps to ensure that was done (by completing his agreements with Dr. Kalcher) nor did he ever advise the Board that was the case. Further, when the Board learned of the problem from Dr. Kalcher, Boehm attempted to shift the blame to Dr. Kalcher.

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[59] Similarly, AdBit was an important part of BitRush's business. Boehm's actions in fraudulently amending the company's register to transfer the shares of AdBit to MezzaCap Investments, carrying on negotiations with third parties on the basis that he was running AdBit and then, without advising the Board of any his actions, making a low ball offer to purchase AdBit allegedly to provide BitRush with cash until the Dr. Kalcher matter was resolved were improper and wrong. He attempted to fraudulently misappropriate BitRush's property.

[60] Finally, Boehm's actions in transferring a total of CDN $561,373 from BitRush to companies controlled by him and subsequently refusing to account for the transfers or return the money when requested constitutes further misappropriation of BitRush's property.

[61] I am also satisfied that Boehm's conduct in refusing to complete share transactions that he agreed to on behalf of BitRush and/or MezzaCap Investments with both Dr. Kalcher and HRSC and his refusal to certify the 2016 3rd quarter financial statements were unfairly prejudicial to and unfairly disregarded the interests of BitRush and its shareholders.

[62] Bohem entered into a number of share transactions both on behalf of BitRush and MezzaCap Investments providing for the provision of BitRush shares in exchange for monies and/or services or technology to for BitRush in order for it to obtain capital and assist it in its development. Boehm subsequently failed to complete and/or reneged on those agreements for no apparent reason. BitRush and its shareholders have a reasonable expectation that BitRush will fulfill its agreements, particularly when it has received the consideration agreed to. The ability to raise capital is crucial to BitRush's ongoing existence. Boehm's conduct in failing to fulfill the agreements in issue unfairly disregards the interests of BitRush and its shareholders by threatening its existence.

[63] Finally, Boehm's actions (and those of Sixt) in refusing to certify the 3rd quarter 2016 financial statements on the basis of their characterization of BitRush's dispute with Dr. Kalcher as blackmail on Dr. Kalcher's part and also because Boehm was allegedly unwilling to work with certain individuals who he said were involved in money laundering had no basis in fact at the time and were improper. Bohem was clearly aware at the time that Dr. Kalcher's dispute with BitRush was a legitimate business dispute caused solely by Boehm's failure to honour his prior agreements with Dr. Kalcher. Further, the individuals who Boehm accused of money laundering were part of a business opportunity that had been introduced to BitRush by Boehm and he knew the Board had previously decided not to deal with the individuals.

[64] As is clear from the emails that circulated prior to November 29, 2016, Boehm knew that in refusing to certify the 3rd quarter financial statements, BitRush's shares would be cease traded by the OSC. His actions in refusing to certify the financials for no legitimate reason and in influencing Sixt in that regard were clearly contrary to the interests of BitRush and its shareholders because BitRush's shares ended up being cease traded and they remain that way.

iii. Remedy

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[65] The real issue in this case concerns the remedy that should follow from my finding that Boehm's conduct as set out herein was oppressive, unfairly prejudicial and unfairly disregarded the interests of BitRush's shareholders. As noted, the Amended Notice of Application seeks a number of remedies. Before me, the remedies sought were primarily to eliminate MezzaCap Investments' shareholdings in BitRush in order that Boehm would no longer have any involvement in BitRush, permitting it to regularize its affairs and proceed with its business without any interference from Boehm.

[66] The Applicants seek to regularize the share transactions in respect of BitRush concerning Dr. Kalcher and HSRC. Further, they seek to eliminate MezzaCap Investments remaining shares in BitRush based on its failure to provide any of the promised assets at the time of the RTO. Finally, they seek to recoup the misappropriated money by cancelling the dollar equivalent of MezzaCap Investments shares in BitRush.

Dr. Kalcher

[67] The Applicants seek an order pursuant to s. 248(3)(d) of the OBCA (directing an issue or exchange of securities) requiring MezzaCap Investments to transfer a total of 21,157,453 shares in BitRush to Dr. Kalcher made up of 4,500,000 shares being the balance of the shares promised by Bohem at the time BitRush was formed and 16,657,453 shares arising from Dr. Kalcher's original agreement with Bohem in 2013.

[68] As noted, Boehm promised Dr. Kalcher 5,000,000 shares in BitRush at the time it was formed to secure his support in the venture. Dr. Kalcher only received 500,000 shares and those shares came from MezzaCap Investments. There is no evidence as to why Bohem failed to complete the agreement with Dr. Kalcher. Dr. Kalcher's technology is important to BitRush. In my view, Dr. Kalcher should receive the balance of the shares owing which were promised by Bohem. Further, it is in BitRush's best interests to complete the agreement. Dr. Kalcher's technology is important to BitRush and BitRush has an interest in seeing that the agreement with Dr. Kalcher be completed to assist in securing the ANOON technology.

[69] Given that Boehm initially provided Dr. Kalcher with shares from MezzaCap Investments, it follows that the remainder of the promised shares should come from MezzaCap Investments, which at all material times Boehm controlled. Therefore, in order to complete the agreement, I order that BitRush issue 4,500,000 shares to Dr. Kalcher and at the same time cancel 4,500,000 of its shares held by MezzaCap Investments and amend its share registry accordingly. That completes the agreement between Dr. Kalcher and Boehm on behalf of BitRush and MezzaCap Investments without affecting the overall issued shares in BitRush.

[70] The Applicants also seek an order that Dr. Kalcher be awarded 16,657,453 shares of BitRush based on his original agreement with Bohem at the time of the formation of MezzaCap GmbH in 2013 that in exchange for providing the CrowdLauncher technology, Dr. Kalcher's company, kb-spirit would receive 20% of MezzaCap GmbH. MezzaCap GmbH subsequently became part of the RTO, resulting in MezzaCap Investments receiving 83,287,265 shares in

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Streetwear which became BitRush. The Applicants seek 20% of MezzaCap Investments initial shareholding in BitRush or 16,657,453 shares for Dr. Kalcher.

[71] I am not prepared to make the order requested. In my view, the agreement in question is not connected to the oppressive conduct found. It predates BitRush and has nothing to do with the conduct of the business and affairs of BitRush. Nor does the relief requested arise from a breach of the shareholders reasonable expectations which in this case are to ensure that BitRush lives up to its obligations. While it coincides with Dr. Kalcher's expectations, he is not a party to the Application. Nor is it clear on the evidence that the agreement was with Dr. Kalcher as opposed to his company. Dr. Kalcher's claim is against MezzaCap Investments.

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HSRC

[72] The Applicants also seek orders for the issuance/transfer of a total of 6,215,910 shares of BitRush to HSRC pursuant to agreements entered into by HSRC and Bohem on behalf of BitRush and MezzaCap Investments made up of 350,000 shares from BitRush's treasury and the balance of 5,865,910 from MezzaCap Investments.

[73] The Applicants submit the 350,000 shares make up the balance which remains owing to HSRC in respect of a subscription agreement for 7 million shares entered into between BitRush and HSRC in February 2016 for a subscription price of CDN $700,000 (the agreement noted in brackets that it was approximately US $500,000). HSRC provided US $500,000 which at the then current exchange rate was CDN $665,000. As a result, HSRC received 6,650,000 shares. Although Bohem assured HSRC that MezzaCap Investments would provide the additional 350,000 shares, it never did.

[74] Through the fluctuation of the exchange rate, HRSC ended up paying less than was agreed for the shares. However, it received the number of shares it paid for based on the subscription price. While Bohem unilaterally amended the subscription agreement to reflect the lesser amount, in my view, the initial agreement governs and HSRC is entitled to receive the remaining 350,000 shares upon payment of the balance owing of CDN $35,000.

[75] In light of the agreement Boehm made on behalf of both BitRush and MezzaCap Investments, the remaining 350,000 shares of BitRush due to HRSC upon its payment of CDN $35,000 to BitRush should come from MezzaCap Investments. Therefore, upon HRSC's payment of CDN $35,000 to BitRush, BitRush shall issue 350,000 shares to HRSC and cancel the same number of its shares owned by MezzaCap Investments and amend its share registry accordingly.

[76] Turning next to the 5,865,910 shares remaining due to HRSC, the agreement, which was between HRSC, BitRush and MezzaCap Investments provided, among other things, that HSRC would obtain 18 million shares of BitRush from MezzaCap Investments in exchange for CDN $1 and HSRC's provision of technical and infrastructure support. HSRC paid the $1 and provided

the technical and infrastructure support. It received 12,493,090 BitRush shares from MezzaCap Investments but not the remaining 5,506,910 shares.

[77] I do not consider that Boehm's purported termination of the agreement on November 29, 2016 to be of any effect. HSRC had already provided the consideration required. In my view, Boehm's purported termination of the HRSC agreement is further evidence of his unreasonable conduct in respect of the business and affairs of BitRush. In that regard, BitRush and its shareholders have a reasonable expectation that BitRush will honour its agreements.

[78] MezzaCap Investments was a party to the agreement in question and Boehm acted on behalf of both BitRush and MezzaCap Investments in respect of the agreement. Given that the obligation to provide the BitRush shares was MezzaCap Investments, in order to complete the agreement, I order that BitRush issue 5,506,910 shares to HSRC and at the same time cancel the same number of BitRush shares held by MezzaCap Investments and amend the share registry such that the impact on BitRush's overall issued shares is nil.

BitRush

[79] The Applicants submit that as a result of misrepresentations by Boehm on behalf of MezzaCap Investments prior to the RTO concerning the extent and value of the assets owned by MezzaCap GmbH, MezzaCap Investments provided no value in return for the shares it received in BitRush at the time of the RTO. They seek the cancellation of all of MezzaCap Investments remaining shares in BitRush.

[80] I am not prepared to make the order requested. In my view, Boehm's oppressive conduct concerning the business and affairs of BitRush has nothing to do with misrepresentations that occurred prior to the RTO. Further, the representations were made on behalf of MezzaCap Investments, in respect of its subsidiary MezzaCap GmbH. The order requested does not arise from Boehm's oppressive conduct that I have found.

$561,373

[81] The Applicants seek an order that 6,237,478 shares of BitRush (the share equivalent of $561,373 at current market price) held by MezzaCap Investments be cancelled in lieu of an order requiring the respondents to return the CAD $561,373 which Boehm and Sixt misappropriated.

[82] The money has been clearly misappropriated by Boehm. Further, although requested, neither he nor Sixt have accounted for it or returned any of the funds to BitRush. Nor would a judgment for the money have any chance of being realized on. The respondents have already demonstrated that they will not respond to court orders.

[83] In my view, BitRush is entitled to the order requested. Boehm's misappropriation of the money without any explanation is part of the affairs of BitRush. Further, the loss of that money is extremely prejudicial to BitRush. BitRush was not in good financial shape at the time the

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monies were transferred. The 3rd quarter financial statements for 2016 (which were never certified) show a net loss for the nine month period of $1,193,658.

Conclusion

[84] For the above reasons, therefore, the following orders shall issue:

a) A declaration pursuant to s. 248 of the OBCA that Boehm caused the affairs of BitRush to be conducted in a manner that was oppressive, unfairly prejudicial and unfairly disregarded BitRush and its shareholders and in breach of his fiduciary duties to BitRush;

b) An order that BitRush shall issue 4,500,000 shares from treasury to Dr. Kalcher and at the same time cancel 4,500,000 of MezzaCap Investments shares in BitRush and amend its share registry accordingly;

c) An order that BitRush shall issue 5,856,910 shares from treasury to HSRC and at the same time cancel 5,856,910 of MezzaCap Investments shares in BitRush and amend its share registry accordingly;

d) An order that BitRush shall cancel 6,237,478 of MezzaCap Investments shares in BitRush and amend its share registry accordingly.

e) The balance of the relief requested is dismissed without prejudice to BitRush raising it at some future time if it considers it appropriate.

[85] While the Applicants did not obtain all the relief they sought on this Application, they were successful in establishing oppression. They are entitled to their costs. In that regard, they have submitted a bill of costs claiming partial indemnity costs (including disbursements) totaling $225,956.87 and substantial indemnity costs totaling $338,935.46.

[86] The Application involved a significant amount of work. The record comprises four large volumes. The issues were complex and even though the respondents did not appear it required the better part of two days to hear. In addition to the main Application, the Applicants had to respond to the respondents' jurisdiction challenge.

[87] In my view, notwithstanding my findings in respect of Boehm's conduct, I think the appropriate scale is partial indemnity. Having reviewed the bill of costs, I am satisfied that the both the time spent and the rates charged are reasonable. Given the issues and the result, I consider that the amount claimed of $225,956.87 is fair and reasonable.

[88] The Application was really directed at Boehm and MezzaCap Investments. No claims were asserted against Dobias and no relief was sought against him apart from return of property. Sixt was added as a respondent later with respect to return of property. No substantive claim was asserted against either of them and no relief sought against either of them on the motion before me. Accordingly, I would not award costs against Dobias or Sixt.

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[89] Costs to the Applicants, fixed at CDN $225,956, payable by Boehm and MezzaCap Investments.

L. A. Pattillo J.

Released: November 14, 2017

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CITATION: Arend v. Boehm, 2017 ONSC 3582
COURT FILE NO.: CV-16-11653-00CL
DATE: 20171114

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KARSTEN AREND, HANSJOERG WAGNER AND BITRUSH CORP.

Applicants

– and –

WERNER BOEHM, ALFRED DOBIAS AND MEZZACAP INVESTMENTS LTD. AND ELFRIEDE SIXT

Respondents

REASONS FOR JUDGMENT

PATTILLO J.

Released: November 14, 2017

Ontario Supreme Court
C.I. Covington Fund Inc. v. White,
Date: 2000-12-01

C.I. Covington Fund Inc., Applicant and Jeffrey A. White, Delta M3 Technologies Corporation, M3 Environmental Services Inc., Watertek Corporation, Fred Rossignol

and

LF Rossignol Development Corporation, Respondents

Ontario Superior Court of Justice Swinton J.

Heard: November 17, 2000

Judgment: December 1, 2000

Docket: 00-CL-3830

David Chernos and M. Paul Michell, for Applicant.

John S. Curtis, for Respondents White, M3 Environmental Services, Watertek.

J. Arthur Cogan, Q.C., for Respondents Rossignol, LF Rossignol Development.

***Swinton J.*:**

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1 C.I. Covington Fund Inc. ("Covington"), as a creditor and shareholder of Delta M_3 Technologies Corporation ("Delta"), has brought an application for an oppression remedy against the respondents pursuant to s. 248 of the *Ontario Business Corporations Act,* R.S.O. 1990, c. B.16. The application arises following the bankruptcy of Delta and the claim by Jeffrey White, president and con trolling shareholder of Delta, that certain intellectual property belongs to him personally, rather than to the corporation.

The Facts

2 In July, 1997, Covington lent $2 million to Delta and purchased $500,000.00 worth of Delta's common shares. The loan was secured by a general security agreement over Delta's assets. Covington is one of four secured creditors of Delta, the others being the Bank of Montreal, the Business Development Bank of Canada ("BDC"), and the Ontario Development Corporation (formerly Innovation Ontario Corporation - "IOC").

3 Delta is an Ontario corporation. Its predecessor, J.A. White & Associates, was formed in 1965 and incorporated under the *Ontario Business Corporations Act* in 1977. In June, 1997, it changed its name to Delta. Its business was the engineering and design of snowmaking and

waste water treatment systems. Sometime in the early 1980s, Delta began to explore the possible use of a freeze crystallization process in the treatment of liquid waste. It subsequently developed the AFC-Snowfluent technology, a cold weather waste water treatment system, which works by pumping liquid waste through a snow making system to purify it and then spraying it onto fields, where it melts in the spring.

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4 Jeffrey White is a professional engineer, who is Delta's president and chief executive officer. Between his direct and indirect shareholdings, he is Delta's controlling shareholder. He was responsible for the day to day management of Delta until its assignment into bankruptcy on July 7, 2000. As well, about 75% of his time was spent on research and development. White is also the sole director of the respondents M_3 Environmental and Watertek. The latter company currently employs the former employees of Delta, and it has taken on the completion of one of Delta's projects in Westport, Maine using the Snowfluent technology.

5 Delta spent over $10,000,000.00 in developing the Snowfluent technology. A Canadian patent application for the technology was filed on October 11, 1995, and a U.S. patent application on October 25, 1995. The U.S. patent was issued March 10, 1998. No Canadian patent has yet been issued. These patent applications, and those pending in other countries, have all been made in the name of White, personally, as the inventor and owner. According to the *Patent Act,* R.S.C. 1985, c. P-4, s.1, the applicant for a patent includes an inventor and the legal representative of the inventor, and a patent application is to be granted to the inventor or his legal representative (s. 27(1)), unless there has been an assignment or bequest of the right to another person (s. 49; *Techform Products Ltd. v. Wolda* (2000), 5 C.P.R. (4th) 25 (Ont. S.C.J.), at 31).

6 It is White's position that he owns the Snowfluent patent and technology. However, Delta has an exclusive licence to use the process of Atomizing Freeze Crystallization Technology/Snowfluent, because of an agreement signed by him personally and on behalf of the company dated October 16, 1995. The licence agreement gives Delta an exclusive licence to use the subject matter, defined as "the continued developments patenting in the name of the Licensor/Inventor Jeffrey A. White, P. Eng., together with the sale and marketing of the technology, atomizing freeze crystallization, as systems, partial systems, services, installations et. al., for the treatment of aqueous wastewaters." No royalties were payable

except in certain circumstances such as the sale of the company, and the licensing agreement was said to terminate on the bankruptcy or insolvency of the company.

7 Delta had successfully obtained financing from IOC in 1994 and BDC in 1995. In 1997, Delta sought further capital to market and develop the Snowfluent technology. Covington provided the loan of $2,000,000.00, and also paid $500,000.00 to Delta for 30,834 common shares and entered into a shareholders agreement with Delta and its other shareholders.

8 Prior to making the loan and investment, Covington conducted due diligence with regard to Delta's business. According to Timothy Leitch of Covington Capital Corporation, Delta was asked for and provided relevant documents, which he and others at Covington reviewed. Copies of a 1994 shareholders agreement with IOC, a 1995 collateral assignment to BDC, the 1997 audited financial statements, and Delta's 1997 Business Plan were all provided and reviewed. The licence agreement was never provided nor disclosed.

9 In the Investment Agreement between Delta and Covington, dated July 21, 1997, Delta made the following representation and warranty:

> 4.1.12 **Patents, Licences, etc.** Schedule C accurately shows for each patentable invention of the Corporation a brief description thereof and the status of any application for a patent in all countries where application has been made. The Corporation owns, free and clear of any lien, other than Permitted Encumbrances, all trade names, patents, licences and permits, including those shown on Schedule C, ("Rights") which are necessary for the conduct of its business as presently conducted or proposed to be conducted. Such Rights are in full force and effect…

"Permitted encumbrances" is a defined term, and has no bearing in this application. Schedule C contains the heading "J.A. White & Associates Ltd. Waste Water Treatment Method and Apparatus". Below that, there is a chart, listing countries, the date on which a patent application was filed, and its status. The U.S. and Canadian patent applications for Snowfluent are found in this chart.

10 Delta also warranted in Article 4.1.14 that the corporation has provided to Covington "all material information relating to the financial condition, business and prospects of the Corporation and all such information is true, accurate and complete in all material respects and omits no material fact necessary to make such information not misleading."

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11 As part of the closing, White provided an officer's certificate to Covington in which he stated that the "representations and warranties of the Corporation contained in each of the Agreements are true and correct on the date hereof".

12 A review of the documents provided to Covington is instructive. The audited financial statements make reference to Delta's patents - for example, "The company has capitalized costs in regards to the development of *its* specialized sewage treatment technology" (emphasis added). Similarly, the 1997 Business Plan contains a number of references to the Snowfluent technology which leave the impression that Delta is its owner - for example, "Delta's proprietary wastewater process, AFC™ - Snowfluent™". Near the end, on p. 87 of the plan, it is stated,

> In arriving at a value for the going business of Delta Engineering, an investor should consider the following: The Snowfluent™ technology is unique, proprietary and all indications are that the company will successfully achieve world patent rights for its major claims.

13 Covington also reviewed a 1994 Intellectual Property Assignment to Delta that is part of a shareholders agreement with IOC, given in order to obtain a loan and investment from IOC. According to Article 11.1,

> <u>Intellectual Property Assignment.</u> In consideration of the sum of one dollar ($1.00) and other valuable consideration, the receipt of all of which is hereby acknowledged, Jeffrey A. White (the "Assignor") hereby confirms that he has sold and assigned, and does hereby sell and assign to the Company, as assignee, all right, title and interest, for Canada, the United States and all other countries, all intellectual property developed by or originating from them, including without limitation: all inventions; all patents or patent applications… The Assignor agrees that he will without further consideration do all such things and execute all such documents as may be necessary or desirable to obtain and maintain patents, … and to vest title thereto in the Company…".

14 Delta also provided Covington with a copy of a collateral assignment of patents and trademarks to BDC, dated September 1, 1995, which was signed by White & Associates and Vector Technology Inc. That document was provided in relation to BDC's loan and investment in shares, and states in article 3.4:

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> J.A. White is the sole and exclusive owner of the entire and unencumbered right, title and interest in and to each of the Patents and Trademarks, free and clear of any voluntary or involuntary lien, charges or encumbrances… except as specifically set forth in the Loan Documents and those licences and sub-licences which are existing as of the date hereof and those licences and sub-licences which may be entered into after the date hereof in the ordinary course of the Assignor's business.

"J.A. White" is defined as the corporate entity. "Patents and trademarks" are defined as

> all presently existing and hereafter acquired or arising patents and trademarks, including, without limitation, the trademark applications and trademarks listed in Schedule A attached hereto and the trademark registrations identified therein, and the patent applications and patents listed in Schedule B attached hereto…

That list of trademarks includes Snowfluent. Schedule B refers only to existing patents for snowmaking technology, as the patent applications for Snowfluent had not yet been made at the time this document was signed.

15 Leitch has given evidence that Covington would not have made the loan or investment if Delta did not own the intellectual property related to Snowfluent. It is his position that he never saw the licence agreement, although Covington asked for all material contracts to which Delta was a party. No evidence contradicts this.

16 Following Covington's loan and investment, the financial statements of Delta made further reference to Delta's ownership of the intellectual property. For example, the 1999 audited financial statements include the statement, "The company has capitalized costs in regards to the development of its specialized sewage treatment technology". In copies of correspondence from Delta's patent counsel that were provided to Covington, references are made to Delta's patent and patent applications.

17 The licence agreement first came to light in May, 2000, after Delta went into default under its loan agreement with Covington. There is affidavit evidence from Darcy Killeen, Chief Financial Officer of Delta from March, 1997 until 1999, that he had never seen the licence agreement while employed there, and was unaware of its content. While White states that the licence agreement was kept in the same filing cabinet as the patent applications at head office, Killeen had never seen it in that cabinet. Nor had the agreement been seen by Kevin

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Carton, the lawyer acting on the patent applications, who was working for the company and White by October 11, 1995 at the latest - that is, prior to the date of the licence agreement.

18 Since the bankruptcy, White has been operating through a new company, Watertek, using the Snowfluent technology and Delta's former employees, and completing at least one of Delta's contracts, with Westport, Maine. After this litigation commenced, White assigned the Snowfluent technology and related patent and patent applications to the respondent LF Rossignol Development Corporation in July, 2000. Fred Rossignol is a former director of Delta and the principal of LF Rossignol Development, a South Carolina company. On cross-examination, White indicated that Rossignol was aware of the litigation and took the patents as a form of collateral for a loan.

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19 The value of Delta's assets, excluding the intellectual property, is $348,000.00. Covington is owed at least $2,195,398.05, and there are other secured creditors. There is in evidence a letter of intent from EBI Securities to the Receiver of Delta, indicating an interest in purchasing the intellectual property and related assets for $3,150,000.00.

Oppression Remedy Claim

20 Covington takes the position that the Snowfluent technology is owned by Delta, and that White's and Rossignol's conduct is oppressive within s. 248 of the *OBCA.* It seeks an order that Delta is the owner, or that the property is held in trust for it.

21 To obtain an oppression remedy, a complainant must show that the business or affairs of the corporation in question are or have been carried on in a manner that is oppressive, or is unfairly prejudicial to or unfairly disregards the interests of a security holder or creditor. The oppression remedy protects the "reasonable expectations" of a corporate stakeholder, having regard to the particular facts (*Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.), at 201). Bad faith is not necessary to a finding that there has been conduct that unfairly disregards or is unfairly prejudicial to the interests of a security holder or creditor.

22 In this case, the applicant seeks relief both as a shareholder and a creditor. The courts have held that in an appropriate case, a creditor can be granted standing as a complainant (see, for example, *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1995), 131 D.L.R. (4th) 399 (Ont. Gen. Div. [Commercial List]) at 403, rev'd on other grounds (1998), 40 O.R. (3d)

563 (Ont. C.A.)). In my view, this is such a case, for the creditor seeks to protect reasonable expectations about the way in which the corporation should have been operated. As well, Covington has standing to seek relief as a shareholder.

23 The respondents argue that there has been no unfair disregard of the applicant's interests or conduct prejudicial to its interests. First, they argue that there was no misrepresentation in the 1997 Investment Agreement, since there was no clear statement that the corporation, rather than White, owned the patents. At most, they suggest that there may have been some ambiguity, and, if so, the contract should be construed *contra proferentem.* In my view, the argument based on *contra proferentem* must fail, as the Investment Agreement was a document drafted in a process in which both parties were represented by experienced counsel.

24 The respondents then take the position that the applicant did not make reasonable efforts at due diligence prior to making the loan and investment. They argue that the applicant could have determined the ownership of the patents and patent applications by the exercise of reasonable diligence - specifically, through an inspection of the public records of the Canadian and U.S. Patent Offices, which would have disclosed White's name as owner in the patent applications. In *Sidaplex, supra,* Blair J. observed that the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from the acts were factors to be considered in determining whether there was oppression (*supra,* at 405). The respondents argue that it was a condition precedent to the Investment Agreement that Covington assure itself of the adequacy of title. Having failed to do so, Covington can not now complain because White has title to the patents. Therefore, they argue that there is no oppression here.

25 The primary position asserted by the applicant rested on the conclusion that the intellectual property rights in the Snowfluent technology had been assigned by White to the corporation in 1994 by the shareholders agreement between White and others and the IOC, quoted above. Therefore, the representation in Article 4.1.12 of the Investment Agreement with Covington that the patentable inventions in Schedule C were those of the corporation was true because of the earlier assignment. According to this line of reasoning, the inventions continue to be the property of Delta, even though White purported to transfer them as owner to Rossignol Development.

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26 Counsel for White argued that the clause in the 1994 shareholders agreement with respect to inventions does not clearly capture the Waste Water Treatment Method and Apparatus that was the subject of the patents filed in 1995, and, therefore, there has been no assignment of the process covered by the patent applications.

27 At the time of the 1994 agreement, no patent applications had been made with respect to this technology, and the agreement does not clearly state that it is an assignment of future patents and patent applications. The clause does make reference to the assignment of all intellectual property, including "inventions", but I have a dearth of evidence before me about the content of the Snowfluent technology in 1994, and there is no evidence to show the invention as it existed in 1994 was the same as the subject matter of the 1995 patent applications. It is true that Delta's 1997 business plan, as well as White's affidavit, indicate that the Snowfluent technology was under development from the 1980's, and the Snowfluent technology was clearly what interested the IOC, as revealed by other terms of its investment agreement with Delta. But the fact that the technology existed in 1994 does not turn the 1994 agreement into an assignment of future patents for a process as it may have developed over time. Therefore, on the evidence before me, I can not conclude that the clause in the 1994 agreement assigned to the company the patents and patent applications which followed for the Snowfluent technology.

28 Nevertheless, the 1994 agreement is of significance, given that it was one of the documents provided by Delta to Covington in an effort to obtain funds from Covington in 1997. In my view, it is one of a series of representations by the corporation, made with White's participation, respecting the corporation's ownership of the Snowfluent technology, upon which lenders and investors were expected to rely and reasonably did rely when they decided to advance funds to Delta.

29 Most telling, in my view, is the representation made by Delta about its ownership of the intellectual property in Article 4.1.12 of the Investment Agreement, quoted above. It stated that "Schedule C accurately shows for each patentable invention *of the Corporation* a brief description thereof and the status of any application" (emphasis added). Schedule C lists the patent applications under the name of "J.D. White & Associates Ltd.", not Jeffrey White. The only reasonable inference from that article is that Delta owns the invention that is the subject of the proceedings in Schedule C - that is, the Snowfluent waste water treatment technology.

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30 Counsel for the respondents argued that this first sentence, read with the one which follows, should be understood as a representation that the corporation has the rights necessary to conduct its business - and because of the licence agreement, that is a correct representation with respect to Delta's operations. The problem with that argument is that it ignores the wording of the first sentence of the article, which, in my view, states that Delta owns the patents included in Schedule C.

31 Moreover, when that clause is read with the other documents provided to Covington, the reasonable conclusion is that the Snowfluent technology and the related intellectual property belong to Delta, not White. I have already made reference to the 1994 shareholders agreement with IOC, which stated that all intellectual property, including inventions, was assigned to Delta. That agreement remained in force until July 18, 1997, well after the patent applications for the Snowfluent technology were made in White's name. The logical inference is that at least some rights in the technology had been assigned to the company, and there is no evidence that they were re-assigned to White. The fact that the shareholders agreement terminated does not automatically create such a reassignment.

32 In addition, the BDC agreement confirms the corporation's ownership of existing and future patents. This agreement was entered into in September of 1995, very shortly before the first patent applications were filed. Again, the logical inference was that the corporation would be the owner of any Snowfluent patents, given their importance to the company's operations. While they are not mentioned in the list of patents in Schedule B, since no applications had yet been made, the Snowfluent trademark is listed in Schedule A. It strains credulity that one is to interpret this as leaving White with the right to hold the patent for the technology, while the company would have the trademark that controlled use of its name.

33 These conclusions are further buttressed by the many references in the Business Plan that suggest Delta owns the Snowfluent technology, as well as the financial statements of the company described earlier in these reasons. All of these representations lead to the conclusion that Delta is the owner of the technology. Given the impression left by all these documents, it is telling that no one from Delta, particularly White, disclosed the existence of the licence agreement to Covington.

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34 The oppression remedy protects the reasonable expectations of corporate stakeholders. In *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1998), 38 O.R. (3d) 749 (Ont. C.A.), the Court of Appeal stated (at 753):

> The public pronouncements of corporations, particularly those that are publicly traded, become its commitments to shareholders within the range of reasonable expectations that are objectively aroused.

While we are dealing here with a small, closely held company rather than one that is publicly traded, the same logic applies. Investors and lenders should be able reasonably to rely on public statements of a corporation made in various legal and corporate documents. In particular, the representations by Delta with respect to its ownership of the Snowfluent technology and related intellectual property can reasonably be relied upon by a shareholder and investor such as Covington when making a decision whether to invest in the company, whose principal asset is that technology and the ability to exploit it.

35 Counsel for the respondents argued that the applicant could have easily determined that White held the patent applications in his name. By the terms of the Investment Agreement, legal counsel for the corporation was to provide a legal opinion with respect to a number of items, as set out in Article 5.1.5, as a condition precedent to closing. The respondents argue that the omission of an opinion with respect to title to the intellectual property in that article meant that this issue was left to examination by the applicant's own legal counsel. If that opinion has turned out to be deficient, that risk should lie on the applicant.

36 In fact, counsel for the applicant has stated that there was no opinion from legal counsel for Covington on the ownership of the intellectual property. Whether such an opinion should have been obtained is not the issue here. This is not a case of professional negligence, nor of negligent misrepresentation in tort involving non-contracting parties, where reasonableness of reliance would be an issue. Here, Delta expressly represented in the Investment Agreement that the patent applications were those of the corporation, and the company had provided other documents that led to the same conclusion. White had certified that the representations were true. At the same time, White and Delta had failed to disclose the licence agreement which purported to circumscribe the corporation's property rights to Covington. Even the Chief Financial Officer of Delta at the time of the investment did not know of the agreement. Indeed, he gave evidence that had he known of the licensing agreement, he would have informed the

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auditor who prepared the financial statements. In my view, the applicant could reasonably rely on Delta's representations to conclude that the patents were the property of the company, as suggested by Schedule C.

37 Therefore, we are left with the situation where the corporation made certain representations about its ownership of the intellectual property pertaining to Snowfluent, but the patents and patent applications were issued in White's name. Without doubt, that state of affairs is prejudicial to the applicant's interests. The question is whether there is unfairness if Delta's ownership interest is not recognized.

38 The applicant argued that I should find the patents and patent applications are the property of the company, because White developed those inventions while he was an employee of Delta. There is a presumption at common law that an employee is the owner of his or her inventions, unless there is an express contract to the contrary, or the person was employed for the express purpose of inventing or innovating (*Techform, supra,* at 32). In particular, courts will find that the employer is the owner of an invention where an employee is hired precisely to design or develop a product (*Seanix Technology Inc. v. Ircha* (1998), 78 C.P.R. (3d) 443 (B.C. S.C.), at 445).

39 White was not in the position of the usual employee, who works for another person in a business. White is the principal shareholder and director of a small, closely held company, where he mixes the roles of manager, employee and inventor. Nevertheless, if one looks at the employment aspect of his relationship, one finds that 75% of his time was spent on research and development. Indeed, the company applied for tax credits based on the fact that he spent 75% of his time on research. There is no dispute that his role in the company was to develop the Snowfluent technology, and that was a predominant focus of his work for many years. Therefore, this is a case where at common law, the employer - here, Delta - could assert that it was the beneficial owner of the patents because of the employment situation.

40 No steps were taken by the corporation to assert an ownership interest against White, however, because of the reality that this is a small, closely held company, and it was in White's personal interest not to assign the ownership to the corporation. However, White was not only an employee, but also a director of the corporation. Thus, he had a fiduciary duty to act in the best interests of the corporation, which obligated him not to take advantage of opportunities available to the corporation (*Classic Organ Co. v. Artisan Organ Ltd.* (1997), 35

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B.L.R. (2d) 285 (Ont. Gen. Div.) at 291). White used the facilities and funds of the corporation, totaling over $10 million, to develop the Snowfluent technology and to advance the patent process, but he retained the benefit of the technology developed with those resources for himself, even though the nature of his employment relationship would normally allow the corporation to claim ownership.

41 A number of oppression cases turn on the fact that there has been conduct by directors or majority shareholders that amounts to self-dealing at the expense of the corporation or other corporate stakeholders (*SCI Systems, Inc. v. Gornitzki Thompson & Little Co.* (1997), 36 B.L.R. (2d) 192 (Ont. Gen. Div.)), aff'd (1998), 110 O.A.C. 160 (Ont. Div. Ct.)).; *Neri v. Finch Hardware (1976) Ltd.* (1995), 20 B.L.R. (2d) 216 (Ont. Gen. Div. [Commercial List]); *Loveridge Holdings Ltd. v. King-Pin Ltd.* (1991), 5 B.L.R. (2d) 195 (Ont. Gen. Div.)). For example, in *SCI,* there was oppression because the directors unfairly removed assets from the corporation so as to prevent the payment of a corporate debt and to benefit themselves.

42 Here, White's failure to put the patents in the name of the company is analogous to the diversion of assets seen in these cases, because it constitutes a form of self-dealing, when all the facts are considered. He chose to use the corporation to solicit funding and to use that funding to develop the Snowfluent technology, but having done that, he sought to keep for himself personally the benefit of that corporate investment in the technology despite his duty of good faith to the corporation. Given the representations about ownership that led Covington to invest in the company, the fact that White's principal employment obligation was research and development with respect to the Snowfluent technology, and White's use of the corporation's resources to develop the technology, Delta should properly be regarded as the owner of the patents and patent applications. In light of all the facts, White's failure to assign the intellectual property to Delta is an unfair disregard of Covington's interests as a creditor and shareholder that is unfairly prejudicial, as Covington had a reasonable expectation that Delta owned the technology and related intellectual property.

43 The fact that White personally invested funds in the corporation does not give him any right to claim as his what is properly a corporate asset. Nor can the licence agreement protect White's claim to ownership, given that it was never disclosed to Covington. It is a further example of a conflict of interest where White preferred his personal interests over those of the corporation to which he had a fiduciary duty.

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44 The facts of this case bear some resemblance to *Turbocristal Inc. c. Handfield* (1991), 41 C.P.R. (3d) 540 (Que. S.C.), although this was not an oppression remedy case. There, the Quebec Superior Court found that the founder of a company, who resigned as a director and employee, had effectively ceded the ownership of patents to the company through his statements and conduct. While there was in that case an ambiguous document suggesting that there had been either a transfer or licence, the Court did not rest its decision on that document, but looked at the factual context, including government grants to the corporation to support research, ownership of a trademark by the company, and the use of large amount of corporate funds for development.

45 Similarly here, when all the facts are considered, White represented that he had ceded the ownership of the Snowfluent technology to Delta. Having regard to his employment and his duty to the corporation as an officer and director, the failure to assign ownership to Delta constitutes conduct unfairly prejudicial to the applicant's interests contrary to s. 248(2) of the *OBCA.*

The Appropriate Remedy

46 Section 248(3) of the *OBCA* confers a broad discretion on the Court in deter mining an appropriate remedy, including "any interim or final order it thinks fit". The purpose of the remedy is to rectify the oppression. The provision has been used to make compensation orders against individual directors where their conduct has been found oppressive in small, closely held corporations such as Delta, and they have personally benefited - for example, by the removal of as sets from the corporation (see, for example, *SCI*; *Sidaplex, supra*).

47 In this case, Delta has represented that the patents and patent applications for the Snowfluent technology are the property of the corporation, and White, as a principal of the corporation, was behind those representations. The corporation has a right to claim beneficial ownership at common law. This is not a case where a monetary award against White will adequately protect the interests of the stakeholders, especially given his evidence that he faces financial difficulties personally. If Delta's proprietary interest is not protected, the corporation will be denied the value of the patents, both in terms of possible licensing fees for their use and their value if they can be sold. Clearly, the creditors will be in a better position to recoup some of their funds if the patents are assets of the corporation which can be sold.

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48 In *Soulos v. Korkontzilas,* [1997] 2 S.C.R. 217 (S.C.C.), the Court stated that a constructive trust may be awarded in two categories of cases: where there has been a breach of a fiduciary obligation or duty of loyalty, and where there has been unjust enrichment through the wrongful acquisition of property. Given White's fiduciary obligations to the company, this is a case where a constructive trust is the necessary remedy to protect the corporation's proprietary right and to provide a remedy to the applicant for the oppressive conduct. Therefore, I declare that Delta is the beneficial owner of the Snowfluent technology and related patents and patent applications, and I order that these patents and patent applications are to be assigned to it. Rossignol was aware of the Covington litigation prior to the assignment of the patents, and there was no dispute that it can take no better title than White. Therefore, LF Rossignol Development, Rossignol and White are ordered to cease using the Snowfluent technology and to assign the patents and patent applications to Delta.

49 The applicant also sought an order that White was in breach of his fiduciary duty to Delta by carrying on the Westport business and using the Snowfluent trademark. As a fiduciary of Delta, White had an obligation not to pursue corporate opportunities available to Delta. Therefore, he and Watertek are ordered to account for profits made through the use of the technology. If there is a dispute about this, I will remain seized. Similarly, the applicant asked that I remain seized with respect to the appointment of a receiver, and I do so.

50 If the parties wish to speak to costs, they may make written submissions or make an appointment with my secretary.

Application granted.

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CITATION: Carbone v. DeGroote, 2018 ONSC 109
COURT FILE NO.: CV-14-505316
DATE: 20180104

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

FRANCESCO CARBONE Plaintiff	*Doug LaFramboise*, for the Plaintiff, Francesco Carbone
– and –	
MICHAEL DeGROOTE, ANDREW MICHAEL PAJAK, ZELJKO ZDERIC aka PAVLE KOLIC aka ALEX VISSER aka SASHA VUJACIC, PETER ALFRED SHONIKER, LORENZO LOMBARDI, SHAUN GENOVY, JOHN DUNLOP, ROBERT MCDOUGALL, THE TORONTO POLICE SERVICES BOARD AND THE ATTORNEY GENERAL OF ONTARIO Defendants	*Sam Rogers*, for the Moving Party Defendant, Michael DeGroote *Robert W. Trifts*, for the Defendant Andrew Michael Pajak *Natalie Kolos*, for the Defendants, Lorenzo Lombardi, Shaun Genovy, John Dunlop, Robert McDougall and the Toronto Police Services Board
	HEARD: December 1, 2017

REASONS FOR DECISION

SANFILIPPO J.

[1] This motion was brought by the defendant, Michael DeGroote ("DeGroote" or the "Moving Party") for an order dismissing or staying this action on the basis of Rule 21.01(3) of the *Rules of Civil Procedure*. DeGroote seeks this relief on two grounds: that there is another proceeding pending in Ontario in respect of the same subject matter; and/or that this action is an abuse of process.

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[2] While the Moving Party sought the dismissal or stay of the entirety of this action, the claim for entitlement to this relief was recognized as being different amongst the many defendants.

[3] This action is one of three actions that arose from issues between DeGroote, Francesco Carbone ("Carbone") and his brother, Antonio Carbone, (collectively the "Carbones") involving numerous other parties. DeGroote sued the Carbones and thirty others in this court's commercial list as court file number CV-12-9886-00CL (the "2012 Commercial List Action") and the Carbones sued DeGroote and six others in court file number CV-14-499554 (the "1st Carbone Action").

[4] For the reasons set out herein, DeGroote has established a basis for dismissal of this action as against him, alone. Leave is granted to Carbone to seek the amendment of the statement of claim in the 1st Carbone Action to plead the causes of action pleaded herein but this leave to amend is only exercisable within sixty (60) days after an order is issued lifting the stay of the 1st Carbone Action. The crossclaims advanced against DeGroote in this action are also dismissed, but with leave to the plaintiffs by crossclaim to issue in this action, within sixty (60) days of issuance of these Reasons, third party claims against DeGroote to plead those claims currently pleaded as crossclaims.

[5] For the purpose of the leave to amend granted to Carbone, the amendment of the statement of claim in the 1st Carbone Action shall, for all purposes of the calculation of any limitation defence, be deemed to have been effected as at May 30, 2014, being the date of issuance of the statement of claim in this action. For the purpose of the leave to issue third party claims to replace the crossclaims in this action, the third party claims shall, for the purpose of the calculation of any limitation defence, be deemed to have been effected as at the date of the delivery of the statement of defence and crossclaim from which the third party claim derives. This reflects that the dismissal of this action as against DeGroote is not intended substantively to determine any of the causes of action pleaded by Carbone or the crossclaims advanced by the plaintiffs by crossclaim but rather is intended to remedy the injustice that would result from allowing Carbone to continue this action against DeGroote in disregard of court orders and in contravention of Rule 56.

A. The Basis for this Motion

The 2012 Commercial List Action

[6] On October 19, 2012, a statement of claim was issued in the 2012 Commercial List Action by which DeGroote seeks damages against 32 defendants, including the Carbones. The 2012 Commercial List Action pleads that DeGroote loaned USD $111,924,208 to certain of the corporate defendants. These loans were to be used for the acquisition and development of gaming, casino and entertainment facilities and for other related uses in Jamaica and the Dominican Republic. Of this amount, $107,331,167 was said to remain unpaid.

[7] The loans were principally advanced to three of the corporate defendants in three credit facilities: a credit facility between DeGroote and DC Entertainment Corporation dated November 29, 2010, referred to as the “Jamaican Contract”; a credit facility between DeGroote and Dream Corporation Inc. dated August 22, 2011, referred to as the “Dominican Republic Contract”; and a credit facility between DeGroote and Dream Software Solutions dated November 18, 2011, referred to as the “VLMT Contract”.

[8] The Carbones are alleged to have been principals of DC Entertainment Corporation, Dream Corporation Inc. and Dream Software Solutions (the “Dream Corporations”) as well as other corporate defendants named in the 2012 Commercial List Action. It is alleged alternatively that the Carbones are responsible for the acts and omissions of the corporate defendants.

[9] DeGroote alleges that the Carbones, as well as others, perpetrated fraud by making false representations to DeGroote, including that the loan funds would be invested in the specific businesses and that revenue from the gaming operations would be partially paid out to DeGroote under the profit sharing provisions in the credit facilities, when they were not. Damages in the amount of $200,000,000 are sought against the Carbones and other defendants based on allegations of fraud, fraudulent misrepresentation, deceit and negligent misrepresentation.

[10] The Carbones deny any liability to DeGroote. On November 23, 2012, the Carbones, together with the Dream Corporations and other related corporate defendants, delivered a statement of defence to the 2012 Commercial List Action in which they denied any breaches of any of the credit facilities and denied any fraud, deceit or misrepresentation of any nature.

[11] Two of the Dream Corporations, namely Dream Corporation Inc. and Dream Software Solutions, advanced a counterclaim against DeGroote. They seek declarations that the Dominican Republic Contract and the VLMT Contract have not been breached and damages in the amount of $12,440,000. Neither Carbone nor Antonio Carbone advanced a counterclaim in the 2012 Commercial List Action, choosing instead to issue an action against DeGroote.

The 1st Carbone Action

[12] On March 4, 2014, a statement of claim was issued in the 1st Carbone Action by which the Carbones seek damages against DeGroote as well as Andrew Michael Pajak (“Pajak”), Zeljko Zderic aka Pavle Kolic aka Alex Visser aka Sasha Vujacic (“Zderic”), Edward Zbigniew Kremblewski (“Kremblewski”), Gianpietro Tiberio, Brenda Marie Joyce Kover and Peter Alfred Shoniker (“Shoniker”).

[13] As against DeGroote, the Carbones seek general damages in the amount of $100,000,000 for intentional interference with economic relations, general and special damages for injurious falsehood in the amount of $50,000,000, general and special damages for defamation in the amount of $50,000,000, punitive damages in the amount of $5,000,000 and injunctive relief restraining DeGroote from making any statements defaming or disparaging the Carbones.

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[14] The Carbones pleaded that they were the majority or sole shareholders of the Dream Corporations, and certain of the other corporate defendants implicated in the 2012 Commercial List Action. The defendant Pajak is alleged to have been a minority shareholder and a director in these companies. The Carbones pleaded that DeGroote entered into the loan transactions with the Dream Corporations for the purpose of funding a gaming and entertainment enterprise initiated by the Carbones that was to carry on business in Jamaica, the Dominican Republic and surrounding Caribbean areas.

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[15] It is unclear why the 1st Carbone Action was not instituted as a counterclaim in the 2012 Commercial List Action. The issues raised by the 1st Carbone Action clearly arose from the issues pleaded in the 2012 Commercial List Action. As a counterclaim, there would have been efficiency in addressing the issues pleaded and consistency in result and both proceedings would have been within the same division of the court.

The 2nd Carbone Action

[16] On May 30, 2014, this action was issued by Carbone (the "2nd Carbone Action") against DeGroote and against three defendants already sued by Carbone in the 1st Carbone Action: namely, Pajak, Zderic and Shoniker. Additionally, this 2nd Carbone Action names as defendants the Toronto Police Services Board together with four of its officers: Lorenzo Lombardi, Shaun Genovy, John Dunlop and Robert McDougall (collectively the "TPS Defendants").

[17] In this 2nd Carbone Action, Carbone seeks from DeGroote the sum of $3,000,000 for damages for malicious prosecution and/or intentional infliction of emotional distress, special damages in the amount of $100,000,000 on account of past and future loss of income and punitive damages in the amount of $5,000,000. This 2nd Carbone Action is based on issues arising from the relationship between DeGroote and Carbone.

Procedural History of the Three Actions

[18] On November 18, 2013, Newbould J. appointed a Receiver over the books and records of the defendant companies in the 2012 Commercial List Action. This motion was opposed by the defendants, including the Carbones. As the opposition to the appointment of the Receiver failed, on January 6, 2014, Newbould J. issued an endorsement awarding costs in favour of DeGroote in the amount of $256,394.74 to be paid, on a joint and several basis, by the defendants in the 2012 Commercial List Action, including the Carbones, as follows:

> In the result, I fix the costs of the plaintiff at $180,000 plus HST for fees and $67,566.14 for disbursements and applicable HST. These costs are to be paid by the defendants on a joint and several basis within 30 days (the "1st Cost Order").

[19] On March 21, 2014, DeGroote delivered his statement of defence in the 1st Carbone Action, together with a motion for security for costs.

[20] On May 21, 2014, DeGroote brought a motion in the 2012 Commercial List Action seeking the appointment of a Chief Restructuring Advisor ("CRA"). On June 27, 2014, Brown J., as he then was, approved the appointment of FTI Consulting Canada Inc. as CRA of Dream Corporation Inc.nand, by endorsement rendered on June 27, 2014, awarded costs to be paid by the Carbones to DeGroote in the amount of $17,636.59, as follows:

> I conclude that an award of costs in the amount of $17,636.59 would be a reasonable one in the circumstances, and I order the Carbones to pay DeGroote that amount within 15 days (the "2nd Cost Order").

[21] On October 16, 2014, DeGroote brought a motion to obtain access to all corporate documents in the possession of the limited purpose receiver over the books and records of Dream Corporation Inc. An Order was issued by Penny J. granting the motion and awarding costs to DeGroote, payable by the Carbones, in the amount of $5,000 (the "3rd Cost Order").

[22] On October 29, 2014, Firestone J. granted a motion brought by DeGroote for security for costs in the 1st Carbone Action. In an Order issued that day, Firestone J. ordered that the Carbones pay security for costs in the amount of $295,000, as follows:

> The plaintiffs [Carbones] are to pay on a joint and several basis security for costs to DeGroote in the sum of $295,000 to be paid into court within 60 days (the "Security for Cost Order").

[23] As part of the Security for Cost Order, the Carbones were ordered to pay DeGroote costs of the motion in the amount of $20,000, as follows:

> THIS COURT FURTHER ORDERS THAT the plaintiffs pay to DeGroote $20,000 for the costs of this motion, inclusive of disbursements and applicable taxes (the "4th Cost Order").

[24] On March 11, 2015, DeGroote brought a motion to dismiss the 1st Carbone Action on the basis of Rule 56.06: namely, the failure of the Carbones to pay the Security for Cost Order. At the request of counsel for the Carbones, the motion was adjourned. By order of Myers J., the Carbones were ordered to pay DeGroote costs thrown away in the amount of $2,500 (the "5th Cost Order").

[25] None of these cost orders has been paid by the Carbones.

[26] The Carbones did not comply with the Security for Cost Order. As such, the 1st Carbone Action has been stayed since November 2014 by operation of Rule 56.05. Myers J. emphasized this in his Order of March 11, 2015: "If it is unclear, under Rule 56.05, the plaintiffs shall not take any step in this proceeding [the 1st Carbone Action] until the security ordered by Firestone J. has been posted."

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[27] Throughout these various steps in the 2012 Commercial List Action and the 1st Carbone Action, this 2nd Carbone Action has remained in abeyance. Indeed, no steps were taken in this 2nd Carbone Action in the period from its inception in May 2014 until June 6, 2016 when the TPS Defendants delivered their statement of defence which includes a crossclaim against DeGroote (the "TPS/ DeGroote Crossclaim"). Similarly, on June 20, 2016, Pajak delivered a statement of defence, which includes a crossclaim against DeGroote (the "Pajak/ DeGroote Crossclaim").

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[28] Counsel for the TPS Defendants and counsel for Pajak submitted that the only reason their clients pleaded to this 2nd DeGroote Action was to ensure that a crossclaim was instituted against DeGroote within the time set out in the *Limitations Act, 2002*, S.O. 2002, c. 24, s. 18(1).

[29] On September 28, 2016, Carbone noted DeGroote in default of delivery of a statement of defence in this action. On March 20, 2017, the noting in default of DeGroote was set aside by Order of Master Muir who granted DeGroote 20 days from the date of his Order to serve and file these motion materials to strike this 2nd Carbone Action.

B. The Motion for Dismissal or Stay of the 2nd Carbone Action

[30] The moving party defendant, DeGroote, seeks to dismiss or to stay this 2nd Carbone Action based on Rule 21.01(3)(c) and (d), which provide as follows:

> 21.01 (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> …
>
> (c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or
>
> (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,
>
> and the judge may make an order or grant judgment accordingly.

[31] Counsel for DeGroote contends that Rule 21.01(3)(c) and (d) are activated, and thereby support a dismissal or stay of this action on the following grounds:

a) This 2nd Carbone Action is duplicative of an existing action: namely, the 1st Carbone Action;

b) This 2nd Carbone Action is an abuse of the court's process, or is otherwise frivolous or vexatious, by reason of the manner by which Carbone has addressed his litigation with DeGroote, including Carbone's chronic breach of court orders.

[32] Counsel for Carbone submits forcefully that this action is distinct from the 1st Carbone Action, contending that the 1st Carbone Action seeks damages arising out of commercial conduct

between the Carbones and DeGroote whereas this action arises from DeGroote's conduct in malicious prosecution of Carbone and intentional infliction of emotional distress.

Is This Action In Respect of the Same Subject Matter as the 1st Carbone Action?

[33] Multiplicity of proceedings can be a form of abuse of process: *Maynes v. Allen-Vanguard Technologies Inc.*, 2011 ONCA 125, 274 O.A.C. 229, at para. 36; *Power Tax Corp. v. Millar*, 2013 ONSC 135, 113 O.R. (3d) 502. In this respect, paragraphs (c) and (d) of Rule 21.01(3) intersect in that, in certain circumstances, a duplicate proceeding can, itself, satisfy the requirements of both paragraphs. As the analysis herein will show, one such circumstance is when the duplicate proceeding is the instrument used to circumvent or disregard a court order.

[34] In *Canadian Standards Assn. v. P.S. Knight Co.*, 2015 ONSC 7980, 139 C.P.R. (4th) 329, at para. 23, Perell J. summarized the test for determining whether an action should be stayed under Rule 21.01(3)(c) as follows:

> The case law about rule 21.01(3)(c) establishes that the court's discretion to grant a stay is to be exercised sparingly, and the test for determining whether an action should be dismissed or stayed is that a stay or dismissal should only be ordered in the clearest of cases, and: (a) where the continuation of the action would cause the party seeking a stay prejudice or injustice, not merely inconvenience or additional expense; and (b) where the stay or dismissal would not be unjust to the other party. Thus, the onus is on the party seeking a stay to show both: (1) that it would be oppressive or vexatious or in some other way an abuse of process to have to be involved in more than one proceeding; and, also (2) that the stay would *not* cause an injustice or prejudice to the other party. [Emphasis in original, citations omitted.]

[35] DeGroote's involvement as a defendant in two actions would result in a prejudice or injustice to DeGroote where the two actions arise from the same facts and seek similar, identical or duplicative relief. An analysis of the allegations pleaded in the statements of claim in the 1st Carbone Action and in this 2nd Carbone Action allows for the following conclusions:

a) Both actions arise from DeGroote's capacity as a lender in relation to gaming and entertainment enterprises alleged to have been initiated by the Carbones: 1st Carbone Action statement of claim, at para. 12; 2nd Carbone Action statement of claim, at para. 18;

b) Carbone alleges in both actions that DeGroote is liable to Carbone for having entered into an agreement to affect the corporate and physical takeover of the Dream Corporations, thereby causing harm to Carbone: 1st Carbone Action statement of claim, at paras. 18, 21; 2nd Carbone Action statement of claim, at para. 19;

c) Both actions allege that DeGroote agreed to fabricate evidence to cause harm to the Carbones in civil proceedings: 1st Carbone Action statement of claim, at para. 21;

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2nd Carbone Action statement of claim, at para. 19. Similarly, allegations of fabrication of evidence to cause criminal charges to be laid against Carbone are pleaded in both actions: 1st Carbone Action statement of claim, at para. 23; 2nd Carbone Action statement of claim, at paras. 27-28;

d) Carbone alleges in both actions that he was charged criminally on August 16, 2013 (1st Carbone Action statement of claim, at para. 24; 2nd Carbone Action statement of claim, at para. 32), and that the criminal charges caused harm to Carbone in that he was prevented from over-seeing or undertaking or in any way managing his interest in the Dream Corporations, being the entities that were otherwise responsible for repayment of the loans: 1st Carbone Action statement of claim, at paras. 25-26; 2nd Carbone Action statement of claim, at paras. 35-36.

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[36] The causes of action and resultant damages alleged in both actions therefore arise from the same factual matrix, in purported support of the theory common to both actions that Carbone sustained losses in his business interests in the gaming and entertainment industry in the Caribbean resulting from DeGroote's conduct. Carbone's counsel submitted that the 1st Carbone Action pleaded causes of action and sought damages resulting from impairment to economic interests while the 2nd Carbone Action seeks damages resulting from intentional conduct resulting in infliction of emotional distress. Carbone thereby contended that the two actions were not duplicative but rather distinct.

[37] The interrelation between the causes of action pleaded in both actions is best seen through paragraph 43 of the statement of claim in the 1st Carbone Action, as follows:

> The Defendants, in acting upon their agreement, orchestrated actions directed exclusively at the Plaintiff's operations, *through a variety of unlawful means, including but not limited to* threats, intimidation, libel, slander, breach of fiduciary duty, and intentional interference with economic relations, thereby causing the Plaintiffs to sustain, and continue to sustain, considerable damages and losses. [Emphasis added.]

[38] The causes of action pleaded in the 1st Carbone Action were not stated to be exhaustive of those considered by Carbone to arise from the conduct of DeGroote but rather left open the identification and pleading of any further causes of action that might be identified by Carbone as applicable. The 2nd Carbone Action pleads two such additional causes of action: malicious prosecution and intentional infliction of emotional distress: 2nd Carbone Action statement of claim, at paras. 1(a), 44 and 52-54. Both actions seek special damages on account of past and future loss of income and punitive, exemplary and/or aggravated damages: 1st Carbone Action statement of claim, at paras. 1, 8; 2nd Carbone Action statement of claim, at paras. 3, 58-61.

[39] There are no causes of action pleaded by Carbone against DeGroote in the 2nd Carbone Action that were not contemplated by, and thereby sheltered under, paragraph 43 of the statement of claim in the 1st Carbone Action. Similarly, there are no damages sought by Carbone

against DeGroote in the 2nd Carbone Action that could not be asserted as part of the broad claims for damages in the 1st Carbone Action.

[40] I have thereby determined that this 2nd Carbone Action is "in respect of the same subject matter" as the claims advanced by Carbone against DeGroote in the 1st Carbone Action. Any cause of action pleaded, or damages sought, by Carbone against DeGroote in the 2nd Carbone Action could have been brought by way of amendment in the 1st Carbone Action. Carbone is not able currently to bring these claims within the 1st Carbone Action because that action is stayed. This underscores the submission made on behalf of DeGroote that allowing the continued prosecution of the 2nd Carbone Action against DeGroote is an abuse of process because it permits Carbone to circumvent the stay of the 1st Carbone Action.

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Abuse of Process

[41] Having determined that this 2nd Carbone Action is "in respect of the same subject matter" as the 1st Carbone Action, and recognizing that the 1st Carbone Action is stayed, the analysis under the test established by Perell J. in *Canadian Standards Assn.* is whether the continuation of the 2nd Carbone Action would cause DeGroote prejudice or injustice and whether the dismissal of the 2nd Carbone Action would be unjust to Carbone. In the present circumstances, however, the further critical consideration is whether allowing Carbone to continue with the 2nd Carbone Action would constitute an abuse of process in light of the stay of the 1st Carbone Action by reason of Carbone's failure to post security for costs and by reason of the chronic disregard by Carbone of court orders pertaining to costs.

[42] The doctrine of abuse of process "engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute": *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), at para. 55, per Goudge J.A., dissenting (approved 2002 SCC 63, [2002] 3 S.C.R. 307).

[43] Circumventing a court order or circumventing the operation of a Rule by initiating a further proceeding has been determined to be an abuse of process. In *Living Water (Pressure Wash Services) Ltd. v. Dyballa*, 2011 ONSC 5695, a second action brought by a plaintiff was stayed on the finding that it had been initiated to circumvent a cost order that resulted in the stay of the initial action. Lederer J. stated, at para. 9:

> The doctrine of abuse of process seeks to promote judicial economy and to prevent a multiplicity of proceedings. The doctrine engages the inherent power of the court to prevent the misuse of its procedures in order to uphold the integrity of the administration of justice. It is an abuse of process to circumvent the requirement that leave of the court be obtained before adding a non-consenting party to the proceeding. [Citations omitted.]

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[44] A similar determination was made in *Vetro v. Canadian National Exhibition Assn.*, 2014 ONSC 4324, 17 C.B.R. (6th) 326, where an action was struck as being brought to circumvent an order requiring service. The findings in *Living Water* and *Vetro* are applications of the court's broad discretion to control proceedings that are determined to be "unfair to the point that they are contrary to the interest of justice": *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 35-37 (SCC).

[45] Having determined that this 2nd Carbone Action is "in respect of the same subject matter" as the claims advanced by Carbone against DeGroote in the 1st Carbone Action, allowing the 2nd Carbone Action to continue against DeGroote would allow Carbone to circumvent the Security for Cost Order made by Firestone J. on October 29, 2014, as reiterated by Myers J. in his Order of March 11, 2015, and would circumvent the stay of the 1st Carbone Action resulting from the operation of Rule 56.05.

[46] Also, Carbone has disregarded the 4th Cost Order and the 5th Cost Order rendered in the 1st Carbone Action, not to mention the disregard of the 1st Cost Order, the 2nd Cost Order and the 3rd Cost Order rendered in the 2012 Commercial List Action. Carbone has offered no reasonable explanation for his chronic failure to satisfy, in whole or even in part, these cost orders, exposing Carbone's actions to dismissal or stay pursuant to Rule 60.12.

[47] The Ontario Court of Appeal's findings in *Maynes* support a determination that the continued prosecution of the 2nd Carbone Action would constitute an abuse of process by circumventing court orders and the Rules. In *Maynes*, a plaintiff brought a second action making the same allegations as in the first action and adding new defendants in order to avoid seeking the court's leave to join parties to the first action. The Court of Appeal upheld the lower court determination striking the second action as circumventing Rule 26.02(c) and thereby undermining the integrity of the administration of justice. At paras. 45 and 46, the court states as follows:

> Disputes about whether parties may be added and whether a claim may be amended must be resolved through the process established by the *Rules*, not by circumventing them by the commencement of a new action seeking declaratory relief. Where, as here, the *Rules* provide an effective means to obtain a remedy, it is reasonable to assume that the legislature intended that litigants and their counsel would rely on the prescribed provisions. Otherwise, the integrity of the administration of justice is undermined, as is the goal of efficiency.
>
> The present statement of claim is an abuse of process because it duplicates claims in the two Ongoing Actions with respect to the Original Defendants and undermines the integrity of the administration of justice by circumventing rule 26.02(c) with respect to the Added Defendants.

C. Disposition

[48] This 2nd Carbone Action shall be dismissed as against DeGroote, alone, on the determination that it is duplicative of the 1st Carbone Action in that it arises from the same subject matter. The continued prosecution by Carbone of this 2nd Carbone Action would constitute an abuse of process as this would effectively circumvent the stay of the 1st Carbone Action resulting from the Security for Cost Order, the court orders requiring cost payments by Carbone and the operation of the *Rules*. In summary, allowing this 2nd Carbone Action to continue as against DeGroote would undermine the administration of justice and would be unfair and prejudicial to DeGroote.

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[49] There will be no injustice to Carbone by dismissal of the 2nd Carbone Action. Leave is granted to Carbone to seek the amendment of the statement of claim in the 1st Carbone Action to plead the causes of action pleaded herein but this leave to amend is only exercisable within sixty (60) days after an order is rendered lifting the stay of the 1st Carbone Action. Any such amendment of the statement of claim in the 1st Carbone Action shall, for all purposes of the calculation of any limitation defence, be deemed to have been effected as at May 30, 2014, being the date of issuance of the statement of claim in this 2nd Carbone Action.

[50] Counsel for Pajak and counsel for the TPS Defendants supported the submissions of the Moving Party, including the submission that Carbone's conduct in these three actions, including noting in default without notice and disregard of court orders, is sufficiently egregious to justify a stay of the entirety of the 2nd Carbone Action. I do not accept that the dismissal or stay of this action in its entirety is established on the current record. The TPS Defendants are not sued in the 1st Carbone Action and no cost orders have been rendered in their favour. Pajak is sued in the 1st Carbone Action but no cost awards have been rendered in his favour and Pajak did not move for security for costs or for dismissal or stay of this action. However, the denial of relief to Pajak and to the TPS Defendants, sought on their behalf by the Moving Party, is without prejudice to them, or either of them, seeking such relief on a motion record of their own, should they consider that they have grounds on which to do so.

[51] The dismissal of this action against DeGroote necessitates the dismissal of the Pajak/ DeGroote Crossclaim and the TPS/ DeGroote Crossclaim. A crossclaim can only be advanced against a co-defendant: Rule 28.01. In the case of a discontinuance of an action against a defendant by crossclaim, or by a dismissal for delay, the crossclaim is deemed to be dismissed thirty days after discontinuance (Rule 23.03(1.1)) or thirty days after service of the dismissal order (Rule 24.04(1.1)) unless the court orders otherwise within that thirty day period.

[52] Consistent with the dismissal of this action against DeGroote, the Pajak/ DeGroote Crossclaim and the TPS/ DeGroote Crossclaim are also dismissed, but with leave to the plaintiffs by crossclaim to issue in this 2nd Carbone Action, within sixty (60) days of issuance of these Reasons, third party claims against DeGroote to plead those claims currently pleaded as crossclaims. For the purpose of the leave to issue third party claims to replace the crossclaims against DeGroote in this action, the third party claims shall, for all purposes of the calculation of any limitation defence, be deemed to have been effected as at the date of the delivery of the Statement of Defence and Crossclaim on which the third party claim is based.

D. Costs

[53] The parties are encouraged to discuss and attempt to resolve the issue of costs.

[54] In the event that the parties are not able to reach agreement on the issue of costs, the Moving Party shall deliver written cost submissions of no more than five pages within twenty days of the release of this decision. It is not anticipated that costs will be sought by or against Pajak or the TPS Defendants given their limited role in supporting the Moving Party, but any submissions that they are advised to make on the issue of costs shall also be made within twenty days of the release of this decision and, again, of no more than five pages in length. The respondent, Carbone, shall deliver written submissions of no more than five pages within thirty days of release of this decision. I will then consider and deliver an endorsement on the issue of costs.

Sanfilippo J.

Released: January 4, 2018

2018 ONSC 109 (CanLII)

CITATION: Carbone v. DeGroote, 2018 ONSC 109
COURT FILE NO.: CV-14-505316
DATE: 20180104

2018 ONSC 109 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

FRANCESCO CARBONE

Plaintiff

MICHAEL DeGROOTE, ANDREW MICHAEL PAJAK, ZELJKO ZDERIC aka PAVLE KOLIC aka ALEX VISSER aka SASHA VUJACIC, PETER ALFRED SHONIKER, LORENZO LOMBARDI, SHAUN GENOVY, JOHN DUNLOP, ROBERT MCDOUGALL, THE TORONTO POLICE SERVICES BOARD AND THE ATTORNEY GENERAL OF ONTARIO

Defendants

REASONS FOR DECISION

Sanfilippo J.

Released: January 4, 2018

DATE: 20031127
DOCKET: C38818

COURT OF APPEAL FOR ONTARIO

WEILER, ABELLA and ARMSTRONG JJ.A.

B E T W E E N:	)	
	)	
ORIENA CURRIE	)	Peter K. McWilliams, Q.C.
	)	for the appellant
Plaintiff	)	
(Appellant)	)	
	)	
- and -	)	
	)	
HALTON REGIONAL POLICE	)	Graydon Sheppard
SERVICES BOARD, OWEN GRAY,	)	for the respondent Michael Jaeger
KIM DUNCAN, and MICHAEL JAEGER	)	
	)	
Defendants	)	
(Respondent)	)	
	)	
	)	Heard: April 14, 2003

On appeal from the order of Justice E. R. Kruzick of the Superior Court of Justice dated August 20, 2002.

ARMSTRONG J.A.:

[1] The appellant was arrested on July 5, 2001 on a charge of fraud over $5,000. She was in custody until released on bail on July 9, 2001. On December 31, 2001, she commenced this action against the respondent and others for damages for false arrest, false imprisonment, and abuse of process. On a motion by the respondent before Justice E. R. Kruzick of the Superior Court of Justice the action was dismissed. The appellant appeals from the order dismissing her action.

Background

[2] The criminal charge, which is central to this action, relates allegedly to an unsuccessful business deal which the appellant had entered into with one Petre Caragioiu. The respondent was the lawyer for Caragioiu and had acted against the appellant in at least two other civil actions.

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[3] The appellant, as part of a plea bargain, entered a plea of guilty to charges other than the fraud charge, which was stayed at the request of the Crown attorney.

[4] The appellant commenced this action against the Halton Regional Police Services Board, two individual police officers and the respondent. The statement of claim contains the following allegation against the respondent: "[The respondent] repeatedly and unlawfully urged and requested the defendant Owen Gray [a detective with the Halton Regional Police Services Board] to arrest the [appellant]."

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[5] The respondent moved *inter alia* for the following relief:

> a. An Order for security for costs as against the plaintiff in the amount of $25,000.00 or such other amount as this Court may deem necessary;
>
> b. Alternatively, an Order striking out the statement of claim as against the defendant as frivolous, vexatious and an abuse of process of the Court;
>
> c. Alternatively, an Order dismissing the action against the defendant as failing to disclose a reasonable cause of action; and granting leave to introduce affidavit evidence, if necessary;
>
> d. Alternatively, an Order for summary judgment dismissing the plaintiff's action against the defendant;
>
> e. An Order declaring the plaintiff to be a vexatious litigant within the meaning of s. 140 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

[6] On the proceedings before the motions judge, each of the parties filed affidavit evidence. The transcript of some of the evidence of the appellant's bail proceedings was also before the court. The motions judge accepted the evidence of Detective Gray of the Halton Regional Police at the bail hearing that it was he who instructed Constable Duncan to arrest the appellant and that the urging of the respondent that the appellant be arrested had no effect on his decision to do so.

[7] In dismissing the action, the motions judge stated:

> Counsel for Mr. Jaeger referred me to *Mishra v. Ottawa*, [1997] O.J. No. 4352 a decision of this court where Sedgwick J. enumerated some seven characteristics of what constitutes a

> vexatious proceeding (relying upon and quoting *Lang Michener and Fabian* (1987), 59 O.R. (2d) 353 (H.C.J.).
>
> Essentially I came to the conclusion that the plaintiff's action, on the material before me has no chance of success and fits under the rubric of [rule] 21.01 (3)(d) as being an action that is frivolous, vexatious and generally an abuse of the process of the court.

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The Appeal

[8] Counsel for the appellant submits that the motions judge had, in effect, dismissed the action on the basis that the statement of claim disclosed no reasonable cause of action pursuant to rule 21.01 (1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Counsel for the appellant further submitted that the motions judge erred in relying upon the affidavit evidence. Rule 21.01 (2)(b) makes it clear that no evidence is admissible on a motion brought pursuant to rule 21.01 (1)(b).

[9] It is perhaps not entirely clear from the above language of the motions judge whether he based his decision, in part, on a failure to plead a reasonable cause of action pursuant to rule 21.01 (1)(b). If he did, I agree that he was not entitled to consider any extrinsic evidence.

[10] I think the better view of the motions judge's decision is that it was based entirely upon the application of rule 21.01 (3)(d) that the action was frivolous, vexatious and an abuse of the process of the court. Under that rule, extrinsic evidence is admissible.

[11] In reaching his decision, one of the factors the motions judge considered was whether it is obvious that the action cannot succeed. In this respect, he relied upon *Mishra, supra* at paragraph 39 where Sedgwick J. stated:

> In *Lang Michener et al. and Fabian et al.*, (1987) 59 O.R. (2d) 353, Henry J., summarized the characteristics of vexatious proceedings in the following passage:
>
> (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceedings;
>
> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no

reasonable person can reasonably expect to obtain relief, the action is vexatious;

(c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;

(g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings. (358-9)

[12] The motions judge did not expressly relate the circumstances of this case to the factors set out by Henry J. in *Lang Michener*. I take from his endorsement that he accepted the evidence of Detective Gray as determinative of the main factual issue, i.e. that the conduct of the respondent had nothing to do with the arrest and incarceration of the appellant. It is also apparent that he relied upon factor (b) referred to by Henry J. in *Lang Michener*.

[13] I turn to a consideration of whether there is a basis on the record before the court upon which the motions judge could conclude that the action is frivolous, vexatious or an abuse of process. A review of the case law under rule 21.01 (3)(d) does not provide precise definitions of the terms frivolous, vexatious or abuse of process. The majority of

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the cases cited by the editors of Ontario Annual Practice and Ontario Civil Practice either refer to abuse of process alone or to all three terms together.[1]

[14] Black's Law Dictionary defines "frivolous" as: "Lacking a legal basis or legal merit; not serious; not reasonably purposeful".[2]

[15] In *Foy v. Foy (No. 2)* (1979), 26 O.R. (2d) 220 at 226, Howland, C.J.O. considered the meaning of "vexatious" under the *Vexatious Proceedings Act*, R.S.O. 1970, c. 481:

> The word "vexatious" has not been clearly defined. Under the Act, the legal proceedings must be vexatious and must also have been instituted without reasonable ground. In many of the reported decisions the legal proceedings have been held to be vexatious because they were instituted without any reasonable ground. As a result the proceedings were found to constitute an abuse of the process of the Court. An example of such proceedings is the bringing of one or more actions to determine an issue which has already been determined by a Court of competent jurisdiction: *Stevenson v. Garnett*, [1898] 1 Q.B. 677 at pp. 680-1; *Re Langton*, [1966] 3 All. E.R. 576.

[16] In discussing the inherent power of the court to invoke the doctrine of abuse of process, apart from rule 21.01 (3)(d), Finlayson J.A. for the majority in *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), rev'd on other grounds (2002), 220 D.L.R. (4th) 466, [2002] S.C.C. 63 at para. 31 stated:

> The court can still utilize the broader doctrine of abuse of process. Abuse of process is a discretionary principle that is not limited by any set number of categories. It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public policy.

Goudge J.A. for the minority in the same case, stated at paras. 55 and 56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine un-

[1] J.J. Carthy, W.A.D. Millar & J.G. Cowan, Ontario Annual Practice 2003 – 2004 (Aurora: Canada Law Book, 2003) at RULE-222 to RULE-224; G.D. Watson & M. McGowan, Ontario Civil Practice 2004 (Toronto: Thomson Canada, 2003) at 535 to 538.

[2] B.A. Garner, ed., Black's Law Dictionary, 7th ed., (St. Paul: West Publishing, 1999) at 677.

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> encumbered by the specific requirement of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All. E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

It is obvious that Finlayson and Goudge JJ.A. were *ad idem* in respect to the nature of the doctrine of abuse of process. The majority judgment was reversed in the Supreme Court of Canada but not in respect to the discretionary nature of the doctrine.

[17] It is apparent that there is a degree of overlap in the meaning of the terms frivolous, vexatious and abuse of process. What I take from the authorities is that any action for which there is clearly no merit may qualify for classification as frivolous, vexatious or an abuse of process. The common example appears to be the situation where a plaintiff seeks to relitigate a cause which has already been decided by a court of competent jurisdiction.

[18] I am mindful that when the court invokes its authority under rule 21.01 (3)(d) or pursuant to its inherent jurisdiction to dismiss or stay an action, it does so only in the clearest of cases. See *Sussman v. Ottawa Sun*, [1997] O.J. No. 181 (Gen. Div.) at paragraph 21.

[19] In my view, the motions judge did not err in his application of rule 21.01 (3)(d) on the record that was before him.

[20] The statement of claim contained the following allegations against the respondent:

> The defendant Michael Jaeger repeatedly and unlawfully urged and requested the defendant Owen Gray to arrest the plaintiff Currie.
>
> The defendant Michael Jaeger had a conflict of interest in that he was the solicitor of record in three civil actions involving the plaintiff.
>
> The defendant Michael Jaeger had oblique motives in requesting the defendant Owen Gray to have the plaintiff arrested.
>
> Furthermore, the conduct of the defendants as aforesaid, was malicious, high handed and deliberate and calculated to cause

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> the plaintiff damage. Accordingly, an award of punitive or exemplary damage is warranted.

[21] The evidence relevant to the issues of false arrest, false imprisonment and abuse of process before the motions judge came from the appellant, the respondent and Detective Gray.

[22] The appellant filed an affidavit in which she stated that the respondent "initiated pressure on Detective Gray to lay criminal charges against me." She also swore that the respondent sent a false document to Detective Gray but did not specify the document or its content.

[23] The appellant also testified that during the course of a recess in a judgment debtor examination that the respondent said, "after I put you behind bars lady, you'll have lots of time to study law." On the record before us there does not appear to be a denial by the respondent of this statement.

[24] The respondent testified by way of affidavit that he had not arrested the appellant and referred to the evidence of Detective Gray at the appellant's bail hearing.

[25] Neither the appellant nor the respondent were cross-examined on their affidavits.

[26] Both the appellant and the respondent filed portions of the transcript of the evidence of Detective Gray at the bail hearing. Counsel for the appellant before the motions judge and in this appeal, Mr. McWilliams, was also counsel for the appellant on the bail hearing. He cross-examined Detective Gray on the circumstances of the arrest of his client and the communications which had taken place between Detective Gray and the respondent.

[27] The cross-examination of Detective Gray revealed that the police carried out their own investigation. However, he conceded that he was contacted by the respondent and urged by him to arrest the appellant. The following excerpt from the cross-examination by Mr. McWilliams is informative:

> Q. And have you discussed the case with him [the respondent], any of these cases?
>
> A. I don't discuss it with him. I just listen to what he has to tell me.
>
> Q. Oh you listen?
>
> A. That's correct.

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Q. So you have met him?

A. Yes, I have.

Q. And when did you last speak to him?

A. I'd have to make – if I may check my notes for a quick second. I think I've made – I do my best to make notations every time.

Q. Well, I'm sure. What I want to know is whether you spoke to him prior to the arrest of Oriena Currie last Thursday? I put it to you that he approached you and urged you to have her arrested and that he's behind her arrest, even though he's the solicitor for these people, the Gosses and Caragioiu, who are involved in civil litigation against her.

A. Actually I can answer your question. You've got three in there.

Q. Yes.

A. The first part of your question is yes he has asked me to arrest her and this started way back I think prior to Peter Caragioiu getting involved because he represents the Williamsons.

Q. Oh you know that too?

A. I'm very familiar with that.

Q. Now, that's another lawsuit where he is the solicitor for the plaintiff suing Oriena Currie and Sheri Duff, who was their own daughter…

A. That's right.

Q. …and the various companies. So you know he's behind that lawsuit too?

A. Yes, I do.

Q. And did it not concern you that he might have a private axe to wield, that he might have a conflict of interest and he

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might be prepared to go to any lengths to have my client arrested in order to pursue his designs in these various lawsuits?

A. The merits of this investigation are on my investigation and my investigation only and the decisions made are based on my findings through my investigation.

Q. Were you not at all concerned that you or the police were being used for the private purposes of this solicitor from Hamilton…

A. No.

Q. …to pursue these various vendettas against my client?

A. Not in the least. Not in the least.

Q. Not in the least.

A. Not at all.

Q. Did you not even acknowledge that there was a conflict of interest on his part?

A. You'll have to explain that to me because he was always coming at me from the civil side. I mean, if he mentions anything to me he's telling me from his civil standpoint which is basically no use to me.

Q. Oh. Well, it was obvious that he wanted to pursue these civil actions, the one by the Williamsons against Oriena Currie?

A. That's correct.

Q. And he wanted to pursue the civil action by Caragioiu against her?

A. Well, he is pursuing all those.

Q. Yes.

A. Yes.

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> Q. And he wanted additional assistance to the point of having her arrested so as to make life difficult for her to defend herself in these civil actions?
>
> A. That's correct.
>
> Q. And you saw no conflict of interest in all that?
>
> A. Well no, because I didn't arrest her on his terms. I arrested Mrs. Currie and Charlie and Sheri on my terms. It has nothing to do with Michael Jaeger or his civil action whatsoever.

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[28] Both the appellant and the respondent relied upon the above portion of the cross-examination by Mr. McWilliams. Not surprisingly, their submissions as to the legal conclusion to be drawn from Detective Gray's evidence were markedly different.

[29] *Simpliciter*, the appellant argued that the conduct of the respondent attracted liability for false arrest and false imprisonment. The respondent, on the other hand, submitted that his conduct did not attract liability for the torts of false arrest and false imprisonment.

[30] Counsel for the appellant submitted that in an action for false arrest, the plaintiff need not prove the defendant actually made the arrest. It is sufficient that the defendant simply use his power or influence in urging the police to do so. He relied upon the following authorities: *Vanderhaug v. Libin* [1954], 13 W.W.R. 383 (Alta. C.A.); *Pike v. Waldrum*, [1952] 1 Lloyd's Rep. 431 (Q.B.D.); *Dendekker v. F.W. Woolworth Co. Limited*, [1975] 3 W.W.R. 429 (Alta. S.C.); *Mann v. Rasmussen* (1928), 3 D.L.R. 319 (Alta. S.C. (A.D.)); and *Hinde v. Skibinski* (1994), 21 C.C.L.T. (2d) 314 (Ont. Gen. Div.). None of these authorities is binding upon the court. All of them are distinguishable from the case at bar. The one Ontario case, *Hinde*, is a malicious prosecution case which left open the question whether the plaintiff could succeed where the defendant had not actually laid a criminal charge.

[31] It is unnecessary, in the circumstances of this case, to decide whether a person who does no more than urges the police to arrest another can ever be liable for false arrest or false imprisonment. In the case at bar, the detective testified at the bail hearing that the respondent had called him more than once to urge him to arrest the appellant. However, the detective conducted his own investigation, made his own decision to arrest the plaintiff, and instructed the constable to execute the arrest. In my view, in these circumstances, the motions judge had before him sufficient evidence upon which to conclude that the action had no chance of success.

[32] While I might have been inclined to dispose of this matter as a summary judgment motion pursuant to Rule 20 on the basis that no genuine issue for trial was raised, the motions judge chose not to do so. However, his conclusion does appear to be tantamount

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to a finding that there was no genuine issue for trial. Nevertheless, counsel before us did not argue the applicability of Rule 20.

[33] Counsel for the appellant also raised the issue of the respondent's failure to comply with rule 2.02(4) of the *Rules of Professional Conduct* of the Law Society of Upper Canada which provides:

> A lawyer shall not advise, threaten, or bring a criminal or quasi-criminal prosecution in order to secure a civil advantage for the client.

While the respondent's conduct as a member of the Law Society, may deserve review by his professional body that issue is not before us. I cannot discern, on this record, that such conduct establishes a basis for civil liability.

Disposition

[34] In the result, I would dismiss the appeal with costs to the respondent on a partial indemnity basis in the amount of $6,000 including interest and Goods and Services Tax.

RELEASED:

"NOV 27 2003"

"KMW"

"Robert P. Armstrong J.A."
"I agree K.M. Weiler J.A."
"I agree R.S. Abella J.A."

2003 CanLII 7815 (ON CA)

CITATION: Dynasty Furniture Manufacturing Ltd. v. Toronto-Dominion Bank, 2010 ONCA 514
DATE: 20100720
DOCKET: C51698

2010 ONCA 514 (CanLII)

COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., Rouleau and Epstein JJ.A.

BETWEEN

Dynasty Furniture Manufacturing Ltd., Shafiq Hirani, Hanif Asaria, Dinmohamed Sunderji and 2645-1252 Quebec Inc.

Appellants

and

Toronto-Dominion Bank

Respondent

Lincoln Caylor and Albert Pelletier, for the appellants

Geoff R. Hall and Junior Sirivar, for the respondent

Heard: July 12, 2010

On appeal from the order of Justice Wilton-Siegel of the Superior Court of Justice dated January 21, 2010.

ENDORSEMENT

[1] On a Rule 21 motion, the motion judge struck out those portions of the appellants' statement of claim that were based on a claim that the respondent bank owed a duty to the appellants, who were not its customers. The alleged duty was to make inquiries into the

activities of its customer with whom the appellants had dealings in order to ensure that its customer was not using the bank to further fraudulent activity.

2010 ONCA 514 (CanLII)

[2] The motion judge gave extensive reasons in which he analyzed the current law as well as whether this was a situation in which a new duty of care should be recognized pursuant to the principles from the *Anns/Kamloops* cases. He concluded that the bank has a duty to a non-customer only where it has actual knowledge (including wilful blindness or recklessness) of its customer's fraudulent conduct.

[3] Counsel for both parties presented very effective arguments; however, we are able to dispose of this appeal by way of this brief endorsement.

[4] In general terms, the struck portions of the statement of claim allege that in opening its customer's accounts, the respondent owed a duty to the appellants, who were not customers of the bank, to ensure that the accounts would not be used for an unlawful purpose. Further, the struck portions of the statement of claim allege that the bank owed a duty to the appellants to inquire into its customer's activities because it ought to have known that those activities were suspicious, unusual, or fraudulent in nature.

[5] We are of the view that the facts, as pleaded, do not give arise to the duties relied upon in the struck portions of the statement of claim. Although in some cases trial courts have, on motion to strike, allowed claims alleging a duty to ensure that a bank's customers did not use their accounts for fraudulent purposes to proceed to trial, we were

not referred to any trial or appellate decision in Canada holding that a bank has those duties to a non-customer. Thus the impugned claims do not fall within a category of cases that has been recognized by the courts.

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[6] Moreover, we do not consider this to be a case where this court should recognize a new duty of care under the *Anns*/*Kamloops* principles. We agree generally with the motion judge's analysis of those principles. Based on that analysis, we are of the view that the facts, as pleaded in this case, are not sufficient to warrant recognizing a new duty of care by a bank to a non-customer.

[7] The appellants rely on *Semac Industries Ltd. v. 1131426 Ontario Ltd.* (2001), 16 B.L.R. (3d) 88 (Ont. S.C.) to support the position that the struck portions of this claim should proceed to trial so that the question as to whether the court should recognize a duty be decided with the benefit of a full evidentiary record. In *Semac* the motion judge identified particular circumstances of the claim that, in his view, ought to be dealt with at a trial. These included allegations that the bank had already raised concerns internally about suspicious conduct on the part of its customer, and that the non-customer had subsequently alerted the bank to its allegation of fraud.

[8] No such allegations were pleaded in the appellants' statement of claim and in our view, there are no circumstances disclosed in the claim that warrant the issue going to trial. We would, therefore, not give effect to this submission.

[9] In these circumstances, we do not find it necessary to decide whether a bank may ever be found to have a duty to a non-customer in circumstances where it does not have actual knowledge (wilful blindness or recklessness) of the fraudulent activities being conducted through an account of its customer. We leave the question of whether such a duty exists and, if so, in what circumstances, to another day.

[10] Thus, we are of the view that it is plain and obvious that the claims made in the struck portions of the statement of claim cannot succeed.

[11] The appeal is, therefore, dismissed. Costs are awarded to the respondent fixed in the agreed-upon amount of $29,700, inclusive of applicable GST, HST and disbursements.

"D.R. O'Connor A.C.J.O."
"Paul Rouleau J.A."
"Gloria Epstein J.A."

2010 ONCA 514 (CanLII)

CITATION: Ernst & Young Inc. v. Essar Global Fund Ltd et al, 2017 ONSC 1366
COURT FILE NO.: CV-16-11570-00CL
DATE: 20170306

2017 ONSC 1366 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ERNST & YOUNG INC. in its capacity as Monitor of all of the following:
ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY
and ESSAR STEEL ALGOMA INC. USA

Plaintiff

- and -

ESSAR GLOBAL FUND LIMITED, ESSAR POWER CANADA LTD., NEW TRINITY COAL, INC., ESSAR PORTS ALGOMA HOLDINGS INC., ALGOMA PORT HOLDING COMPANY INC., PORT OF ALGOMA INC., ESSAR STEEL LIMITED and ESSAR STEEL ALGOMA INC.

Defendants

HEARD: January 31, February 2, 3, 4 and 5, 2017

BEFORE: NEWBOULD J.

COUNSEL: *Clifton Prophet, Nicholas Kluge, Michael Watson, Marco Romeo, Delna Contractor and Brent Arnold* for the Monitor

Patricia D.S. Jackson, Andrew Gray, Jeremy R. Opolsky, *Davida Shiff* and *Alexandra Shelley*, for Essar Global Fund Limited, Essar Ports Algoma Holdings

Inc., Algoma Port Holding Company Inc., Port Of Algoma Inc. [the "Essar Defendants"]

Peter H. Griffin, Monique J. Jilesen and Matthew B. Lerner, for GIP Primus, LP and Brightwood Loan Services LLC

Eliot Kolers and Patrick Corney, for the Applicants

John A. MacDonald and Alex Cobb, for Deutsche Bank AG, Intervenors

L. Joseph Latham and David Conklin, for the Ad Hoc Committee of Essar Algoma Noteholders, Intervenors

Karen Ensslen, for the Retirees, Intervenors

Robert A. Centa, for USW and Local 2724, Intervenors

Alexandra Teodorescu, for USW Local 2251, Intervenors

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REASONS FOR JUDGMENT

[1] Ernst & Young Inc. was appointed Monitor of Essar Steel Algoma Inc. ("Algoma"), Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA (the "Applicants") pursuant to the CCAA on November 9, 2015.

[2] This is not the first time that Algoma has been under CCAA protection. It went through a restructuring in CCAA proceedings in 1991 and again in 2001. In late 2013 Algoma faced another liquidity crisis and restructured in 2014 under the CBCA.

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[3] Essar Global Fund Limited ("Essar Global") is a Cayman Island company. Its investments are managed by Essar Capital Limited ("Essar Capital") based in London, U.K. The Essar Group of companies has worldwide interests in assets across the core sectors of energy, metals and mining, infrastructure and services. It was founded in India by two brothers, Shashi and Ravi Ruia, and members of the Ruia family are the beneficial owners of the Essar Group.[1]

[4] Essar Global is also the ultimate parent of Port of Algoma Inc. ("Portco") through a chain of subsidiaries, which includes Essar Port Holdco and Algoma Port Holding Company Inc.

[5] Essar Global acquired all of the shares of Algoma Steel Inc. through subsidiaries in April, 2007 and changed the name to Essar Steel Algoma Inc. ("Algoma").

[6] On September 26, 2016, the Monitor was authorized by court order to commence oppression proceedings under section 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C. 44 ("CBCA") in relation to a number of related party transactions, including the transactions involving the conveyance of Algoma's Port facility assets (the "Port Transaction") to Portco. The action was commenced shortly thereafter. The claims regarding the Port Transaction proceeded first and these reasons for judgment deal solely with those claims.

[7] The Port assets are located immediately adjacent to the Algoma buildings and facilities. Algoma is dependent upon the Port to receive the raw materials to make steel, and to ship its steel products to market. Algoma could not function economically without unfettered access to the Port. The Port has always been utilized almost exclusively by Algoma. It is not viable without Algoma as a customer. Algoma employees have always operated the Port.

The Algoma Restructuring and the Port Transaction

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[1] All statements of fact in these reasons are findings of fact unless indicated otherwise.

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[8] By the end of 2013, it was clear that Algoma was facing significant financial issues involving a liquidity crisis and upcoming debt maturity issues. Algoma was operating with very tight liquidity, resulting in low inventory levels. Algoma's capital structure was untenable and it would not be able to meet a coupon payment to unsecured bondholders due in June 2014 and an approximately $300 million term loan maturity payment due in September 2014. While support from Essar Global had been enabling Algoma to meet its liabilities as they came due, by early 2014 Essar Global was increasingly hesitant to advance cash to Algoma.

[9] Steps were taken to refinance Algoma. These steps ultimately resulted in two main transactions which closed at the same time on November 14, 2014, being a recapitalization transaction (the "Recapitalization") and the Port Transaction. There is a huge record of what took place in 2014 leading to these transactions. It need not all not be described. However there were events that are of some relevance to the issues raised.

[10] On January 17 2014, a refinancing plan was presented to Algoma's board of directors in a memo dated January 16, 2014. Two scenarios were proposed. "Plan A" contemplated the refinancing of the entire capital structure, which required a minimum cash infusion of $200 million ($300 million was ideal); "Plan B" contemplated refinancing only the term loan.

[11] At the time, there were eight directors of Algoma. Five were not independent and were affiliated with the Essar Group or the Ruia family. Three were independent of Essar, being Thomas Dodds, Hans J. Jacobsen and Navin Dave. In the fall of 2013 these three began expressing concerns about their role on the Board, noting that the disclosure of information to the independent directors was limited, especially when compared to the information being provided to the other members of the Board. Through December 2013 and into January of 2014, their concerns became more acute due to the serious financial challenges facing Algoma. The refinancing plans in the January 16 memo were presented to them for the first time on January 17, 2014 at an informal meeting of the Algoma Board and they felt that they had little or no time to review and reflect on the memo, which was a concern to them.

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[12] As a result, they prepared an email proposing a committee of independent directors to work with outside financial advisors to advise the Board. Mr. Dave sent it to the Algoma directors on January 19, 2016. The email stated in part:

> Further, the company's internal forecast indicates that the company will not have internally generated cash to pay the interest payments due in mid-March. As of the 17th of January there were no solutions as to how the company will find this cash. Of course, one option is for the shareholder to put in the required cash as it has in the past. However, there is no firm commitment to do so.
>
> Given that we do not know where we will get the funds to pay the interest amount due about two months from now and not having seen a plan for unforeseen events, we believe the Company should be prepared and not be surprised in the event the scenario does not unfold as laid out. The probability of something internal or external event happening is high, and this may have a detrimental effect on the refinancing effort and significant adverse consequences for the Company.
>
> It is with this in mind that we are proposing that the company appoint a committee made of Independent Directors to work with outside financial advisors selected by the committee to advise the Board on a contingency plan which will hopefully not be needed. If it is needed, then we will have it ready for implementation and it will be very helpful in serving the best interest of the Company.
>
> We are asking that a special Board meeting be called to discuss and vote on a resolution to appoint a special committee of Independent Directors to advise the Board on contingency plans and recommendations emanating there from.

[13] At the board meeting on February 11, 2014, Mr. Dave asked that his memo and its request for an independent committee of the Board be added to the agenda and approved. In the Board discussion which ensued, the other directors, including the chairman of the Board, Mr. Jatinder Mehra of Essar Global in India, expressed the view that a special committee of independent members to address refinancing issues was not needed and provided assurances that independent members of the Board would be informed and engaged as Algoma's refinancing plans moved forward. As the three independent directors had been given similar assurances in

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the past without material change, it was their view that the matter could not be dealt with in this way and they requested a vote on their independent committee motion. By a vote of 4 to 3, with the three independent directors voting against, the Board held that the independent committee request was not approved.

[14] Mr. Jacobsen came to the conclusion that he could no longer serve as an independent director in the absence of the governance changes proposed in the independent committee motion. He resigned a few hours after the meeting.

[15] It is said that there is no evidence that Mr. Ghosh, the CEO, was not free to vote at that meeting as he wished. That may be, just as there was no evidence that any of the directors were not free to vote as they wished. But it cannot be overlooked that prior to becoming CEO of Algoma, Mr. Ghosh had been with Essar Steel India. Mr. Marwah, the CFO of Algoma, described the four directors who voted against the independent committee as “Essar-affiliated directors”. That accords with the common sense of the situation, and I accept it. It was clear that the Ruia family did not want an independent committee.

[16] On February 17, 2014, Mr. Dodds wrote an email to Prashant Ruia, the son of one of the founders of the Essar Group and a director of Essar Capital which controls Essar Global’s investment decisions. He was the chair of Algoma’s board at the time, although he did not attend board meetings during the recapitalization efforts of Algoma. The email requested the opportunity to discuss the situation directly with Mr. Ruia, and stated in part:

> If your expectation of ESAI [Algoma] Board is to simply be a formality and our role as independent directors is to essentially “rubberstamp” shareholder and management decisions, we are not prepared to continue serving as directors.
>
> As you know, Directors and particularly independent directors have a legal, fiduciary responsibility to all the stakeholders of the Company starting with the Company first, followed by the shareholders, employees, community and others. This Director responsibility may on occasion conflict with the objectives of the

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> shareholder who may, understandably, be more interested in matters of import to themselves. Most of the time there will be no conflict between the responsibilities of the Directors, objectives of the shareholder and that of the Company stakeholders as broadly defined. However, there are other occasions when they do.
>
> What we as independent directors have experienced in the last few Board meetings is a complete disregard for any discussion or wholesome debate on alternatives to re-financing or contingency planning at ESAI.
>
> As an example, we are very happy that Essar Global, acting on behalf of the shareholder, has appointed Mr. Joe Siefert to lead the effort on refinancing the debt and restructuring the balance sheet of ESAI. We hope he comes through with all he has promised. The ESAI Board, in particular the Independent Directors, had no input on this appointment, the scope of the work, or the output. For a company like ESAI, with its urgent need for refinancing, the Directors need to be actively involved in the whole refinancing effort. Not only were we not all involved; we are not getting any regular, timely progress reports. In addition when we ask questions, or propose alternatives, we are asked to wait a while for additional information and told that everything will work out.
>
> We cannot discharge our obligations under such an environment.

[17] The two remaining independent directors were not able to meet with Mr. Ruia and felt their concerns were not adequately recognized. Mr. Dave resigned as a director of Algoma on February 21, 2014. Mr. Dodd resigned on May 5, 2014. In his resignation letter, he described the reason behind his decision:

> The fundamental reason for the decision to resign was my conclusion that as an independent director, that I lacked confidence that I was receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company and or its parent. This became more acute over the past months, when short term liquidity and long term debt issues have increasingly become problematic. I have been of the understanding that as a Director, I would be provided information and engaged in decision-making on the affairs of the company at the board governance level on equitable and timely basis in the manner as non-independent directors. The role I had envisioned is that what

> I and the former independent directors (Dave and Jacobsen) have described to you verbally and in writing.

[18] It is apparent that the Recapitalization and Port Transaction efforts were run by Mr. Joe Seifert of Essar Capital. As will be discussed, I do not accept the contention of the Essar Defendants that Mr. Siefert was merely an advisor to the Algoma Board that independently made all of the critical decisions.

[19] Leading to the Recapitalization, Essar Global entered into a Restructuring Support Agreement ("RSA") with Algoma and some of its unsecured noteholders dated July 24, 2014 which set out the principal terms of a restructuring. As a condition in the RSA, Essar Global agreed to make a cash investment of $250 to $300 million in Algoma under an Equity Commitment Letter dated July 24, 2014.[2][3]

[20] The Recapitalization as contemplated by the RSA was first approved as an arrangement under section 92 of the CBCA on September 15, 2014. It was a condition of the plan of arrangement that Essar Global would comply with its financing obligations under the RSA to provide a cash equity infusion of $250 million to $300 million. However, as early as March 28, 2014, representatives of the Ruia family had made clear that they did not have $250 million for equity. Different amounts of an equity cash injection were proposed by Essar Global, including at one point $90 million that was shown to potential investors in a roadshow presentation that failed. In the end, the RSA was amended on November 6, 2014 and approved by an amended approval order on November 10, 2014. It provided for a cash injection into Algoma of only $150 million to be funded largely not by Essar Global but by a loan from third party lenders to Portco of $150 million. The Monitor asserts this was a breach of the equity commitment made by Essar Global. In the consent plan of arrangement that followed, based on an Amended RSA, Essar Global was released from its obligations under the Equity Commitment Letter.

[2] All dollar amounts in this decision are US dollars unless otherwise stated.
[3] Up to $50 million of this could be provided by third party inventory financing.

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[21] The reorganized debt structure in the amended plan of arrangement of Algoma was as follows:

(a) Algoma's unsecured noteholders (the "Unsecured Noteholders") were paid a portion of their principal and were issued new junior secured notes pursuant to the CBCA plan of arrangement;

(b) $375 million of senior secured notes were issued pursuant to an offering memorandum;

(c) Algoma entered into a new $50 million senior secured asset-based revolving credit facility (the "ABL Facility" (the lenders under the facility are referred to as the "ABL Lenders"));

(d) Algoma entered into a new $350 million term loan (the "Term Loan" (and the lenders under the loan are referred to as the "Term Lenders"); and

(e) all other Algoma lenders, including the pre-Recapitalization senior secured noteholders and the revolving credit facility, were repaid in full.

[22] The Port Transaction involved (i) Algoma selling to Portco the Port assets consisting of the buildings, the plant and machinery but excluding the land, (ii) Algoma leasing to Portco the realty for 50 years, (iii) Portco agreeing that it would provide the services necessary for the operation of the Port assets in return for a monthly payment from Algoma to Portco and (iv) Algoma agreeing that it would provide to Portco the services necessary to operate the Port, in return for a monthly payment from Portco to Algoma that would be less than the monthly payment paid by Algoma to Portco.

[23] The Port Transaction was carried out under a master purchase and sale agreement between Algoma and Portco dated November 14, 2014 (the "MPSA"). Under the terms of the MPSA:

(i) Algoma conveyed to Portco all of the fixed assets owned and used by Algoma in relation to the Port. Portco agreed to pay to Algoma $171.5 million for the purchased assets to be satisfied by the payment of $151.6 million and a one-year promissory note for $19.8 million. The total payable was allocated $3.8 million in respect of the purchased assets, $154.8 million in respect of the leasehold interest and $12.9 million in respect of the cargo handling services.

(ii) Portco agreed to pay the $154.8 million to Algoma as prepaid rent under the Lease.

[24] Under the MPSA, Algoma and Portco entered into four agreements dated November 14, 2014 to effect the transaction:

(a) A promissory note for $19.8 million payable by Algoma to Portco with interest at 10% per annum. Under an assignment and assumption agreement dated the same day, the promissory note was assigned by Portco to Essar Global which is now the obligor under the promissory note, and Algoma released Portco from any obligation under the promissory note. The promissory note matured and was payable in full on November 13, 2015. It has not been paid.

(b) A Lease of the land used by the Port from Algoma to Portco (the “Lease”) for 50 years. Under the Lease, Algoma has responsibility for all maintenance and repairs, insurance and property taxes.

(c) A Cargo Handling Agreement under which Portco agrees to provide cargo handling services to Algoma for an initial term of 20 years. The contract is a take or pay contract under which Algoma is required to pay for at least 6 million net tons of cargo at the Port each year at a cost of approximately $6 per ton. That is, Algoma is obliged to pay Portco at least $36 million per year under the Cargo

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Handling Agreement for 20 years, subject to escalation beginning in 2016 at the rate of 1% per annum.

(d) A Shared Services Agreement under which Algoma is responsible for providing all the services necessary for Portco to fulfill its obligations under the Cargo Handling Agreement, and all such services are to be performed by employees of Algoma who will not be employees of Portco. Portco agreed to pay Algoma $11 million annually subject to escalation beginning in 2016 at the rate of 3% per annum.

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[25] The Cargo Handling Agreement contains a change of control clause that requires Portco's consent to a change of control of Algoma. The Monitor takes the position that this clause gives Essar Global, the ultimate parent of Portco, a veto over any party acquiring Algoma in the CCAA process and that it is negatively affecting the sales process. The Monitor says that the clause in itself constitutes oppression.

[26] The cash amount to be paid by Portco to Algoma under the MPSA was largely funded by a $150 million Term Loan made to Portco by GIP Primus, LP (as to $125 million) and Brightwood Loan Services LLC (as to $25 million)[4]. The loan is secured by all of Portco's assets, has an 8 year term and an interest rate between 9.25% and 8.375%, depending on the year. When the costs of operating the Port (shared services) are netted from the cargo handling charges, the result is that Algoma will pay approximately $25 million per year to Portco, which is the amount required by Portco to service the Term Loan each year. That amount of $25 million for 20 years comes to $500 million, far more than the amount needed to repay the $150 million GIP loan.

Form of the proceeding

[4] GIP Primus, LP took the lead in negotiating the loan to Portco and for ease of reference, both will be referred to simply as GIP.

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[27] Because of the urgency to select a buyer for the Algoma business and conclude a transaction in the CCAA process under the SISP, it was important that the issues in this case be tried quickly. A number of pre-trial conferences were held to iron out how the case would be presented. Pleadings were ordered. It was agreed that the evidence in chief would be provided by affidavit evidence or expert reports and that cross-examination would take place during the trial. Eventually, however, after all of the affidavits and expert reports were delivered, the parties decided to cross-examine the witnesses and experts before the trial and so the trial consisted of argument on the affidavits and expert reports, the transcripts of the cross-examinations and exhibits made to the affidavits or put to witnesses on their cross-examinations. Subsequently, written argument was submitted in accordance with the protocol agreed by the parties. The argument in this case therefore has taken place during and after the hearing, with parties relying on what was argued during the motions to strike the claim, what was argued during the hearing and what was argued in the written submissions made after the hearing.

[28] At one of the case conferences prior to the trial, counsel for the Essar Defendants and counsel for GIP said they intended to move to strike the claim of the Monitor at the opening of the trial for the purpose of educating me on their defences. I permitted the motions to be argued on the understanding that I would not rule on the motions at that time. I see no need to decide on these motions as my decision on the merits of the claim and defences will dispose of them.

[29] This was real time litigation to be sure. All counsel are to be commended for the professional way in which they dealt with the case, which was no easy task.

Standing of the Monitor to be a complainant

[30] The Essar Defendants and GIP contend that the Monitor is not a proper complainant to bring this oppression action involving the Port Transaction. They contend that the action is in substance for alleged damage caused to Algoma and that any action, if it existed, could only be a derivative action which has not been brought. They contend that an oppression action can only

be brought by persons who have been damaged directly by the oppressive conduct. For a number of reasons I do not accept these arguments.

[31] When the Monitor delivered particulars of its claim it initially cast the net of stakeholders affected by the Port Transaction quite widely. Currently, those stakeholders who the Monitor says were harmed are mainly the trade creditors, Algoma pensioners and retirees.

[32] As of the date of the Portco Transaction, Algoma had a number of creditors who were owed significant amounts, including:

a. Accounts payable and accrued liabilities owing to trade creditors in the amount of approximately CDN$136.6 million;

b. Municipal taxes and interest owed to the city of Sault Ste. Marie in the amount CDN$13.4 million;

c. A solvency deficiency owed to the pension plans of Algoma retirees in the amount of CDN$400.9 million; and

d. Post-employment life insurance, health care and dental benefits for Algoma retirees in the amount of CDN$361 million.

Together, these outstanding debts of Algoma totalled $911.9 million as of the date of the Portco Transaction.

[33] A person who may be a complainant under the oppression provisions of the CBCA is contained in section 238, which provides:

In this Part,…

complainant means

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(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or any of its affiliates,

(c) the Director, or

(d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

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[34] While it is the case that normally a Monitor, as an officer of the court, is to be neutral in its role and not take sides in favour of one stakeholder against another, there are exceptions. Under section 23(1)(k) of the CCAA, the Monitor shall carry out any function in relation to the debtor that the court may direct. In this case, the Monitor was authorized and directed to take this oppression action by court order.

[35] This is not the first action in which a monitor has been authorized to act as a litigant. In *Nortel*, orders were twice made that gave the Monitor all of the powers of the Nortel debtors in Canada after all of the directors and senior executive had resigned. This resulted in the Monitor litigating in defence of claims made against Nortel and in favour of an allocation of the sale proceeds of the business. The Monitor did so in *Nortel* to protect the interests of Nortel's Canadian creditors.

[36] Whether a person can be a complainant is a discretionary matter. In *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp*. (2003), 46 C.B.R. (4th) 313 (Ont. C.A.), a trustee in bankruptcy acting on behalf of the creditors of the bankrupt estate was held to be entitled to be a complainant in an oppression action against a non-arm's length party that had entered into an agreement with the debtor that was alleged to be an oppressive agreement. Goudge J.A. expressed the wide flexible discretion contained in the OBCA to determine if a person is a proper complainant in an oppression case:

> 45 …s. 245(c) confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence oppression proceedings under s. 248. This provision is designed to provide the court with flexibility in determining who should be a complainant in any particular case that accompanies the court's flexibility in determining if there has been oppression and in fashioning an appropriate remedy. The overall flexibility provided is essential for the broad remedial purpose of these oppression provisions to be achieved. Given the clear language of s. 245(c) and its purpose, I think that where the bankrupt is a party to the allegedly oppressive transaction, the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.
>
> 46 In this case the appellants were affiliates of OYDL, the party with which the allegedly oppressive transaction was concluded. In that transaction, OYDL gave up something of significant value (the OYSF note) in return for something of no value (additional shares in OYRC). It would have been reasonable for the trial judge to conclude that since the appellants unfairly disregarded the interests of the OYDL creditors, those creditors have properly been recognized as complainants. Thus it was equally reasonable in the circumstances for the trial judge to find that this was a proper case in which to conclude that the trustee of OYDL was a proper person to be a complainant in effect on behalf of the creditors of OYDL. This conclusion is consistent with the bankruptcy principle of collective action to pursue the claims of the creditors of the bankrupt and the trustee's role as their representative. See *Husky Oil Operations Ltd. v. Canada (Minister of National Revenue),* [1995] 3 S.C.R. 453. The appellants have put forward no reason why this principle should not be followed in this case. The trial judge therefore exercised his discretion reasonably in finding that the respondent was a proper person to be a complainant here and I would dismiss the appellants' first argument.

[37] I see no reason why the principle of collective action to pursue the claims of creditors in a bankruptcy should not be followed in this CCAA proceeding. There are very large amounts owing to trade creditors, pensioners and retirees. Aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gives the parent control over who can be a buyer of the Algoma business, are harmful to a restructuring process and

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negatively impact creditors. The Monitor has taken this action as an adjunct to its role in facilitating a restructuring.

[38] The Essar Defendants and GIP contend that this action should be dismissed because it is properly a derivative action. Under section 241(2) of the CBCA, relief may be granted if an action of the corporation or its affiliates is oppressive or unfairly prejudicial to or unfairly disregards the interests of any security holder, creditor, director or officer. It is said that no such person has been harmed beyond the harm that may have been done to Algoma.

[39] Reliance is placed on *Rea v. Wildeboer*, 2015 ONCA 373. I do not see that case as supporting the argument. That case involved a shareholder who sued for a wrong done only to the company and the case was dismissed on a summary judgment motion. The reasoning for the result was stated by Blair J.A.:

> 27 However, I agree with the respondents that claims must be pursued by way of a derivative action after obtaining leave of the court where, as here, the claim asserted seeks to recover solely for wrongs done to a public corporation, the thrust of the relief sought is solely for the benefit of that corporation, and there is no allegation that the complainant's individualized personal interests have been affected by the wrongful conduct.

[40] In this case it is asserted by the Monitor that the personal interests of the creditors have been affected. *Rea* created no new law, but merely set out a number of well-known principles, including the principle that a derivative remedy and an oppression remedy are not mutually exclusive and can co-exist as there may be overlap in the factual circumstances. Blair J.A. cited a number of such cases involving creditors who successfully pursued an oppression remedy in circumstances in which a derivative remedy also existed, such as *Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111; *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Gen. Div.); *C.I. Covington Fund Inc. v. White*, [2000] O.J. No. 4589 (S.C.), aff'd [2001] O.J. No. 3918

(Div. Ct.); and *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.) at para. 526, leave to appeal refused, [2004] S.C.C.A. No. 291. *Olympia & York* is no different in that respect.

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[41] This is not a case such as in *Rea* in which the thrust of the relief sought was solely for the benefit of the corporation. In *Rea*, there was no allegation that the complainant's individualized personal interests were affected by the wrongful conduct.

[42] I find that the Monitor is a proper complainant in this oppression claim.

Who directed the Recapitalization and Port Transaction?

[43] The Monitor says that these transactions were directed by Essar Global personnel, particularly the Ruia brothers and Mr. Joe Seifert who worked for Essar Capital, which is responsible for Essar Global investments world-wide. The Essar Defendants say that Mr. Seifert was only an advisor to the Algoma board of directors and that it was the Algoma board that made the decisions, acting in good faith in accordance with its fiduciary duties.

[44] In some respects it does not really matter who made the decisions. If they were oppressive or unfairly prejudicial to or unfairly disregarded the interests of the creditors, relief can be granted under section 241 of the CBCA whether the decisions were made by Essar Global or by the Algoma board of directors. Section 241(2) provides:

> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

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> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[45] Moreover, it is settled law that conduct need not have been in bad faith to attract sanction under section 241. See *Brant Investments Ltd. v. KeepRite Inc*. (1991), 3 O.R. (3d) 289 (C.A.) at para. 47; *Ford Motor Co. of Canada v. Omers* (2006), 79 O.R. (3d) 81 (C.A.) at para. 91; and *BCE v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 in which it was stated:

> 67 Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241 oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations: see Koehnen, at pp. 81-88. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.

[46] *Palmer v. Carling O'Keefe* (1989), 67 O.R. (2d) 161 (Div. Ct.) is an example of a finding of oppression despite the good faith actions of the corporate directors.

[47] Based on my reading of the evidence, however, and I find, the direction and decision making in so far as the Recapitalization and Port Transaction are concerned was by Essar Global and Essar Capital, particularly led by Mr. Seifert. While the board of directors of Algoma in form made the decisions for Algoma, the strategic decisions were made by Essar Global and Essar Capital.

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[48] The Essar Defendants contend that Messrs. Ghosh and Marwah, the CEO and CFO of Algoma, were particularly instrumental in the decision making process leading to the Recapitalization and the Port Transaction. In my view, this argument greatly overstates their roles.

[49] I do not intend to refer to all of the evidence on this issue. I will refer to only some of it, although it is overwhelming in substantiating that Essar Global and Essar Capital were calling the shots.

[50] In January 2014, Algoma's board of directors received a presentation dated January 16, 2014 that outlined the plans for a debt refinancing. The presentation set out the names of the individuals who would be responsible for various aspects of the transactions. All of the names listed but one were employees of Essar Capital or Essar Services in India. The then VP Finance & Capital Markets of Algoma, Mr. Bakshi, was named as having some tasks but never actually performed any tasks relating to the Port Transaction. He held other roles within the Essar Group and did not spend the majority of his time in Sault Ste. Marie. Notably, neither Mr. Ghosh nor Mr. Marwah were named as having any responsibility.

[51] Algoma's Annual Business Plan dated February 3, 2014, which was shown to Mr. Prashant Ruia for his approval before it went to the Board of Algoma, stated that "Refinancing of the balance sheet is critical for the company and beyond management control. The refinancing is headed and coordinated by Essar Global." The Plan also stated that Essar Global was developing a strategy and referred to Mr. Seifert of Essar Capital, Mr. Pankaj (sic, meaning Mr. Pankaj Saraf) of Essar Services, Mr. Bakshi and Mr. Iqbal of Essar Capital as comprising the Essar Global team. Management, including Messrs. Ghosh and Marwah, did not play any strategic role. Mr. Ghosh was told by the chairman of the board of Algoma, Mr. Mehra, and by Prashant and Ravi Ruia that Mr. Seifert and his team would lead the refinancing.

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[52] Both Mr. Ghosh and Mr. Marwah said they did not negotiate the economic terms of the Debt Refinancing or the Portco Transaction. I accept this evidence. It is consistent with the statements in the Algoma February 3, 2014 business plan that the refinancing was beyond management control and was headed by Essar Global. The fact that Mr. Ghosh spent a great deal of time in New York was explained by him and I accept that he was not negotiating any deal. I put little weight on internal lists of things to be done and where on the list Mr. Ghosh appeared. Mr. Seifert was on those lists as well.

[53] For the same reason, I do not accept the evidence in Mr. Seifert's affidavit that his role was merely as an advisor to the management team of Algoma and that all material decisions were made by its board and senior management. It is inconsistent with the statements in the Algoma February 3, 2014 business plan that the refinancing was beyond management control and was headed by Essar Global. Mr. Seifert was somewhat evasive in his evidence on cross-examination. He did, however, admit that he was leading the efforts with specific investors in March 2014. Mr. Saraf of Essar Services India Limited said that Mr. Seifert was the point person for the meetings with investors at that time.

[54] Mr. Seifert's role never changed throughout 2014. At a meeting of the board of Algoma on October 30, 2014, he stated that he was leading an effort on several alternatives with specific investors to place the remaining debt and was considering other alternatives if this should prove unsuccessful. I do not accept his evidence on cross-examination that he was leading the effort to help Algoma on the transaction as an advisor. It is contrary to the October 30, 2014 board meeting minutes and it was his experience in the capital markets at JP Morgan that made him fit to lead the effort. Neither Mr. Ghosh nor Mr. Marwah were involved in the renegotiation of the RSA.

[55] In a February 25, 2014 email to Mr. Dodds, one of the independent directors of Algoma at the time, Mr. Prashant Ruia, a director of Essar Capital and of Algoma, said that there was a need to recapitalize the Algoma balance sheet and that "We [meaning Essar Global as investors]

deployed the services of Joe Seifert, CFO of Essar Capital, to undertake this exercise." This was no statement that Mr. Seifert was asked to advise the Algoma board of directors who would be making the decisions. On his cross-examination Mr. Prashant Ruia made clear that Mr. Seifert was given the responsibility by Essar Capital to manage the investment in Algoma and that it was Mr. Seifert who had the responsibility for the discussions relating to the Recapitalization of Algoma.

[56] The evidence is clear that the decisions were being made by Essar Global or its subsidiary, Essar Capital, throughout the piece. In a July 1, 2014 email, Mr. Rewant Ruia, identified in the Essar Groups's material as responsible for the strategic oversight of Essar Group's North America operations including Algoma, said that the financing was "our responsibility" and that they would not talk about any asset sales with the unsecured creditors. In spite of his waffling on his cross-examination, it is clear that Mr. Rewant Ruia was the family lead in the Essar Group's North American operations. I do not accept Rewant Ruia's evidence on cross-examination that he was not responsible for the North American operations of Essar or that it was Mr. Ghosh, as CEO of Algoma, that was responsible for the refinancing of Algoma, with Mr. Seifert merely providing assistance.

[57] Mr. Rewant Ruia, like Mr. Seifert, was evasive in much of his testimony. Mr. Rajiv Saxena, the Executive Director of Essar Steel India Ltd. based in Mumbai, was also somewhat evasive on his examination, saying at first that he did not know the roles played by Rewant and Prashant Ruia in the Essar Group but eventually after being shown a publication from Essar's website conceded that Mr. Rewant Ruia's role was to oversee the North American operations of the Essar Group including Algoma. Mr. Saraf of Essar Services India Ltd who assisted Mr. Seifert with the Recapitalization of Algoma acknowledged on his examination that the views of Rewant Ruia and the other members of the Ruia family as to the cash equity that could be invested were extremely influential to the Recapitalization team.

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[58] Prashant Ruia, a director of Essar Capital and clearly involved in the affairs of Essar Global and its affiliates, although quite evasive on his cross-examination about this, admitted that Essar Capital had given the responsibility for managing the investment in Algoma to Mr. Seifert and it was Mr. Seifert that was given responsibility for running Algoma, the refinancing by the Port Transaction and the discussions on the Recapitalization.

[59] The Portco Transaction documents (the Master Purchase and Sale Agreement, the Lease, the Cargo Handling Agreement and the Shared Services Agreement) were negotiated with GIP primarily by Mr. Seifert, along with Messrs. Harrold and Anshumali Dwivedi. Mr. Dwivedi was an Essar Global employee during the relevant period and is the current CEO of Portco. Algoma personnel provided operational information as necessary. I am satisfied that Mr. Seifert had primary carriage over the negotiations, as stated by Mr. Ghosh. The evidence of Mr. Sreckovic of GIP supports this conclusion. Mr. Sreckovic was clear that the primary negotiators on behalf of Algoma were Mr. Seifert and Mr. Harrold of Essar Capital who reported to Mr. Seifert. It was those negotiated terms that became the reason for the Port Transaction.

[60] I am satisfied that representatives of Essar Global including Essar Capital carried out the Recapitalization and Port Transaction negotiations and made the critical decisions. Algoma management were handed the economic terms of the Recapitalization and Port Transaction and implemented them from an operational perspective. Algoma management did not negotiate the terms. Their role was to support the negotiations with regard to non-economic, primarily operational, issues.

Reasonable expectations

[61] It is clear from the authorities that an action under section 241 of the CBCA requires a two-step process. The first is to consider whether the evidence supports the reasonable expectation asserted by a claimant and the second is to consider whether the evidence establishes

that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest. See *BCE* at para. 68.

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[62] As to how a reasonable expectation may be established, the evidence may take many forms depending on the facts of a case. See *BCE* at para. 70:

> 70 At the outset, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. As stated above, it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment. However, oppression, as discussed, generally turns on particular expectations arising in particular situations. The question becomes whether the claimant stakeholder reasonably held the particular expectation. Evidence of an expectation may take many forms depending on the facts of the case.

[63] Expectations can be established by direct evidence or by drawing reasonable inferences from circumstantial evidence. It is not the case that a claimant must give direct evidence as to his or her expectation; caution is to be exercised in not proving an expectation based on a claimant's wish list.[5] See *Ford Motor Co. of Canada v. Omers* at paras. 65-66:

> [65] I can find no support for the proposition that there must be evidence, in the form of testimony, from the shareholders as to their expectations. The existence of reasonable expectations is a question of fact and like any question of fact can be proved by direct evidence or by drawing reasonable inferences from circumstantial evidence. …
>
> [66] Where the minority shares in a public company are widely held it may be difficult to adduce cogent direct evidence of the reasonable expectations of the shareholders. In such cases, it is open to the trial judge to infer reasonable expectations from the company's public statements and the shared expectations about the way in which a public company should be run. As Farley J. said in

[5] The Essar Defendants contend that a party must have a subjective expectation, relying on a statement of Justice Myers in *Couture v Toronto Standard Condominium Corp. No. 2187*, 2015 ONSC 7596 at para. 58. The authority that Myers J. referred to for this statement says no such thing, and I do agree with it. As stated in BCE, the expectation held must have been reasonably held and the evidence of that may take many forms. As stated in Ford, there is no requirement that there be testimony from claimants as to their expectations.

> *820099 Ontario Inc. v. Harold E. Ballard Ltd.*, [1991] O.J. No. 266, 3 B.L.R. (2d) 113 (Gen. Div.), at para. 129, affd [1991] O.J. No. 1082, 3 B.L.R. (2d) 113 (Div. Ct.), "It does not appear to me that the shareholder expectations which are to be considered are those that a shareholder has as his own individual 'wish list'. They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders."

[64] In this case, the reasonable expectations asserted by the Monitor relate to the loss by Algoma of a critical asset and value to Portco and the change of control clause in the Cargo Handling Agreement. The Monitor contends that the reasonable expectations of the creditors of Algoma, including the trade creditors, employees, pensioners and retirees, were that Algoma would not deal with its core assets like the Port in such a way as it would lose long-term control and value over those assets to a related party on terms that permitted the related party to veto or thwart Algoma's ability to do significant transactions or restructure, as was done in this case.

[65] The Monitor relies on two affidavits of trade creditors. One is by Mr. Brian Wallenius, the General Manager of Sling Choker Manufacturing (Sault) Ltd that has supplied sling and cable products to the steel mill at Algoma since 1975 and has consistently carried a balance owing on its invoices to Algoma that varies, but is generally above $300,000. In November of 2015 the balance owing by Algoma to Sling-Choker was approximately $637,370.45. This amount remains unpaid. The other affidavit is by Mr. Donnie Varcoe, the President and sole shareholder of Lakeway Truck Centre Ltd. which has leased heavy trucks, boom trucks and other types of vehicles, provided vehicle repair and sold vehicle parts to Algoma since 1959. In November of 2015 the balance owing by Algoma to Lakeway was approximately $599,000. It remains unpaid. Both state that, as a creditor of Algoma, they want Algoma Steel to come out of bankruptcy and may suffer if the arrangements made by Portco and its parent company concerning the Algoma port facilities, including any arrangement giving Portco control over the port, make it harder for Algoma Steel to come out of bankruptcy. Both say they were not aware of the transaction between Algoma and Portco in November of 2014 and are surprised to learn

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that Algoma no longer has full control over its port facility. They say they would not have expected this outcome.

[66] This evidence is not very surprising. Creditors dealing with Algoma over the years would likely expect that if Algoma got into financial trouble, it would have the ability to take steps itself to try to get out of the financial trouble. I hesitate however to put too much reliance on this evidence as it suffers from the risk that it is a hindsight view rather than a view held contemporaneously with the events in 2014 when the Recapitalization and the Port Transaction were worked out and settled.

[67] I would not disregard the evidence, however, on the argument advanced that these witnesses or trade creditors had no expectation to be consulted on corporate transactions involving Algoma. In some cases, past practices and contractual terms may be of importance, as discussed in *BCE*, but I do not see them as particularly relevant in considering the expectations of trade creditors here. Nor do I agree that the expectations of the other creditors, such as the employees, pensioners and retirees, are governed only by their agreements with Algoma.[6]

[68] In *BCE* at para. 72, the Court referred to factors from case law that are useful in determining whether a reasonable expectation exists. I do not read that as requiring each listed factor to be satisfied in any particular case. In para. 71, the Court began by saying that it is impossible to exhaustively catalogue situations where a reasonable expectation may arise due to their fact-specific nature. I do not think in this case, for example, that the prior sale of a non-critical asset, such as a co-gen power facility, would lead to the creditors in question expecting a critical asset to be sold to a related party. The co-gen power facility was not necessarily the sole

[6] The USW collective agreement for Local 2251 provides for a joint steering committee of representatives of the company and the union. One of its functions is to review proposed major sale, lease or rental of assets. Mr. Da Prat, the president of Local 2251, could not say how many times the committee had met over the past two years, i.e. in the two years since the Recapitalization and Port Transaction, but said no grievance had been brought with respect to the joint committee. In the CCAA proceedings, the union had complained that the decision to disqualify a bid by a numbered company owned by Essar Global had not been discussed with the union. I do not see this evidence as relevant to what expectations were at the time of the Recapitalization and Port Transaction in 2014.

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source of electricity for Algoma, whereas the Port is necessary for all of Algoma's business. Nor do I see the fact that change of control provisions may be the norm in infrastructure lending as being helpful in considering the expectations of the creditors.

[69] The Essar Defendants argue that the creditors knew, or ought to have known, about Algoma's history of insolvency and yet, despite the fact that the trade creditors, unions, and retirees all have rights defined by contract, no steps were taken to protect themselves from related party transactions or the disposition of assets. I find this an astonishing argument. Trade creditors or retirees could not expect to bargain for any such rights. So far as the union is concerned, it has acknowledged that it had no right to be making decisions regarding the disposition of assets. Management rights clauses in the union contract make that clear. These creditors had no functional control over decisions made by Algoma and its board and no expectation of being able to control those decisions.

[70] There is evidence that Ms. Dale, the president of Local 2724, expected that any sale of the Port facilities would be given full value. Whether she had any other expectations was not explored. She did not learn that Algoma no longer owned the Port facilities until May, 2015 when she was told that there would be no job losses. There is also evidence that Mr. Da Prat, the president of Local 2251, thought that the Port Transaction was positive, although when he formed that idea was not clear. However, in my view the evidence of local union officials is not neutral because the USW and its Locals have aligned themselves with the attempts by Essar Global to acquire the Algoma assets in the CCAA process.

[71] Essar North America, a subsidiary of Essar Global submitted a bid during the CCAA sales process through a numbered company. It was disqualified to be a Phase II bidder because it failed to provide sufficient evidence of the financial ability to pursue the assets. Local 2251, supported by Local 2724 and the USW, brought a motion on May 13, 2016 to have the Essar Global bid qualify as a Phase II bidder. At the motion, counsel for Essar Global said that Essar Global still wanted to be a bidder. That motion was dismissed. On July 18, 2016, Local 2251

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served a motion authorizing Local 2251 to advance a transaction in accordance with a term sheet under which Ontario Steel Investments Ltd., owned by Essar Global, proposed to acquire all of the Algoma assets. Apparently, Local 2251 and Ontario Steel signed the term sheet. The affidavit of Mr. Da Prat in support of the motion stated that Local 2251 had been approached by Ontario Steel and that Local 2251 supported the term sheet. The motion was adjourned. Essar Global is still interested in purchasing the assets of Algoma. On January 30, 2017, Essar Capital served a motion for an order directing the applicants to re-open the SISP. The motion referred to the continued interest of Essar Global.

[72] There is support in the evidence for a finding that the expectations relied on by the Monitor have been established by drawing reasonable inferences from the circumstances that existed at Algoma in 2014. Algoma has gone through a number of insolvencies and court proceedings to restructure since the early 1990s. In 2014, Algoma was under financial distress with a highly leveraged debt structure and liquidity issues. Given the cyclical nature of the steel business, it was entirely reasonable in the circumstances for all stakeholders to expect that significant corporate changes might be necessary for Algoma in the future, i.e. a restructuring might be necessary again. GIP made it clear that it had concerns that Algoma might find it necessary to go through another insolvency proceeding in light of its history and for that reason structured its loan and the resulting Port Transaction to provide some protection against that. It was reasonable for the stakeholders to expect that Algoma would not lose its ability to restructure in the future without the agreement of its parent, Essar Global.

[73] Often equity is entirely wiped out in a restructuring. This substantially occurred at Algoma in 1992 when majority ownership of the restructured company ended up in the hands of the employees. It would not seem reasonable to expect in 2014 that the equity holder would in the future have the right to veto any restructuring in a CCAA process in which it was not an applicant and thus the right to prefer its own interests to those of other stakeholders. That would not be fair treatment of creditors. Stakeholders have a reasonable expectation of fair treatment.

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See *BCE* at para. 70. This is particularly the case in Sault Ste. Marie in which Algoma is of critical importance and the major industry which trade creditors and employees rely on.

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[74] I do not accept the argument that the Algoma secured lenders or senior noteholders, who were informed of the Recapitalization and Port Transaction at the time and decided to support it, could be considered as proxies for all stakeholders and that their expectations should be accepted as the expectations of all stakeholders. Different groups of stakeholders can have different expectations, particularly from sophisticated institutional participants who were quite able to negotiate for themselves in the new capital structure. See *BCE* at para. 64.

[75] I find that the reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

Were the reasonable expectations violated?

[76] These reasonable expectations were violated in two principle ways, being (1) the Port Transaction itself and (2) the change of control veto provided to Portco, and thus Essar Global, in the Port Transaction.

(1) **The Port Transaction**

[77] The Port Transaction, which was caused as a result of the breach by Essar Global of the Restructuring Support Agreement and the Equity Commitment Letter under which Essar Global agreed with Algoma to inject $250 to 300 million into Algoma, transferred control of the Port

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facilities from Algoma to Portco/Essar Global. This transfer of control was caused by the Port Transaction under which the fixed assets were transferred to Portco and a lease of the land used by the Port was given by Algoma to Portco for 50 years. The Cargo Handling Agreement, under which Portco agreed to provide cargo handling services to Algoma, provided for an initial term of 20 years and automatic renewal for successive three year periods unless either party gave notice of termination. Thus Essar Global will be in a position to terminate the Cargo Handling Agreement after 20 years which would give it leverage to negotiate a new payment schedule from Algoma, assuming it wanted to continue providing services to Algoma. Algoma will be at its mercy.

[78] The transfer of the Port assets to Portco was driven by the desires of GIP. GIP first became involved in April, 2014 when it was approached by Barclays, which was exploring alternative financial structures for Algoma on behalf of Essar Global. Mr. Seifert of Essar Capital was introduced to GIP by Barclays.

[79] On May 12, 2014, representatives of GIP met with representatives of Essar Global and Barclays to discuss Algoma's infrastructure assets and potential asset disposition transactions. They discussed the possibility of a Port transaction in which Algoma might sell its Port assets to a new corporate entity as a means to generate cash proceeds. GIP thought it of critical importance that an independent corporate entity for the Port assets be set up. On May 22, 2014, GIP sent Barclays a term sheet for a $150 million facility described as a facility "with a bankruptcy remote SPV that includes the ports and related infrastructure of Essar Steel Algoma Inc."

[80] Regarding the need for a "bankruptcy remote structure", GIP was aware that Algoma had sought insolvency protection twice in the last 25 years, largely due to high leverage combined with economic downturns and the cyclical volatility of the steel industry. One of GIP's main concerns was bankruptcy remoteness. It would only lend to a new entity that would purchase the Port assets if that entity was separate and distinct from Algoma and had a mechanism in place,

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i.e a take or pay contract, to receive a stable cash flow stream rather than cash flow dependent upon fluctuating steel prices. The utilization of a “bankruptcy remote” structure is apparently very common in project finance transactions associated with infrastructure assets and frequently utilized by banks and other institutional investors such as GIP.

[81] That the Port Transaction took on a form dictated by GIP does not, however, excuse the actions of Essar Global in breaching its equity commitment to Algoma, without which breach the Port Transaction would not have been necessary.

[82] The entire Port Transaction and the GIP secured loan to Portco would not have been necessary had Essar Global lived up to its obligations under the Restructuring Support Agreement it made with Algoma and the accompanying Equity Commitment Letter dated July 24, 2014 pledging a cash investment of $250 to $300 million. However, it is quite clear from the evidence that, despite its obligations to Algoma under these agreements, Essar Global had no intention of living up to its promises. Essar Global acted in bad faith in this regard.

[83] On March 28, 2014, the Ruias made it clear to Mr. Saraf of Essar Services India Limited in Mumbai that they did not have $250 million for an equity investment in Algoma, that they did not want to tell any banks or investors that they would put in $250 million of equity and that they could only put in $120 million but would just take it out to reduce liabilities of Algoma owed to Essar companies.

[84] Mr. Saraf was dealing with Goldman Sachs, who were advising on the Recapitalization that would pay out Algoma’s junior unsecured noteholders. Goldman Sachs advised that up to $300 million was needed as an equity contribution. On July 29, 2014, just five days after Essar Global signed the Equity Commitment Letter obliging it to provide equity of $250 to 300 million (less $50 million in potential third party inventory financing), Mr. Saraf advised Goldman Sachs that Essar Global wanted to limit its equity contribution to Algoma to $150-160 million and asked if it could be reduced to $100 million. On his cross-examination, Mr. Seifert referred to the

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equity commitment in the Restructuring Support Agreement as "a temporary agreement to an ultimate refinancing". That agreement was not by its terms a temporary agreement. While the Equity Commitment Letter provided for a payment to be made if it or the RSA were breached, it did not make the agreement temporary.

[85] Beginning in October, 2014, Mr. Seifert led a series of roadshow presentations to potential investors, marketing the securities being offered through the recapitalization. The transaction presented in the roadshow presentation was not what was contemplated by the RSA. Instead, it described a transaction in which the Essar Group contributed less than $100 million of cash to Algoma, rather than the $250-$300 million required under the Equity Commitment Letter. This alternative transaction also contemplated cash being contributed to the recapitalization through the sale of the Port, something forbidden by the terms of the RSA without the express consent of the noteholders which had not been obtained. This roadshow presentation failed, and one reason given by Deutsche Bank, the lead bookrunner in the roadshow, was an insufficient contribution of cash equity into Algoma by Essar Global. This concern of potential investors over current and previous support from Essar Global was referred to at a board meeting of Algoma on October 30, 2014.

[86] The Essar Defendants argue that a shareholder has no obligation to inject cash equity into the company in which it owns shares. In the abstract that is certainly the case. But it was not the case with Essar Global which had obligated itself to inject $250 to 300 million in cash into Algoma.

[87] The Essar Defendants also argue that there was no connection between the Essar Global equity commitment, i.e., the failure to advance under that commitment, and the Port Transaction and that the Port Transaction was a "key component" of the Recapitalization by May, 2014. I do not accept that. It is the case that the Port Transaction was contemplated as a possible transaction when first introduced in May, 2014, but it was by no means a certainty. In the first plan of arrangement to effect the Recapitalization that was approved by the Court on September 15,

2014, it was a condition of the plan that Essar Global comply with its cash funding commitment of $250 to 300 million under its Equity Commitment Letter. The Port Transaction was not a part of the plan at all.

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[88] It was Essar Global's decision not to fund Algoma according to the terms of the Equity Commitment Letter that made it necessary to carry out the Port Transaction. The Port Transaction was the result of the structure required by GIP to support the loan of $150 million to Portco that was advanced to Algoma net of costs. That reduced the amount of cash equity previously promised by Essar Global to be advanced to Algoma. In the amended RSA, $150 million of historical debt owed by Algoma to Essar Global was converted into preferred equity for Essar Global. That however was not cash as had been agreed to be advanced by Essar Global to Algoma in the Equity Commitment Letter. Moreover, the $150 million debt had been at the bottom of the capital structure of Algoma and its value was certainly questionable, making the conversion of debt to equity also of questionable value. On cross-examination, Mr. Seifert chose not to "speculate" on what he would pay for the $150 million debt and said the value was something in the eye of the beholder. This is confirmatory of the fact that the loans and equity conversion was of questionable value and certainly less than the cash infusion that Essar Global had previously agreed to put into Algoma and later reneged on.

[89] In my view, Essar Global's failure to inject cash equity into Algoma as agreed was the root cause of the Port Transaction and the resulting long-term effect on Algoma and its stakeholders of the transfer of control over the Port facilities from Algoma to Portco/Essar Global. The cash equity injection agreed to by Essar Global was a contractual alternative and clearly more beneficial to Algoma. That root cause was an exercise in bad faith. Had an independent committee of the board of directors of Algoma been struck, it may have been that steps may have been taken to hold Essar Global to its bargain rather than simply look to third party financing from GIP under the structure of the Port Transaction. The failure of the board of

Algoma to look to some other way to effect a Recapitalization was in itself an indication of a lack of regard for the interests of stakeholders of Algoma.

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[90] The Essar Defendants contend that there was no legal requirement to appoint an independent committee of the Algoma board. However, actual unlawfulness is not required to invoke section 241 of the CBCA. The remedy is focused on concepts of fairness and equity rather than legal rights. A court is to look beyond legality to what is fair, given all of the interests at play. See *BCE* at para. 71.[7]

[91] The Monitor argues that although it is no longer claiming that the Port assets were transferred to Portco at an undervalue, the long-term value given to Essar Global, after the GIP loan is repaid, was itself oppressive. Essar Global paid cash to Algoma of under $5 million, but will receive a stream of payments of $25 million each year after GIP has been repaid. It would not be in the interests of the lenders to Algoma to want such a stream being paid out after the GIP loan was repaid. Their interest, as understood by Ms. Glass, was that they wanted to ensure that the port charges did not result in an ever increasing cost to Algoma and thus the reason for the amount to be paid by Portco annually for the shared services was to escalate at a higher rate of 3% as against an increase in the annual cost to be paid by Algoma to Portco for access to the Port facilities of 1%. It also would not be in the interests of the trade creditors, pensioners and retirees of Algoma.

[92] Two critical assumptions in the Duff & Phelps valuation of the cash flows were (i) that the amount of $6 per ton to be paid by Algoma to Portco under the Cargo Handling Agreement

[7] On June 16, 2014 Prashant Ruia resigned as a director of Algoma. On June 23, 2014 Mr. Mirchandani became a director and on August 24, 2014 Mr. Kothari became a director. The four directors were then Mr. Mehra of Essar Global, Mr. Ghosh and Messrs. Mirchandani and Kothari. In an October 2014 offering memorandum, it was said that there were two independent directors, presumably being Messrs. Mirchandani and Kothari. They may have been legally independent of Essar Global, but there is no evidence of what their business connections to Essar Global were, or why they were appointed. Mr. Kothari had over 19 years' experience in financial services in India. Mr. Mirchandani had over 25 years' experience in the finance and accounting fields, having held numerous senior positions in major international firms. As will be seen, they took no steps to hold Essar Global to its original equity commitment under the RSA, despite being advised by Algoma's legal advisors to do so.

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was reasonable and (ii) that the price would escalate by 1% for each of the 50 years. The Monitor is critical of the evidence of the comparable transactions used by Duff & Phelps and Susan Glass to test the $6 per ton to be paid by Algoma to Portco under the Cargo Handling Agreement. I am not satisfied that the criticism is warranted. I accept the evidence of Duff & Phelps and Susan Glass in that regard that the $6 per ton at the time in 2014 was reasonable.

[93] Regarding the assumption that the price to be paid by Algoma to Portco would be $6 per ton escalated by 1% for 50 years, I find it somewhat difficult to accept that anyone can anticipate what the price of anything will be for 50 years, particularly in the steel industry, which on the evidence is quite cyclical. While the Cargo Handling Agreement provides for such an increase, an issue is whether that could be considered to be an indication of the market value over 50 years, albeit discounted to the present value. Duff & Phelps assumed that to be the case without any analysis to support it. The comparables they looked at were for three years only. Ms. Glass said that in her experience, annual price escalation can be something less than one percent or slightly higher than one percent and that the one percent in the Cargo Handling Agreement was not out of line with industry practice. No particulars were provided as to any other agreements and how long the escalation terms were, except for three comparables and two years of pricing in 2013 and 2014. No evidence of any comparable transaction for any port for anything close to 50 years was provided.

[94] One cannot question the expertise of Duff & Phelps or Ms. Glass. But I must say that the assumption that the price to be paid by Algoma to Portco of $6 per ton for 50 years increased by 1% each year for 50 years was reasonable is weakly supported (in reality virtually not at all). Thus whether the amount paid to Algoma for the lease represented market value is to my mind somewhat questionable. Thus whether it was fair to the stakeholders whose reasonable expectations are to be taken into account is also questionable. The concern is heightened by the fact that Essar Global advanced only approximately $4.2 million of its own money for this right to the cash flow, with by far the lion’s share of the money going to Algoma coming from the

$150 million GIP Loan advanced to Portco. Essar Global also became obligated to pay the $19.8 million promissory note from Portco to Algoma that was assigned to Essar Global, which Essar Global has refused to pay since due in November 2015.

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[95] There is evidence that Mr. Ghosh voted in favour of the Port Transaction as being in the best interests of Algoma at the board meeting in November 2014. However, it is clear that he did so not because it was ideal, but because there was no other option given the failure of Essar Global to capitalize Algoma with the $250 to $300 million.

[96] Mr. Ghosh said that on a stand-alone basis, he would not have done the Port Transaction as it was too expensive with effective interest at 20%, being a cost of $25 million annually on $150 million. However, he said he had to agree to the Port Transaction as it was the only way to close the refinancing that was bringing in $150 million and it was the only deal on the table because Essar Global was not providing $250 to $300 million in equity as previously agreed. He did not think that the refinancing at the time was adequate for Algoma's needs. I accept this evidence.

[97] Mr. Marwah, the CFO of Algoma (but not a director), said the same thing. He thought the payment of $25 million annually on $150 million was high and said that it did not concern him as it was the only option available at that point in time. In his words, there was no other option to keep the company alive. I accept that evidence as well.

[98] The Essar Defendants submit that Mr. Marwah, in his capacity as CFO, swore an affidavit in support of the arrangement application deposing that Algoma's trade creditors, retirees and employees "will not be affected" by the Recapitalization. I do not see that as assisting Essar Global. That was an affidavit in support of the first plan of arrangement approved by the Court. It was a condition of that plan of arrangement that Essar Global would comply with its financing obligations under the RSA to provide a cash equity infusion of between $250 million to $300 million. Mr. Marwah referred to this in his affidavit and said that Essar Global

will fund up to $300 million by way of equity on the closing of the Recapitalization. When Essar Global failed to provide that equity and a revised plan of arrangement was approved, there was no affidavit of Mr. Marwah saying that the trade creditors, retirees and employees would not be affected. Whether he was obliged as argued by the Essar Defendants to say in that affidavit that these creditors would be affected was really not for him to say.

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[99] The fact that Mr. Ghosh and Mr. Marwah acted in good faith thinking they were doing the best for Algoma in the circumstances is not in itself an answer to an oppression claim. Good faith is not necessary.

[100] The Essar Defendants argue that in the amended RSA and order approving it, a release was given to Essar Global for breach of the Equity Commitment Letter, and it would be an improper attempt to re-litigate an issue previously decided by Morawetz R.S.J. and an abuse of process which should not be allowed. I do not see this as an issue in this proceeding. First, the release in the amended RSA was a release of any claim arising out of the Equity Commitment Letter. The Monitor is not making a claim under the Equity Commitment Letter or asking that Essar Global provide the equity it agreed to provide in that commitment. Nor is the Monitor asking that the release be set aside. The Monitor contends, and I agree, that the failure of Essar Global to fund as agreed in the RSA and Equity Commitment Letter is a part of the factual circumstances to be taken into account in considering whether the affected stakeholders who were not party to the agreements were treated fairly by the Port Transaction.

[101] Second, it was only the failure of the roadshow to attract investor interest that left Algoma with a shortfall of funds to refinance its debt. Algoma was compelled to amend the RSA to permit proceeds from the Port Transaction to be used as a source of funding. Nowhere in the affidavits adduced in support of the amendment to the Plan of Arrangement was there any reference to the Port Transaction. The order approving the amendment to the RSA was obtained without opposition. It cannot be said that the Court adjudicated at all on the terms of the Port Transaction. Nor did the Court make any finding in the unopposed order that a release of Essar

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Global in respect of that transaction was warranted as being fair and reasonable in the circumstances. The trade creditors, employees, pensioners and retirees of Algoma were not a party to the motion approving the amended RSA.

[102] It is also argued by the Essar Defendants that the claim of the Monitor is only brought with the benefit of hindsight and that there is no evidence that a subsequent CCAA filing was reasonably foreseeable in 2014 when the amended Recapitalization was agreed and closed. I disagree. It was the concern based on Algoma's past history and its previous CCAA filings that led GIP to require a "bankruptcy remote" loan structure to protect it in the event of a future insolvency. At the time, Mr. Ghosh did not think that the amended Recapitalization was adequate for Algoma in the future without the equity injection of $250 to $300 million that Essar Global had agreed to make. That turned out to be prescient. This argument by the Essar Defendants is also somewhat inconsistent with its argument that the trade creditors, employees, retirees and pensioners knew, or ought to have known, of Algoma's history of insolvency in 2014 and taken steps to protect themselves.

[103] I conclude and find that the Port Transaction was in itself unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners and retirees.

(2) **Change of control provision**

[104] The change of control provision contained in section 15.2 of the Cargo Handling Agreement gives Portco (and thus Essar Global) effective control over who may acquire the Algoma business. It provides that the Cargo Handling Agreement may not be assigned by either party, being Algoma and Portco, without the prior written consent of the other and that a change of control of a party will be deemed to be an assignment:

15.2 Assignment

> … this Agreement may not be assigned by either Party without the prior written consent of the other Party. This Agreement shall enure to the benefit of the successors and permitted assigns of the Parties hereto. For greater certainty, a change of control of a Party will be deemed to be an assignment. Any successor to PortCo or assignee of PortCo's obligations hereunder will enter into an express agreement to be bound by this Agreement in favour of ESAI.

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[105] It is clear that the Port facilities are of crucial importance to the operation of the Algoma steel mill.[8] In light of the 50 year lease of the Port facilities from Algoma to Portco, and the Cargo Handling Agreement and Shared Services Agreement, any buyer of the Algoma business would require the Cargo Handling Agreement to be assigned to it in order to be able to operate the steel mill. Thus the veto of Portco under this clause, which Essar Global controls, is effectively a veto of Essar Global over any change of control of the Algoma business.

[106] The change of control clause in the Cargo Handling Agreement was driven by GIP. The evidence of Mr. Sreckovic of GIP was that GIP required the Cargo Handling Agreement to have an assignment or change of control provision (section 15.2) to ensure that Portco (and GIP) would always know who its counterparty to the agreement was. For instance, if Algoma was sold to an entity with limited financial resources or a hedge fund with no experience in running a steel company, Portco would have the ability to withhold consent to the assignment of its contract. GIP also had a change of control provision in its credit agreement with Portco for its protection. It provided that if a change of control of Portco or Algoma occurred, GIP had the right to require immediate repayment of 101% of the loan amount.

[107] Mr. Seifert, who had been chosen by Essar Global to undertake the exercise to recapitalize Algoma's balance sheet, had no discussion with any other party other than GIP regarding a debt investment, i.e. a loan to Portco. Thus it was the decision of Mr. Seifert and the controlling shareholder not to have any lender to Portco other than GIP. Had there been other

[8] The fact that the Port was referred to in an offering memorandum as a non-core asset of Algoma does not mean that it was not crucial to the operation of the steel mill. Mr. Seifert's evidence is that whether an asset is important to a business is not determinative of whether it is core and that companies regularly sell off infrastructure without which they cannot operate.

investment advisors to an independent committee of the board of Algoma, it may have been that the purpose of the control clause given to Portco in section 15.2 of the Cargo Handling Agreement could have been achieved by some other means. There is no evidence that anyone at Essar Global or Algoma tried to avoid the clause. There was a way to achieve that purpose other than giving Portco/Essar Global a veto over a change of control of Algoma.

[108] The Essar Defendants say that any infrastructure lender would have required a clause giving Portco a veto over any change of control. It relies on the opinion of Mr. Weisdorf as to why GIP, as an infrastructure lender, would want Portco to hold a veto over any change of control of Algoma. In his report he said that it is ordinary practice in the circumstances for Portco to require change of control provisions in order to be assured that any new potential owner of Algoma would continue to operate the Port to the same standard as the prior owner of Algoma. He explained this in his cross-examination, saying that the reason why GIP would request the clause is because if GIP elected to act on its security and become the equity owner of Portco i.e. it was no longer a lender to, but an owner of Portco, it could no longer act or rely on its security that had a change of control provision and it would have to rely on the right of Portco to veto any purchaser. Mr. Weisdorf conceded that such a scenario was remote and unlikely to occur.

[109] There was, however, another way for GIP to protect itself in this scenario, but no one from Essar Global or Algoma sought to pursue it with GIP.

[110] One of the agreements signed at the time of the Recapitalization and Port Transaction on November 14, 2014 was an Assignment of Material Contracts made among a number of the secured lenders, including GIP, Portco and Algoma. It contained covenants by Algoma in favour of GIP, such as a clause precluding it from selling or assigning any material contract, which included the Cargo Handling Agreement. There was no reason why the agreement could not have contained a change of control provision that Algoma or its parent could not enter into any arrangement leading to a change of control of Algoma without the consent of GIP if GIP became

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an equity owner of Portco under its security and unable to act on the change of control provision contained in its security. Such a clause would have given GIP everything that Mr. Weisdorf said an infrastructure lender would want. It was an alternative definitively available and clearly more beneficial to Algoma.

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[111] Had there been a committee of independent directors with advisors independent of the Essar Global interests, that result may have been achieved. What happened however is that GIP, the lender to Portco decided on by Essar Global and Mr. Seifert, had no real pushback on the change of control giving Portco/Essar Global a veto. It was in Essar Global's interest to have such a veto reside in Portco and it had no reason to argue against it.

[112] In its pleading, the Monitor claimed a declaration that the Port Transaction was a transfer of assets from Algoma to Portco at undervalue. At the time of the Port Transaction, GIP required that a valuation be done to assist it in later defending any possible attack in a bankruptcy that the assets had been transferred to Portco at an undervalue. For that purpose, Duff & Phelps did a valuation which would suggest that the assets were not transferred at an undervalue. For the purposes of the trial Essar Global obtained an opinion from Susan Glass of KPMG that the Duff & Phelps opinion was reasonable. It is important however to note that none of the opinions took into account the change of control provision in the Cargo Handling Agreement or attempted to value it.

[113] There is little doubt that the change of control clause is of considerable value to Essar Global. On May 10, 2016, counsel for Portco wrote to counsel for Algoma to highlight matters of particular concern to Portco in connection with the CCAA process. Included was a concern that any prospective bidder be told of the veto right of Portco/Essar Global under the change of control clause. The letter stated:

> Portco and ESAI [Algoma] are party to a Cargo Handling Agreement pursuant to which ESAI has committed to long-term use of the Port. Portco has, of course, a

> keen interest in any successor to ESAI as counterparty to that Agreement and would like it to be clear to prospective bidders that, pursuant to the terms of the Cargo Handling Agreement, Portco has a consent right in the event of any assignment by ESAI of the Agreement or a change of control of ESAI. Again please confirm that this has been made clear to prospective bidders.

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[114] This letter was sent around the time that Ontario Steel, a subsidiary of Essar Global, negotiated and signed a term sheet with Local 2251 under which Ontario Steel would acquire the Algoma business. The letter was clearly meant to be a shot across the bow of any potential buyer of the Algoma assets. Essar Global continues to have an interest in being a bidder, as is clear from the motion of Essar Capital to reopen the SISP, first made returnable on January 30, 2017.

[115] The evidence of Mr. Ghosh is that, as the Cargo Handling Agreement governs the rights of Algoma to access the Port and since Algoma cannot survive without access to the Port, this right of Portco to refuse assignment in the event of a change of control is a material impediment to restructuring Algoma. The evidence of Mr. Marwah, formed from discussions with several potential purchasers, is that Portco's right to refuse an assignment is an impediment to the sale of Algoma. This evidence is not surprising and was not challenged. I accept it. It is clear that the dictate of Portco through its solicitors that prospective purchasers should be made aware of the change of control provision was successful.

[116] I do not accept GIP's argument that they had no chance to consider this issue. It was clear from the opening bell in this proceeding in the conferences held that this change of control power was central to the claim of the Monitor. It was pleaded in the statement of claim. The affidavits of Mr. Ghosh and Mr. Marwah were served on the parties, including GIP, and GIP could have answered them in its own affidavit evidence if its wished. Mr. Ghosh and Mr. Marwah could have been cross-examined on this issue as well. They were not.

[117] In argument, counsel for Essar Capital said that it would not unreasonably withhold its consent to a transaction. There is no evidence to this effect, but I put little weight in that

statement in any event. As long as Essar Global holds out a prospect of being a buyer, it cannot be expected to consent to another bidder buying Algoma. It would be in its interest to dissuade other buyers in order for it to achieve the lowest possible purchase price. Essar Global has moved to reopen the bidding process and indicated an interest in being a bidder, perhaps with some financial partner, and I would not be prepared to say there is no concern raised by the change of control provision on the mere say so of Essar Global.[9] The letter from counsel for Essar Global on May 12, 2016 speaks volumes. It clearly invites any bidder to understand that Essar Global has control rights.

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[118] I conclude and find that the change of control provision in favour of Portco in section 15.2 of the Cargo Handling Agreement was unfairly prejudicial to, and unfairly disregarded the interests of, Algoma's trade creditors, employees, pensioners and retirees.

The business judgment rule

[119] The Essar Defendants rely on the business judgment rule as a defence to the claims made against them. The business judgment rule was described in *BCE* at para. 40:

> 40 In considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives…. It reflects the reality that directors, who are mandated under s. 102(1) of the CBCA to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the

[9] In a decision released contemporaneously with this judgment, I have dismissed the motion to re-open the SISP. However, as stated in that decision, it is open to any person to reach out to the Term Lenders and the Consenting Secured Noteholders to propose and negotiate a transaction that they are willing to accept and support.

> corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

[120] In this case I do not think that the business judgment rule provides a defence to the Essar Defendants.

[121] The Essar Defendants argue that throughout the Recapitalization and Port Transaction, Algoma's Board had the benefit of advice from sophisticated financial and legal advisors. That surely was the case. What all the advice was that was provided is not in the record. However there was one piece of advice not heeded by the Algoma board that is of central importance in this case.

[122] Algoma's Board held meetings on October 30 and November 1, 2014. It is quite clear from the meeting minutes that it was Mr. Seifert who was leading the Recapitalization effort. At the November 1 meeting, Mr. Schrock of Weil, Gotschal & Manges advised that unsecured noteholders would not react well to proposed changes to the Port Transaction and would likely push for a higher infusion of cash/equity from Essar Global, as promised in the Equity Commitment Letter. The advisors said that the board should insist that Algoma press all parties to fully satisfy their commitments and this could include a letter to Essar Global setting forth its obligations regarding the equity commitments. That advice was not followed.

[123] I fail to see how the directors of Algoma can rely on the business judgment rule in the face of not following advice to go after Essar Global on its cash equity commitment. There was no issue about the validity of that commitment. If the Ruia interests had acquiesced to forming an independent committee of the board, or listened to the truly independent directors before they resigned in frustration, steps may have been taken differently including accepting and following Mr. Schrock's advice. What happened in the Port Transaction was an exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefited Essar Global at a time that a

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future insolvency was a possibility.[10] That would not have been necessary had Essar Global lived up to its cash injection commitment. Yet the board did not take any steps to call Essar Global on its commitment, even in the face of legal advice that it should do so.

[124] The Board of Algoma also accepted the change of control provision without considering whether other steps could be taken to protect GIP. There is no evidence that the Board even considered the issue. There were steps that could be taken and failure to consider those steps on such an important matter for Algoma was not reasonable.

The appropriate remedy

[125] The Monitor has taken somewhat different positions on the appropriate remedy as this case has progressed. In the original statement of claim, the Monitor sought to set aside the Port transaction and the relief sought against GIP was vague other than to say that its interests should be addressed. The pleading requested:

> an order setting aside the Port Transaction, and vesting Algoma with all right, title and interest in and to the lands….which are subject of the Port Transaction…free and clear of the claims of Portco, EGFL, Essar Ports Algoma Holding Inc. and Algoma Port Holding Company Inc. on such terms as this Court deems just, including terms addressing the interests of those arm's length parties unrelated to the Essar Group who have provided secured credit facilities in connection with the Port Transaction…

[126] GIP sought particulars of the relief claimed against it. In a short handwritten endorsement of January 5, 2017 I ordered further particulars as follows:

[10] I do not agree with the Essar Defendants' argument that control of the Port remained unchanged by the Port Transaction as control rested with Essar Global before and after the Port Transaction. The argument ignores the reality of Algoma as a separate company that had control of the Port assets and would continue to have control in this insolvency that would not be control in the hands of Essar Global once the Initial Order was made in the CCAA proceedings and after the SISP was ordered.

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> I appreciate that without the evidence of GIP, the plaintiff is not able to clearly articulate what specific relief should be granted and what relief to GIP, if any, should be granted.
>
> GIP needs to know what evidence to lead in its affidavit evidence to be filed, and needs to know as best it can which evidence it thinks it needs to cross-examine on.
>
> In my view, the statement of claim should be amended to provide as much particulars of possible relief against GIP it will seek, presumably in alternatives depending on the evidence.
>
> GIP should then file a defence as an intervening party setting out its position and as best as it can what relief (or protection) it seeks if the Port Transaction is set aside.
>
> There is no particular easy solution here in light of the way this trial is being structured. It may be that GIP may need to lead more than less evidence it wishes.
>
> I urge the plaintiff to give as many particulars as it can at their (sic) stage of what relief it may seek.

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[127] In its amended statement of claim, the Monitor claimed an order setting aside the Port Transaction free and clear of the security interests of GIP and directing Algoma to enter into alternative arrangements as to its indebtedness to Portco and security in favour of GIP:

> (o) an Order setting aside the Port Transaction and vesting Algoma with all right, title and interest in and to the lands, fixtures and chattels which are the subject of the Port Transaction (the "Port Assets") free and clear of all security interests...[of GIP];
>
> (p) further or in the alternative, and on the condition that the Port Transaction is set aside… an order directing that Algoma enter inter alternative arrangements as to any indebtedness owed to the Port Lenders [GIP] and as to any security in favour of the Port Lenders on such terms as this Court deems just, including

> arrangements addressing the terms of such indebtedness and the priority of such security;
>
> (q) further or in the alternative, and on the condition that the Port Transaction is set aside… an order directing that Algoma enter into arrangements as to any indebtedness owed to the Port Lenders and as to any security in favour of the Port Lenders on terms no less favourable on the whole than the terms currently in effect in favour of [GIP];

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[128] In its response to the motions of Portco and GIP to strike the claim as disclosing no cause of action heard at the outset of the trial, the Monitor stated in its factum that it was no longer seeking the relief in (o) and therefor was not seeking relief against GIP directly. During the argument on the motion, counsel for the Monitor stated that the Monitor was seeking to set aside the Port Transaction as per (p) and (q) of the amended statement of claim, and that what was not being sought under (o) was the relief "free and clear of all security interests [of GIP]". What I take from counsel's statement, while not acknowledged as such, was that the factum was sloppily, and no doubt quickly, drafted.

[129] In its factum on the motion to strike, the Monitor did state:

> [29] Should an oppression remedy be granted, the plaintiff will seek to have it tailored as carefully as possible so as not to disturb the legitimate interests of the Lender Intervenors; and
>
> [30] The remedy sought is to have the Port returned to Algoma ownership so as to facilitate a restructuring. If a restructuring is ultimately successful and a new owner purchase Algoma, then if that new owner does not pay out the Lender Intervenor loan as part of the purchase transaction, the Monitor will seek to put in place substantially the same package of security currently enjoyed by the Lender Intervenors, but in a structure where the Port is under Algoma ownership.

[130] In oral argument, counsel for the Monitor said that one thing that could have been done was to insert a clause in the Assignment of Material Contracts to which Algoma and GIP were parties preventing a change of control of Algoma without the consent of GIP. He argued that I

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could strike the change of control clause from the Cargo Handling Agreement if it was found to be oppressive.[11] He also argued that it the entire Port Transaction was found to be oppressive, a remedy could be to transfer the shares of Portco to Algoma and keep all of the agreements relating to GIP in place as against Portco and Algoma. This argument was reiterated in the closing written submissions of the Monitor.

[131] GIP argues that its interests as a stakeholder in the Port Transaction must be taken into account in considering an oppression remedy and that it expected the terms of the secured loan to be respected. I have considerable doubt that GIP is a stakeholder whose interests were to be protected under oppression principles. The stakeholders whose interests were to be protected were the existing stakeholders and the issue is whether the transaction that is attacked was oppressive to those stakeholders. In *BCE* at para. 70 it is stated that “the claimant must identify the expectations that he or she claims have been violated by the conduct at issue”. The conduct at issue here is the Port Transaction and the GIP loan.

[132] Nevertheless, I am reluctant to order the shares of Portco to be transferred to Algoma. GIP lent on a certain basis. That included lending to a company that was separate and not owned by Algoma with a cash flow stream generated by the Cargo Handling Agreement on a take or pay basis.

[133] I have some sympathy with the argument of the Monitor that in substance and practically, the position of GIP will realistically be no different if Portco becomes a subsidiary of Algoma. What GIP strove to do was to achieve a “bankruptcy remote” structure with its loan to Portco. As a practical matter, however, the cash flow generated by the Cargo Handling Agreement will certainly be affected if Algoma does not survive in the hands of a solvent buyer. The cash flow has already been affected by the order that payments under the Cargo Handling Agreement were

[11] GIP says that the Monitor has not sought this remedy, as it is not in its closing written submissions. I do not agree. The remedy was claimed by the Monitor in oral argument. All parties, including GIP at para. 13 of its closing written submissions, rely on their opening submissions, the submissions on the motion to strike, their oral submissions, as well as their closing written submissions.

to be stopped, as Essar Global was not paying the $19.8 million owing to Algoma under the promissory note assigned to Essar Global and a set-off issue arose from Essar Global's refusal to pay this promissory note.

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[134] Transferring the shares of Portco to Algoma would have a negative effect on GIP. GIP's security, which was to be a first ranking security, would rank behind each of several charges in the CCAA proceedings over Algoma's assets if Portco were a subsidiary of Algoma. There might also be a risk of Algoma leveraging itself and taking on additional debt. Also, GIP was prepared to lend at a higher multiple of EBITDA because Portco was considered bankruptcy remote and the loan would not have been for the full $150 million if Portco was not bankruptcy remote.

[135] Under section 241(3) of the CBCA, a court may make any interim or final order it thinks fit. It has been said, however, that a remedy for oppression should be taken with a scalpel. In *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.), Galligan J.A. quoted with approval the following statement of Farley J. in *820099 Ontario Inc. v. Harold E. Ballard Ltd*. (1991), 3 B.L.R. (2d) 113:

> The court should not interfere with the affairs of a corporation lightly. I think that where relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe. I would think that this principle would hold true even if the past conduct of the oppressor were found to be scandalous. The job for the court is to even up the balance, not tip it in favour of the hurt party. I note that in *Explo [Explo Syndicate v. Explo Inc*., a decision of the Ontario High Court, released June 29, 1989], Gravely L.J.S.C. stated at p. 20:
>
>> In approaching a remedy the court, in my view, should interfere as little as possible and only to the extent necessary to redress the unfairness.

[136] If there were no less obtrusive way to remedy the oppression in this case, I would order the shares of Portco to be transferred to Algoma. But in my view there are less obtrusive ways. Included under section 241(3) is the power to order a variation of a transaction.

[137] The change of control provision in section 15.2 of the Cargo Handling Agreement was inserted at the instance of GIP. It was not something that Essar Global requested, although it is something that Essar Global wants to take advantage of now. GIP can be protected from the very thing that motivated section 15.2 according to the evidence of Mr. Weisdorf whose opinion was relied on by Essar Global and GIP. The purpose was to protect GIP in the unlikely event that GIP elected to act on its security and become the equity owner of Portco, i.e. if it were no longer a lender but an owner of Portco, it could no longer act on its security that contained a change of control provision.

[138] That purpose, however, could have been accomplished by an agreement between GIP and Algoma that if GIP became the owner of Portco, Algoma or its parent could not effect or be a party to any arrangement leading to a change of control of Algoma without the consent of GIP. GIP and Algoma were parties to the Assignment of Material Contracts agreement that contained covenants by Algoma in favour of GIP. In my view, and I so order, the appropriate relief for the oppression involving the change of control clause in the Cargo Handling Agreement is to delete section 15.2 from that agreement and to insert a provision in the Assignment of Material Contracts agreement that if GIP becomes the equity owner of Portco, Algoma or its parent cannot agree to or undertake a change of control of Algoma without the consent of GIP.

[139] GIP has not provided any argument as to why that relief would not protect it instead of relying on section 15.2 of the Cargo Handling Agreement. GIP has instead made arguments on the pleadings and said that relief was not spelled out in the claim. I am not sympathetic to this argument.

[140] As can be seen by my endorsement on the motion by GIP for particulars, I had some concerns that without the evidence of GIP, the Monitor could not clearly articulate what specific relief should be granted. I urged the Monitor to provide as full particulars as possible at that stage of the relief that it was seeking.

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[141] The evidence subsequently filed and relied on by GIP was that of Mr. Weisdorf, who was cross-examined on January 18, 2017 shortly before the trial was to commence. It is the cross-examination of Mr. Weisdorf that revealed the real reason why section 15.2 was required and it is that cross-examination that the Monitor relies on to support its claim to delete section 15.2 from the Cargo Handling Agreement. I grant leave to the Monitor to amend its claim to support this relief that I order. Neither GIP nor Essar Global were taken at all by surprise. The issue with the change of control clause was pled by the Monitor and the affidavit material filed by Essar Global and GIP dealt with the issue.

[142] The other concerns are with respect to the obligations in the Cargo Handling Agreement. I have a concern with the imbalance in the term of the lease to Portco for 50 years against the term of the Cargo Handling Agreement for 20 years with automatic renewal for successive three year periods unless either party gives written notice of termination to the other party. If Essar Global thought that it wanted an increased payment after 20 years, it could refuse to continue the Cargo Handling Agreement and put Algoma at its complete mercy. If the market did not support an increased payment, or indicated that the payments from Algoma to Portco should be less in the future, Algoma would still be at the mercy of Essar Global. As the Port facilities are critical to the operation and survival of Algoma, it would be foolhardy indeed for Algoma to refuse to extend the Cargo Handling Agreement. The language in the Cargo Handling Agreement that Algoma can refuse to extend it after 20 years is illusory and not realistic. In reality, it is a provision that is one-sided in favour of Essar Global.

[143] GIP is entitled to the assurance that the net $25 million (as adjusted by the 1% increase to be paid by Algoma to Portco and the 3% increase to be paid for shared services by Portco to Algoma) is to be paid by Algoma to Portco so long as the GIP loan to Portco has not matured and remains unpaid. That is the basis on which it made the loan and GIP is entitled to that protection. The loan terms require that any principal and interest amounts outstanding on the maturity of the loan be repaid on the maturity date of November 14, 2022. Without

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oversimplifying the details of the loan agreement and the charges under it, in the 8 years during which the loan is outstanding, the expected $25 million per year to be paid by Algoma to Portco and paid by way of a cash sweep to GIP would amount to $200 million. The loan was for $150 million. Interest was to be LIBOR plus, I believe, around 8% and there were costs. Whether Algoma is able to pay off GIP at the maturity date or required to refinance it through GIP is not known.

[144] For the balance of the first 20 years under the Cargo Handling Agreement after the GIP loan matures, if that agreement survives only to that date, Algoma will pay a further 12 years at $25 million, or $300 million, to Portco which will benefit Essar Global after the balance of the GIP loan is paid off. If the Cargo Handling Agreement is not terminated before the end of its life of 50 years, that will be another 30 years at $25 million, or $750 million, paid to Portco/Essar Global. Taken with the small amount paid by Essar Global, the $4.2 million in cash (and the $19.8 million note that it has refused to pay), it means that Essar Global will obtain an extremely large amount of cash from Algoma for little money. I realize that if Algoma became solvent and able to pay its debts, it would be able to pay a dividend to Essar Global (or the appropriate subsidiary) so long as Essar Global remained its shareholder. Whether and when Algoma could become solvent with its pension deficits that have existed for some time and be in a position to pay dividends to its shareholder is a significant unknown. But the payments under the Cargo Handling Agreement do not require any solvency test and are in the financial circumstances Algoma finds itself in, a clear contractual benefit for little money. It is an unreasonable benefit that was prejudicial to, and unfairly disregarded, the interests of the creditors on whose behalf this action has been brought by the Monitor.

[145] In my view, the appropriate relief for the oppression that I have found in the Port Transaction, and I so order, is that the Lease to Portco, the Cargo Handling Agreement and the Shared Services Agreement be amended to provide that after the GIP loan has matured and been paid, Algoma shall have at any time thereafter during which the Lease exists the option of

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terminating the Lease to Portco, the Cargo Handling Agreement and the Shared Services Agreement. Further, if the Cargo Handling Agreement continues and if Portco elects not to renew it after 20 years or after any three year extension, the Lease to Portco shall terminate at that time along with the Cargo Handling Agreement and Shared Services Agreement. Upon termination of the Lease, Algoma shall repay to Portco $4.2 million with interest from the date of the termination of the Lease calculated under the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. If there is any issue as to any payment to be made by Algoma to Portco under section 2.1 of the Lease, that issue shall be arbitrated under the provisions of article 18 of the Lease.

[146] I do not think that any amendment to the claim of the Monitor is necessary for this order to be made. It goes partway to the full setting aside of the Port Transaction that was claimed by the Monitor. However, if necessary I would grant leave to the Monitor to amend its claim to support this relief that I order. The issues were fully canvassed in the evidence and argument.

Counterclaim

[147] Portco has made a counterclaim for a declaration that the $19.8 million note has been paid in full as a result of set-off and for payments beyond that amount said to be owing under the Cargo Handling Agreement. When and how the set-off occurred is not in the record and whether that could be affected by the stay of proceedings in the CCAA has not been argued. Nor are the amounts said to be owing set out with any precision. In my view the appropriate place to make this claim is in the CCAA proceedings and I do not intend to deal with it in this counterclaim.

Costs

[148] Any party seeking costs may make brief cost submissions in writing within two weeks along with a proper cost outline and brief responding cost submissions may be made in writing within a further two weeks.

Newbould J.

Released: March 6, 2017

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COURT OF APPEAL FOR ONTARIO

CITATION: Gaur v. Datta, 2015 ONCA 151
DATE: 20150312
DOCKET: C59142

2015 ONCA 151 (CanLII)

Rouleau, van Rensburg and Pardu JJ.A.

BETWEEN

Pradeep Gaur, Apt Flow Technologies Inc.
and 2081706 Ontario Inc.

Plaintiffs (Appellants)

and

Dipti Datta, Utpal Datta, Inge Datta
and M&I Power Technology Inc.

Defendants (Respondents)

J. David Keith and Evan Moore, for the appellants

Constance Olsheski, for the respondents

Heard: February 6, 2015

On appeal from the order of Justice Michael G. Emery of the Superior Court of Justice, dated June 26, 2014.

van Rensburg J.A.:

[1] This is an appeal from an order dismissing an action against the respondents under rule 21.01(1)(b) of the *Rules of Civil Procedure*. For the reasons that follow I would allow the appeal. In my view, the motion judge erred in dismissing the action against the respondents. I would permit the appellants to proceed with their action against the respondents, claiming both defamation and

intentional interference with economic relations, with leave to amend their pleadings as set out below.

A. BACKGROUND

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[2] The appellants – Pradeep Gaur and two companies of which he is a principal – are defendants to an action in the Superior Court commenced by M&I Power Technology Inc. ("M&I Power") in 2012 (the "First Action"). That action, alleging breach of contract and breach of fiduciary duty, was commenced after the termination of Pradeep Gaur's employment with M&I Power.

[3] In 2013, the appellants commenced Action No. CV-13-1230-00 in the Superior Court against Dipti Datta and the respondents (the "Second Action"). The respondent M&I Power is the plaintiff in the First Action. The respondents Utpal Datta and Inge Datta are current directors of M&I Power. Dipti Datta (who did not move to dismiss the action, and is therefore not a respondent to this appeal) is a former director and officer of M&I Power.

[4] In the Second Action the appellants claim damages for defamation and intentional interference with economic relations. Central to the action are three emails. The first two (dated July 5, 2012 and July 11, 2012) were authored by Dipti Datta. The third (dated March 22, 2013) was authored by Utpal Datta. It is the motion judge's dismissal of the Second Action against the respondents under rule 21.01(1)(b) that forms the subject of this appeal.

[5] The motion judge correctly identified the legal principles applicable to a motion to strike under rule 21.01(1)(b). No evidence is admissible, and the facts pleaded are assumed to be true unless patently ridiculous or incapable of proof: *Lysko v. Braley*, [2006] O.J. No. 1137 (C.A.), 79 O.R. (3d) 721, at para. 3; *McCreight v. Canada*, 2013 ONCA 483, 116 O.R. (3d) 42, at para. 29. In determining whether a cause of action is disclosed, particulars can be considered as part of the pleading. In assessing the substantive adequacy of the claims, the court is entitled to review the documents referred to in the pleadings: *McCreight*, at para. 32.

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[6] The appellants contend that the motion judge erred by dismissing the claim against the respondents after making findings of fact. They assert that the amended statement of claim, when read with the particulars and the emails (which are incorporated by reference in the pleadings), discloses proper claims against the respondents sounding in defamation and intentional interference with economic relations.

[7] I consider the appellants' submissions regarding each cause of action in turn.

B. THE DEFAMATION CLAIMS

[8] The tort of defamation requires the plaintiff to prove three elements: (1) the defendant made a defamatory statement, in the sense that the impugned words

would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) the words in fact refer to the plaintiff; and (3) the words were communicated to at least one person other than the plaintiff: *Guergis v. Novak*, 2013 ONCA 449, 116 O.R. (3d) 280, at para. 39; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 28; see also *Lysko*, at para. 91.

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[9] In *Lysko*, at para. 90, this court noted that "publication by the defendant is an essential element of a defamation action and any person who participates in the publication of the defamatory expression in furtherance of a common design will be liable to the plaintiff". As Raymond E. Brown stated in *The Law of Defamation in Canada,* loose-leaf (2012-Rel. 3), 2nd ed. (Scarborough: Carswell, 1999), at pp. 7-30 – 7-31:

> The defamatory material may be published indirectly through the action of some intermediary for whose publication a defendant may be held to share responsibility. This may be because the defendant authorized, incited or encouraged another to publish it…A defendant may be responsible for the acts of others by encouraging, instructing or authorizing them to publish defamatory information, or providing them with information intending or knowing that it will be published.

[10] Pleadings in defamation cases are more important than in any other class of action, and require a concise statement of the material facts: *Lysko*, at para. 91.

[11] In this case, the alleged defamation occurred in the three emails referred to above: two authored by Dipti Datta and a third by Utpal Datta. The amended statement of claim pleads the following:

- all of the defendants (including the respondents) falsely and maliciously published the words set out in the paragraph (defined as the "Defamatory Words") (para. 7);
- the Defamatory Words were published by email correspondence to certain named third parties (para. 8). It is acknowledged that this pleading refers to the two emails authored by Dipti Datta;
- Utpal Datta published additional Defamatory Words in a third email and sent the email to certain named third parties, associated with potential clients of the plaintiffs (paras. 8a and 8b);
- the meaning of the Defamatory Words (para. 10);
- the defendants published the Defamatory Words knowing they were false or with careless disregard for their truth (para. 11); and
- "the plaintiff" (presumably, Pradeep Gaur) has been injured and suffered damages for which the defendants are liable (paras. 12-14).

[12] Paragraph 15 of the amended statement of claim asserts that the respondents acted in concert with Dipti Datta to publish the Defamatory Words, and that Utpal Datta published some of the Defamatory Words directly. Paragraph 17 pleads, in the alternative, that Dipti Datta, when he published the

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Defamatory Words, was acting as Utpal and Inge Datta's agent. Paragraph 18 pleads, in the further alternative, that Dipti Datta acted on behalf of M&I Power when he published the Defamatory Words.

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[13] Although these paragraphs appear in the pleading under the heading "Intentional Interference with Economic Relations", the respondents acknowledge that, reading the amended claim broadly, the pleadings of agency and "acting in concert" also apply to the defamation claims.

(1) Dipti Datta's Emails

[14] The respondents accept that the pleading is sufficient to disclose a defamation claim against Dipti Datta. The principal issue is whether the action regarding Dipti Datta's emails can proceed against the respondents. This depends on whether the pleading is sufficient with respect to their participation, authorization or otherwise, to make them liable for the publication of the emails.

[15] The allegations that the respondents acted in concert with Dipti Datta and that he was their agent, are bald. These are conclusions of law, not supported by material facts: *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, [2011] O.J. No. 5049, at paras. 217-220, aff'd 2012 ONSC 4692, [2012] O.J. No. 3120 (Div. Ct.); *Durling v. Sunrise Propane Energy Group Inc.*, 2012 ONSC 4196, [2012] O.J. No. 3408, at para. 75.

[16] However, this is not the end of the analysis. One must turn to the particulars to see whether material facts have been pleaded. The respondents' counsel made a number of demands for particulars over the course of several months, which included increasingly more pointed requests for particulars as to how the respondents acted in concert. Eventually, in particulars provided on July 26, 2013, the appellants stated as follows:

> Dipti Datta wrote the words in an email in or around July 2012. In addition, Utpal Datta told a contractor (Ilia) that Mr. Gaur was incompetent. Mr. Utpal Datta, at an M&I Power Technology Inc. meeting with Inge Datta present, told Mr. Gaur that should he leave the company, they would do what they could to blacklist him in the industry. Utpal Datta and Inge Datta requested the involvement of Dipti Datta who uttered the Defamatory Words. Utpal Datta also provided Dipti Datta with the contact information of business associates in order that Dipti Datta might contact them to undermine Mr. Gaur's reputation.
>
> The threats to litigate were made by Dipti Datta in or around July 2012 via email to Triton Synergies. M&I Power and Utpal Datta provided the information to Dipti Datta in order that he act on behalf of them in respect to Mr. Gaur.

[17] These particulars provide additional material facts relevant to the respondents' participation in the publication of the Dipti Datta emails: Utpal Datta, at an M&I Power meeting with Inge Datta present, told Pradeep Gaur that should he leave the company, they would do what they could to blacklist him in the industry; Utpal and Inge Datta requested the involvement of Dipti Datta, who uttered the Defamatory Words; Utpal Datta provided Dipti Datta with the contact

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information of business associates in order that Dipti Datta might contact them to undermine Pradeep Gaur's reputation; and M&I Power and Utpal Datta provided Dipti Datta information in order for him to threaten litigation in an email to Triton Synergies on their behalf.

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[18] Further, paragraphs 8a and 8b of the amended claim plead that Utpal Datta sent his own, similarly defamatory email and that the consistency in words used in the emails "indicate[s] a concerted and collective effort by the defendants". I disagree with the motion judge's observation that the third email, written by Utpal Datta, must be considered in isolation from the emails written by Dipti Datta. Reading the pleading generously, the inclusion of consistent Defamatory Words in Utpal Datta's email is a material fact supporting the allegation that the respondents acted in concert with respect to the Dipti Datta emails.

[19] The motion judge was entitled to review the emails to determine whether what was pleaded (as enhanced by the particulars) was "patently ridiculous or incapable of proof". Instead, he appears to have examined the emails as evidence, weighing the inferences that could be drawn from their contents and then concluding there was no allegation or fact to support the pleadings that the respondents acted "in concert" with Dipti Datta (para. 29) and that the respondents could not be held accountable for the Defamatory Words in the Dipti Datta emails (para. 32).

[20] In my view, the allegations in the particulars, which are based on the words contained in the emails, are capable of an interpretation that the respondents acted in concert with Dipti Datta. The facts pleaded are neither patently ridiculous nor incapable of proof. This of course does not mean that they will necessarily be proven, only that on a Rule 21 motion sufficient material facts have been pleaded to support an action in defamation against the respondents in relation to the Dipti Datta emails.

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(2) Utpal Datta's Email

[21] The appellants allege that Utpal Datta sent a similarly defamatory email on March 22, 2013. The motion judge concluded that since only Utpal Datta sent the email, it gives rise to no claim against Inge Datta or M&I Power. He also concluded that the amended statement of claim did not contain sufficient material facts to support this pleading. He dismissed the claim, but without prejudice to its being asserted against Utpal Datta by way of counterclaim in the First Action. I disagree with the motion judge. In my view, the pleading is sufficient.

[22] Paragraphs 8a and 8b of the amended statement of claim plead all of the necessary elements of the tort of defamation. The paragraphs plead the words that are alleged to have been defamatory, their publication in an email by Utpal Datta, and specifically identify two recipients of the email. It is alleged that the consistent use of the Defamatory Words indicates a concerted and collective

effort by the respondents. With respect to the claim against M&I Power and Inge Datta, the pleading is sufficient, when considered in the context of the entire pleading as well as the particulars provided.

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C. THE INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS CLAIM

[23] The motion judge's reasons suggest he struck the appellants' claim against the respondents for intentional interference with economic relations under rule 21.01(1)(b), and that he did so for two reasons. First, the amended statement of claim failed to disclose material facts addressing the tort's requisite elements. Second, as with the defamation claims, the pleading disclosed insufficient material facts to assert a claim premised on concerted action between the respondents and Dipti Datta.

[24] For the reasons already discussed, I do not agree with the second conclusion. I turn to consider whether all of the required elements of the tort have been pleaded.

[25] In *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, a recent decision of the Supreme Court of Canada, Cromwell J. clarified the elements of unlawful interference with economic relations, which he indicated is also referred to as intentional interference with economic relations: at para. 2. The tort requires the defendant to have committed an actionable wrong against a third party that intentionally caused the plaintiff economic harm.

Conduct is unlawful if it is actionable by the third party, or would be actionable if the third party had suffered a resulting loss: *A.I. Enterprises Ltd.*, at para. 5.

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[26] The amended statement of claim asserts the following with respect to the tort of intentional interference with economic relations. It alleges that, by undermining Pradeep Gaur's professional reputation, the defendants sought to, and did, interfere with the plaintiffs' ability to maintain existing contracts, secure additional contracts and develop business opportunities (para. 20). The claim also alleges that this interference was unlawful and induced a breach of contract (para. 21). Finally, the claim alleges that the defendants' conduct aggravated the damages caused to the plaintiffs by, among other things, "sending the plaintiffs' third party business associates threats to send 'quasi legal letters' to potential customers implicating the third party business associates and threatening legal action" (para. 22d), and "attempting to induce potential third-party business associates of the plaintiffs to either break their contracts with the plaintiff or not enter into contracts with the plaintiff" (para. 22e).

[27] This pleading alone does not address each of the essential elements of the tort of intentional interference with economic relations. In particular, there is no allegation that would amount to "unlawful means". The reference to third parties here is confusing and there is no clear allegation of an actionable wrong against any third party.

[28] However, the appellants urge the court to consider, together with the amended statement of claim, the particulars and what is stated in the July 5, 2012 email.

[29] With respect to the unlawful means element, the particulars assert that the respondents, through Dipti Datta, offered to pay Triton (a third party) a portion of an acknowledged debt owed by M&I Power if Triton would cease doing business with Pradeep Gaur. The appellants contend that, when considered with reference to the July 5, 2012 email, the allegation is that Dipti Datta (on behalf of himself and the respondents) threatened that Triton would not receive payment of a debt owed by M&I Power unless it provided its “full cooperation” in the respondents’ campaign against Pradeep Gaur by ending its business relationship with Gaur. In *A.I. Enterprises Inc.*, at para. 80, Cromwell J. acknowledges that threatening to breach a contract with a third party can satisfy the unlawful means element of the tort of intentional interference with economic relations.

[30] Regarding the intention element, the amended statement of claim only alleges that the respondents, by undermining Pradeep Gaur’s reputation, sought to interfere with the appellants’ ability to maintain existing contracts, secure additional contracts and develop business opportunities (para. 20). This allegation is not explicitly pleaded as the respondents’ reason for inducing third parties to either break or not enter into contracts with the appellants (para. 22e). However, on a generous reading of the pleading together with the particulars and

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the July 5, 2012 email, it appears that the appellants are alleging that the respondents' threats to withhold monies from Triton was targeted at inflicting economic harm on the appellants, as the condition for receiving payment was for Triton to cease its business relationship with Gaur.

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[31] Regarding the requirement that the unlawful means caused the plaintiffs economic harm, the particulars assert that the appellants have lost $1.5 million as a result of third party business associates – who pursued contracts on their behalf and provided them access to contract opportunities – discontinuing their relationship with the appellants. The particulars also attribute $32 million in losses to the withdrawal of third parties from proposed contracts and joint venture opportunities. Although Triton is not explicitly named in these particulars, given the similarity between the relationship between the appellants and Triton and the intermediary relationship described, on a generous reading this element of the tort is disclosed.

[32] In my view, when the particulars and the July 5 email are considered, intentional interference with economic relations is raised in this action against the respondents. The appellants allege an actionable wrong by the respondents (a threat to continue an ongoing breach of contract) against a third party (Triton Synergies) that was aimed at causing, and did in fact cause, the appellants economic harm: *A.I. Enterprises Inc.*, at paras. 5, 23. These allegations are neither incapable of proof nor patently ridiculous. Taking them as true, and

adopting a broad and generous reading of the pleading together with the particulars and the July 5, 2012 email, it is not "plain and obvious" that the pleading discloses no reasonable cause of action for intentional interference with economic relations: *Hunt v. T & N plc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, at paras. 33, 36; *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17. Accordingly, I would set aside the motion judge's order under rule 21.01(1)(b) striking the appellants' claim for intentional interference with economic relations, subject to what I say below respecting the need to amend the pleading.

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D. ALTERNATIVE BASES FOR RELIEF

[33] The motion judge indicated that, while it was unnecessary to address the other bases for the relief sought by the respondents under rules 25.11, 25.06(1) and 21.01(3)(d), he would have struck certain paragraphs of the amended statement of claim as frivolous, vexatious or an abuse of process.

[34] The motion judge referred to authority that "in the absence of material fact, an action can be dismissed as frivolous, vexatious or an abuse of process of the court": see, for example, *George v. Harris*, [2000] O.J. No. 1762 (S.C.), at para. 20. Given his finding that the pleading was bald and lacked sufficient material facts to establish concerted action between the respondents and Dipti Datta, the motion judge would have struck any claims for defamation and intentional

interference with economic relations premised on such allegations as frivolous, vexatious or an abuse of process.

[35] As already explained, I disagree with this characterization. Accordingly, I also disagree with the conclusion that the pleadings should be struck on this alternative basis.

E. LEAVE TO AMEND

[36] While not strictly necessary for the survival of the action in defamation against the respondents at the pleadings stage, I would grant the appellants leave to amend the amended statement of claim to incorporate the material facts set out in the particulars in relation to agency and acting in concert.

[37] With respect to the elements of intentional interference with economic relations, as I have indicated, the pleading is deficient, but the particulars provide the necessary elements of the cause of action. It is therefore necessary for the appellants to amend the claim for intentional interference with economic relations so that the various facts contained in the particulars are brought into the pleading and the elements of the tort are clearly set out. An amended pleading shall be delivered within 30 days, and the respondents shall have 30 days thereafter to deliver their statement of defence.

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F. CONCLUSION

[38] For these reasons I would allow the appeal, set aside the order dismissing the action against the respondents, and grant leave to amend the amended statement of claim.

[39] Since the appellants were successful in the appeal, I would set aside the motion judge's order for costs and award the appellants costs of the motion in the sum of $10,000, as well as costs of the appeal in the further sum of $10,000, with both amounts inclusive of disbursements and applicable taxes.

Released: (KMvR) MARCH 12, 2015

"K. van Rensburg J.A."
"I agree Paul Rouleau J.A."
"I agree G. Pardu J.A."

2015 ONCA 151 (CanLII)

CITATION: Harris v. Leikin Group Inc., 2013 ONSC 1525
COURT FILE NO.: 08-CL-7482
DATE: 20130312

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN:

Adam Leikin Harris, Naomi Sara (Harris) Stanton, Sheira Rachel Harris, Zena Leah Harris, Hilliard Brian (Rick) Kesler and David Joseph Spieler

Plaintiffs

R. Bennett, S. Erskine and D. Barbaree, for the Plaintiffs

– and –

Leikin Group Inc., Barbara Linda Farber, David Lawrence Katz, Andrew Mark Katz, Grant Jameson, Geoffrey Gilbert, Ogilvy Renault LLP, Ingrid Levitz, in her capacity as estate trustee with a will of the Estate of Gerald Levitz, Patricia Day, Ginsburg Gluzman Fage & Levitz LLP and First Capital Realty Inc.

Defendants

S. Victor, Q.C. and D. Cutler, for the Defendants, Barbara Linda Farber, David Lawrence Katz and Andrew Mark Katz

D. Scott, Q.C. and I. Mentina, for the Defendant, Leikin Group Inc.

B. Zarnett, J. Kimmel and S. Gotlieb, for the Defendants, Ogilvy Renault LLP, Grant Jameson and Geoffrey Gilbert

Alan D'Silva, L. Mercer and S. Clarke, for the Defendants, Ingrid Levitz, in her capacity as estate trustee with a will of the Estae of Gerald Levitz, Patricia Day and Ginsburg Gluzman Fage & Levitz LLP

HEARD: May 28, 29, 30, 31, June 1, 5, August 9 and 10, 2012

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REASONS FOR JUDGMENT

D. M. BROWN J.

2013 ONSC 1525 (CanLII)

I. Overview

[1] In 2005 eight of eleven cousins, who together constituted the owners of the common shares of a group of closely-held family companies, the Leikin Group, decided to monetize the value of their interests in the two core assets of those companies – shopping centres in the Ottawa area. They entered into a share redemption transaction with the family companies. In order to fund the share redemptions the non-selling cousins brought in an equity investor who purchased a 50% stake in the key asset – the College Square shopping centre. The equity investor was a public company which immediately made known the fact and the price of its acquisition. The selling cousins found out that the price paid by the equity investor reflected a much higher value attributed to College Square than the price on which the share redemption transaction had been negotiated.

[2] Some of the selling cousins – six of the eight to be precise - thought they had been hard done by their non-selling cousins. (Two of the eight did not, and they did not join in this lawsuit.) Nevertheless, the six cousins waited almost two years before commencing this action. They sued their non-selling cousins, the family companies' lawyers and accountants, as well as the public company which paid hard cash for its share of College Square. The selling cousins seek damages of $11 million for what they view as their share of the difference in value between the amount attributed to College Square in the share redemption transaction and that in the arm's-length sale to the public equity investor.

[3] For the reasons set out below, I dismiss the action.

II. Procedural history

[4] In January, 2011, all defendants moved for summary judgment. I granted summary judgment in favour of the public equity investor, First Capital Realty Inc., and dismissed the action against it, while directing a trial of the claims against the other defendants.[1] The Court of

[1] 2011 ONSC 3556 ("SJ Reasons").

Appeal dismissed the plaintiffs' appeal from my order dismissing their action against First Capital Realty Inc.[2]

[5] Pursuant to directions which I gave in my Summary Judgment Reasons, the trial of this action adopted a hybrid form: (i) affidavits filed by witnesses on the motions served as part of their examination-in-chief at trial; (ii) transcripts of the examinations conducted for the motions – cross-examinations and Rule 39.03 examinations – served as part of the cross-examination of a witness at trial; and, (iii) the *viva voce* evidence led at trial, both during examinations-in-chief and cross-examinations, focused on the key issues in dispute.[3] I wish to compliment counsel on conducting an efficient, focused trial.

III. The parties

A. Harry and Zena Leikin

[6] The late Harry Leikin was a dairy farmer in the Ottawa area who, during the latter part of his life, assembled, developed and managed properties through a number of companies: Harry Leikin Holdings Limited ("HLH"), Harzena Holdings Limited ("Harzena"), Zena-Kinder Holdings Limited ("ZKH") and Zena's Fisher Heights Plaza Limited ("ZFHP"). The parties have referred to these corporations collectively as the Leikin Group of Companies. The Group's major asset was College Square, a "big box" retail shopping centre located in the west end of Ottawa. HLH and Harzena together owned College Square.

B. Their offspring

[7] Harry and his wife, Zena Harris, had four daughters: Josephine Harris, Ethel Kesler, Goldie Spieler, and Libby Katz. Harry ultimately put in place a governance structure for the Leikin Group which saw each of his four daughters hold seats on the companies' boards of directors. In 1982 Harry enacted an estate freeze which set up trusts for each of his grandchildren who were issued the common shares in the Leikin Group of companies. In 1996 the trustees distributed those shares directly to each grandchild.

C. Their grandchildren

[8] The pedigree of those grandchildren is as follows. Josephine Harris is the mother of the plaintiffs Adam Harris, Naomi Stanton, Sheira Harris and Zena Harris (the "Harris Plaintiffs").

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[2] 2011 ONCA 790.
[3] SJ Reasons, para. 404.

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All four grandchildren were Selling Shareholders. Sheira Harris and Zena Harris gave evidence in this proceeding.

[9] Ethel Kesler has three sons: the plaintiff Rick Kesler, and Steven and Ivan Kesler. All sold their shares under the transaction in question in this action. However, neither Steven nor Ivan joined their brother, Rick, as plaintiffs. Rick Kesler gave evidence in the proceeding.

[10] The third daughter, Goldie, had one child, the plaintiff, David Spieler, who started off as a Non-Selling Shareholder, but ultimately participated in the transaction as a Selling Shareholder. He testified throughout the proceeding.

[11] The other daughter, Libby Katz, had three children: the defendants Barbara Farber, Andrew Katz and David Katz (the "Katz Defendants", the "Katz Siblings", or the "Non-Selling Shareholders"). All three gave evidence in this proceeding.

[12] In these Reasons I shall follow the lead of the parties and refer to the plaintiffs as the "Selling Shareholders", and to the Katz Defendants as the "Non-Selling Shareholders".

[13] Only partial information about the background of Harry Leikin's grand-children was put before me. Initially, Josephine Harris filed the evidence on behalf of her four children but, by the time of the trial, Sheira and Zena had filed affidavits. Zena is a medical doctor. At the time of the transaction the plaintiff, Rick Kesler, was a lawyer practising customs and excise tax law as a partner in the Toronto office of Fraser Milner Casgrain LLP; he retired from the practice of law a few months after the share redemption transaction closed. David Spieler lived in Barbados where he owned and operated a pottery factory.

[14] David Katz lived in Montreal. His business background was in commercial real estate and shopping centre development. He was the President of the Leikin Group from 2003 until May, 2004. Andrew Katz was the President of Skypoint Capital, an Ottawa-based venture capital company. Prior to that he had been a senior executive with a public technology company and a partner of Deloitte & Touche. Barbara Farber was the CEO of the Leikin Group and had been involved with the companies for all her career.

D. The Leikin companies

D.1 Common shares and Barbara Farber's special voting shares

[15] Harry Leikin created an ownership structure for his companies which contained three key elements: (i) his grand-daughter, Barbara Farber, was issued a special class of preferred shares in the companies which carried voting rights which, in effect, gave Barbara control over the Leikin

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Group of companies; (ii) each of his four daughters owned an equal number of preferred shares in ZKH; and, (iii) each of his 11 grand-children owned an equal number of common shares in the various companies comprising the Leikin Group. After Harry's death in 1998, Barbara became the Chief Executive Officer of the Leikin Group.

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D.2 Restrictions on the transfer of the shares

[16] Harry Leikin incorporated into his business structure the principle that the shareholders of HLH and Harzena could not sell or transfer their shares to anyone other than the issue of Harry Leikin. This restriction was designed to keep the shareholdings and management of the business within the family, and it also drove the form of corporate re-organization through which the Non-Selling Shareholders effectively purchased the shares of the Selling Shareholders.

D.3 Directorships

[17] Each of the four daughters enjoyed a seat on the board of directors of the Leikin Group, as did Barbara Farber. Ethel, Libby and Goldie stepped down as directors around 2000, and their places were taken by their children, Rick Kesler, Andrew Katz and David Spieler. By 2004, when the events surrounding this lawsuit unfolded, the board of directors of the Leikin Group of Companies consisted of Josephine Harris, Rick Kesler, Andrew Katz, David Spieler and Barbara Farber. The CEO for the Leikin Group was Barbara and, for a period of time in early 2004, David Katz was the President.

E. The non-family defendants

[18] The defendant, Grant Jameson, was a partner at the defendant, Ogilvy Renault LLP (now Norton Rose LLP), who practiced corporate law at its Ottawa office. Jameson had started acting as corporate counsel for the Leikin Group of Companies in early 2003. Geoffrey Gilbert was an associate at Ogilvy Renault who assisted Jameson on the share redemption transaction.

[19] The defendant, Ginsburg Gluzman Fage & Levitz LLP, had acted for many years as the corporate accountants for the Leikin Group, including performing the annual audits of their financial statements. Gerald Levitz was the partner who had a long-term association with the Leikin Group of companies. On the share redemption transaction he was assisted by Patricia Day, another partner who was a chartered accountant. Mr. Levitz passed away in October, 2009; his estate was the defendant at trial.

IV. A summary timeline and the key elements of the dispute in this action

A. Who has sued and who has not

[20] This action involves a dispute amongst some, but not all, of the grandchildren concerning the share redemption transaction in 2005 which saw a majority of the grandchildren (8 of the 11) have their shares redeemed in companies which owned two significant, or core, shopping centre assets – College Square and Zena's Fisher Heights Plaza. Six of those eight selling grandchildren have brought this action seeking damages in respect of that share redemption transaction. Two of the selling shareholders – Ivan Kesler and Steven Kesler, the brothers of Rick Kesler – have not joined this action as plaintiffs. Evidently they were content with the share redemption transaction.

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B. An overview of the chronology

[21] The share redemption transaction between the Selling and Non-Selling Shareholders used a negotiated price which reflected an attributed value for College Square of $60 million. The later sale of a 50% interest in College Square to First Capital Realty ("FCR") to finance the share redemption transaction was at a price which reflected an attributed value of $78.8 million. The plaintiffs/Selling Shareholders alleged, in essence, that they should be entitled to share in some of the enhanced value attributed to College Square on the sale to FCR as a result of various alleged breaches of fiduciary duties by the defendants.

[22] In February, 2004, Josephine Harris, on behalf of the Harris Family plaintiffs, informed the Company that they wanted to cash-out their interests. This then prompted several other shareholders to offer to sell their shares. At an April 15 meeting of the Board, David Katz raised the possibility of a strategic alliance with FCR; the Board did not pursue the matter.

[23] Pressure mounted from some family members to monetize their interests in the Company, especially that related to College Square. In June then counsel for the plaintiffs wrote indicating that a majority of the shareholders wanted to redeem their shares or wind up the Company. The possible sale of College Square was also mentioned.

[24] In July, 2004, Barbara Farber approached the CIBC to act as an advisor, and that month the Board engaged CIBC to prepare a report valuing the Company's core developed assets – College Square and Fisher Heights – and developing a structure under which the plaintiffs could sell their shares.

[25] The CIBC secured an appraisal report from the Altus Group which valued College Square at $55 million as of August 1, 2004. The CIBC then submitted its own report on

September 23 describing a possible share redemption transaction structure by which the Selling Shareholders could monetize their interests in the core assets. Later that month the Board reviewed the report, as well as a draft letter of intent ("LOI") amongst the shareholders prepared by Ogilvy Renault.

[26] On October 1, 2004, information was circulated to the holders of common shares, including a term sheet for a proposed share redemption transaction, as well as the draft letter of intent. The LOI proposed a reorganization of the Leikin Group and a share redemption transaction, rather than a share purchase transaction. Grandfather's restriction on the transfer of Leikin Group shares drove the choice of that deal structure.

[27] Rick Kesler thought that a further appraisal of College Square should be obtained, so the Board retained Grant Edwardh, who submitted a review report dated October 20, 2004 suggesting revisions to the Altus Report. That then led to Altus sending the Company a revised valuation report dated November 5 increasing the appraised value of College Square.

[28] Extensive negotiations then ensued amongst the shareholders. For a period of time the parties broke off negotiations. Rick Kesler, and his legal partner, Jules Lewy, acted as the principal negotiators for the Selling Shareholders. Ultimately on April 18, 2005 the shareholders executed a Letter of Intent for a share redemption transaction in which the negotiated transaction price used a value of $60 million for College Square. The LOI provided the Non-Selling Shareholders with a window of 120 days in which to secure financing for the share redemption and the method of financing was in their "sole discretion".

[29] Shortly after executing the LOI the Non-Selling Shareholders retained RBC Capital to run a marketing process for the sale of an interest in College Square to a third party equity investor. RBC circulated a Confidential Information Memorandum to interested parties and secured several letters expressing interest. After evaluating the expressions of interest RBC recommended the proposal by First Capital Realty as the superior one. On July 8 FCR formally offered to acquire a 50% interest in College Square for $39.4 million.

[30] On August 4, 2005 the share redemption transaction closed in escrow. On August 11 the Non-Selling Shareholders entered into an agreement of purchase and sale with FCR for a 50% interest in College Square. On September 29, the FCR transaction closed, and a few days later, on October 4, the Selling Shareholders received their proceeds from the share redemption transaction. Very shortly thereafter the Selling Shareholders learned of the FCR transaction when that company announced the completion of the deal in a press release. Almost two years passed before the plaintiffs/Selling Shareholders issued the Notice of Action for this proceeding on October 2, 2007, just a few days before the expiration of the limitation period.

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C. An overview of the claims advanced by the plaintiffs

[31] Before proceeding to review the key portions of the evidence and to make findings of fact, let me sketch the nature of the claims advanced by the plaintiffs so that a framework exists in which to understand the evidence.

[32] In this action the plaintiffs seek damages of $11 million from the defendants, which they contend was the "profit" earned by the Non-Selling Shareholders on their sale of an interest in College Square to FCR. In general terms the plaintiffs alleged against the defendants breaches of fiduciary duty or knowing assistance in breaching fiduciary duties owed to the plaintiffs, and against the Non-Selling Shareholders and the Leikin Group they also alleged oppression, breach of confidence, misuse of confidential information, and unjust enrichment.

[33] The essence of the plaintiffs' breach of fiduciary claims is that the defendants knew, before concluding the redemption of the Selling Shareholders' shares, that the true fair market value of College Square was significantly in excess of the value attributed by CIBC and its advisors which, the Selling Shareholders contend, formed the basis of the redemption transaction. Armed with that knowledge, it is alleged, the Non-Selling Shareholders were able to buy out the other family members at an unreasonably low price and then, immediately upon locking up the redemption of those shares, sell part of College Square to FCR based on a much higher value. The resulting "profit" earned by the Non-Selling Shareholders is what the plaintiffs seek to recover in this lawsuit.

C.1 As against the Non-Selling Shareholders and the Leikin Group

[34] The plaintiffs claim against the Non-Selling Shareholders and the Leikin Group for damages for breach of fiduciary duty, oppression, breach of confidence, misuse of confidential information and unjust enrichment. The plaintiffs pleaded that the Non-Selling Shareholders owed duties to all shareholders. Specifically, they asserted that the individual Non-Selling Shareholders, in their capacities as directors, officers or, in the case of David Katz, a former officer of the Leikin Group, owed a fiduciary duty "to all of the shareholders, including the Selling Shareholders" (i) to act in their best interests, (ii) to refrain from utilizing confidential information for their personal gain to the detriment of the Selling Shareholders, and (iii) to refrain from diverting a corporate opportunity for their personal benefit.

[35] The plaintiffs' opening and closing statements identified the following key elements of their claims against the Non-Selling Shareholders:

(i) The Non-Selling Shareholders possessed material information about the potential value of College Square which they failed to disclose to the plaintiffs, specifically the

existence and nature of discussions regarding the sale of College Square held with FCR;

(ii) By July 14, 2004, the Non-Selling Shareholders were aware that (a) FCR had expressed a strong desire to purchase an interest in College Square, (b) FCR had the wherewithal to purchase such an interest, and (c) FCR had been involved in negotiations with David Katz which had assigned a value to College Square in excess of $70 million;

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(iii) The information about the dealings with FCR was material from the start of 2004 or, as put by the plaintiffs in their opening statement:

> It was material when David Katz was President of the companies; it was material when he was employed as a consultant; it was material when he communicated this information to the other Defendants to this action; and it was material when these Defendants pressed the Plaintiffs in negotiations to accept a significantly lower value for College Square in the share redemption transaction.

(iv) The Non-Selling Defendants were under a duty to disclose that information to the plaintiffs. The Non-Selling Shareholders owed the plaintiffs an *ad hoc* fiduciary duty because:

(a) they had undertaken to act in the plaintiffs' best interests by representing that the share redemption would be based on fair market value, the process would be open and transparent, and the process would be in the interests of all shareholders;

(b) they possessed information which by its very nature caused the plaintiffs to be vulnerable;

(c) this vulnerability could only be addressed properly through the disclosure of the FCR negotiations;

(v) This fiduciary duty could not be discharged by suggesting that the plaintiffs obtain independent legal advice or by the give-and-take of a process of negotiation. The duty could only be discharged by the disclosure of the material information; and,

(vi) By failing to disclose that material information and by concealing the FCR negotiations, the Non-Selling Defendants were able to manufacture a significant benefit – effectively they increased their interest in College Square from 27% to 50% without any financial contribution from them, all at the expense of the Selling Shareholders. The Non-Selling Shareholders intended to use the spread between the

values assigned to College Square in the share redemption transaction and the price fetched on the subsequent sale of an interest in that property to a third party to increase their equity share in College Square.

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[36] In their factum on the Summary Judgment motion, on which they relied at trial, the plaintiffs identified two ways in which the Non-Selling Shareholders stood as fiduciaries in relationship to the Selling Shareholders: (i) as directors and officers of the Company with duties "to the board of directors that flowed to all the shareholders", and (ii) as agents to their principal by virtue of "their undertaking to devise a strategy and process for the Selling Shareholders to liquidate their interests in College Square."[4]

[37] The plaintiffs also pleaded that the Non-Selling Shareholders, as directors and officers (or former officer), owed a duty to the corporation not to divert a corporate opportunity for their personal benefit. Although the *Ontario Business Corporations Act* provides for shareholders to seek leave of the court to commence a proceeding against directors and officers for breach of a duty to the corporation, no such leave has been sought or received in respect of this element of the plaintiffs' claim, so I give no effect to it.[5]

[38] The Non-Selling Shareholders argued that they owed no fiduciary duty to the plaintiffs, largely for two reasons: (i) the level of mistrust between the two sides of the family militated against the creation of a fiduciary relationship; and, (ii) the share redemption transaction essentially placed one group of shareholders in a position opposite to the interests of the other – the transaction involved classic self-interested negotiations. Further, the Non-Selling Shareholders contended that they did not fail disclose any material facts.

C.2 As against the lawyers, Grant Jameson, Geoffrey Gilbert and Ogilvy Renault LLP (the "Lawyer Defendants")

[39] In their opening and closing statements at trial the plaintiffs submitted that an *ad hoc* fiduciary relationship existed between the Lawyer Defendants and the plaintiffs, that the Lawyer Defendants owed them a duty to disclose material information, and that by failing to disclose the FCR negotiations, or assisting in its non-disclosure, they breached that duty. Specifically, the plaintiffs argued that by July 14, 2004, the Lawyer Defendants possessed information concerning the value of College Square, FCR's willingness to purchase an interest in the asset, and the goal

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[4] Plaintiffs' Summary Judgment Factum, para. 183.

[5] *Ontario Business Corporations Act,* R.S.O. 1990, c. B.16, s. 246(1); *BCE Inc .v. 1976 Debentureholders,* [2008] 3 S.C.R. 560, para. 43.

of the Non-Selling Shareholders in the share redemption transaction to gain an equity control over College Square which they did not have at the expense of the plaintiffs.

[40] In their Statement of Claim the plaintiffs alleged that because the Leikin Group was a closely-held family corporation and Jameson had acted as corporate secretary at board meetings, the Lawyer Defendants owed a fiduciary duty to both the corporation and its shareholders. The plaintiffs also pleaded that the Lawyer Defendants knowingly assisted the Non-Selling Shareholders in breaching their fiduciary duties to the plaintiffs and the corporation.

[41] In response, the Lawyer Defendants argued that they were the solicitors for the companies and owed no fiduciary obligation to the shareholders to look out for and protect their personal self-interests. Those personal interests, these defendants argued, were protected by the independent legal and financial advice the plaintiffs received concerning the reorganization and the share redemption transaction. The Lawyer Defendants also contended that they did not possess any material information about the dealings with FCR which they failed to disclose to the plaintiffs.

[42] At trial the plaintiffs disputed the suggestion made by the Lawyer Defendants that they were acting as mere conduits of information between the Selling and Non-Selling Shareholders. It was the plaintiffs' position that the Lawyer Defendants were acting on the instructions of the Non-Selling Shareholders, even when those instructions were to the detriment of the plaintiffs or the company itself.

C.3 As against the accountants, Patricia Day, the estate of Gerald Levitz and Ginsburg Gluzman Fage & Levitz LLP (the "Accountant Defendants")

[43] In their opening and closing statements at trial the plaintiffs submitted that an *ad hoc* fiduciary relationship existed between the Accountant Defendants and the plaintiffs, that the Accountant Defendants owed them a duty to disclose material information, and that by failing to disclose the FCR negotiations, or assisting in its non-disclosure, they breached that duty. Specifically, the plaintiffs argued that by July 14, 2004, the Accountant Defendants possessed information concerning the value of College Square, FCR's willingness to purchase an interest in the asset, and the goal of the Non-Selling Shareholders in the share redemption transaction to gain an equity control over College Square which they did not have at the expense of the plaintiffs.

[44] The plaintiffs alleged that the Accountant Defendants "acted as the corporate accountants" for the Leikin Group and "in respect of the share redemption transaction, were providing professional accounting advice to the corporation, its Board of Directors and all of the shareholders." At the same time, the plaintiffs claimed that the Accountant Defendants "took

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direction from some or all of the Non-Selling Shareholders exclusively in respect of the financial affairs of the company". The plaintiffs also pleaded that the Accountant Defendants knowingly assisted the Non-Selling Shareholders in breaching their fiduciary duties to the plaintiffs and the corporation. Further, the plaintiffs alleged that at certain points in the transaction Gerald Levitz provided them with advice concerning the transaction, on which they relied.

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[45] The Accountant Defendants took the position that they owed no fiduciary duty to the individual shareholders, knew nothing of any deal with FCR until after the August, 2005 agreement was executed, prepared various calculations using numbers provided by the management of the Leikin Group and, as accountants for the corporation, appropriately released to the plaintiffs only those calculations which management had directed them to provide.

V. How I intend to deal with the evidence

[46] As a result of the directions I gave when disposing of the summary judgment motions, the evidence at trial consisted of that adduced on the summary judgment motions, together with additional evidence tendered at the trial. My Summary Judgment Reasons contained a detailed review of the evidence led on those motions. In these Reasons I will recite most, but not all, of that evidence, but I do wish to emphasize that in preparing these trial Reasons I have reviewed and taken into account all of the evidence set out in my Summary Judgment Reasons, in particular the evidence found in paragraphs 42 to 273, 306 to 308, 346 to 364, and 384 to 390 of those Summary Judgment Reasons. As I proceed through the chronology of events in these trial Reasons, I will identify those portions of the Summary Judgment Reasons which contained evidence relating to the particular events which I have reviewed and considered.

[47] What I propose to do in these Reasons is to draw on all of that evidence in order to make the necessary findings of fact to determine the issues at trial. I will take into account the following findings of fact which I made at paragraph 274 of my Summary Judgment Reasons largely concerning the dealings between the Non-Selling Shareholders and FCR. Specifically, I made the following findings of fact:

(i) Prior to the commencement of negotiations amongst the shareholders in November, 2004, First Capital had not entered into any binding agreement to acquire an interest in College Square. First Capital had not even made an offer to the Leikin Group for such an interest. What First Capital did, as early as January, 2004, was to express an interest in acquiring part of College Square and it engaged in some discussions with David Katz to that end in January and February, 2004, as well as in the August to October, 2004 time period;

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(ii) At the time the shareholders executed the LOI on April 18, 2005, First Capital had not made any offer to acquire an interest in College Square, let alone enter into any binding agreement to do so. To the contrary, First Capital was told by the Leikin Group in October, 2004 that no further discussions could be held until the company had resolved its internal affairs;

(iii) First Capital made its first, and only, offer to purchase an interest in College Square by its LOI dated July 8, 2005;

(iv) A binding agreement of purchase and sale for an interest in College Square was entered into between First Capital and the designated Leikin Group entity on August 11, 2005. No prior binding agreement had been entered into;

(v) David Katz commenced discussions with First Capital about the possibility of that company acquiring an interest in College Square in January, 2004. He continued those discussions in February, 2004, and from July until October, 2004. As was described in the engagement letter for RBC Capital, by October, 2004 those discussions had reached an "advanced" stage before they were terminated by the Leikin Group;

(vi) During their discussions in January and February, 2004, David Katz and Sylvie Lachance had talked about a possible acquisition price using a 100% value for College Square in the low 70 millions;

(vii) From the beginning of the discussions about the possible sale of shares by certain shareholders in early 2004, the relationship between the plaintiffs (except for David Spieler) and the Katz Siblings was marked by significant mistrust. By April or May, 2005, a similar lack of trust had emerged between David Spieler and the Katz Siblings;

(viii) Throughout their dealings with the Leikin Group and the Non-Selling Shareholders, the plaintiffs had access to, and availed themselves of, independent legal and accounting advice; and,

(ix) As a result of market commentary contained in the Edwardh Report and the updated Altus Group Report in September and October, 2004, the Selling Shareholders knew,

> or reasonably ought to have known, that the CIBC valuation of College Square had been undertaken in a hot, rising market where investors were aggressively pursuing opportunities to purchase assets such as College Square.[6]

In my Summary Judgment Reasons I concluded:

> The plaintiffs alleged and argued that some sort of deal existed with First Capital before negotiations on the LOI started in the fall of 2004 and before the LOI was executed. No evidence supported that allegation. Certainly First Capital expressed an interest in College Square to David Katz in early 2004, and the parties pursued their discussions in the late summer of 2004. But that is all they were – discussions. No agreement was reached; no commitment was made by First Capital.[7]

[48] With that by way of background, let me turn to a consideration of the evidence.

VI. The state of family affairs at the beginning of 2004[8]

[49] Prior to the events of 2004 strained relationships had existed amongst the children of Harry Leikin and their children. Josephine Harris described the relationships amongst the Leikin sisters and the grandchildren in early 2004 as ones characterized by conflict and lack of trust. She recalled the relationships as "fractious" going back to at least 2002, and that as of 2004 the relationships amongst the grandchildren featured mistrust and disagreement. Rick Kesler deposed that Barbara Farber's style of management was causing tension within the family and he agreed that the board was emotional and polarized. David Spieler deposed that by 2002 tensions in the family business were very high, and he described his four Harris cousins and Stephen Kesler as "bugbears". Business relations amongst family members were so strained that in 2002 Barbara Farber had retained the KPMG Centre for Family Business in an effort to resolve family business issues.

[50] Jameson deposed that when he started providing legal services to the Leikin Group in 2003, the common shareholders were a fractious group and little trust or cooperation existed amongst them. He knew there was acrimony between the directors, as well as issues of trust.

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[6] SJ Reasons, para. 274.
[7] SJ Reasons, para. 311.
[8] The evidence which was before the court on the summary judgment motions was referenced at paragraphs 42 to 46 of the SJ Reasons.

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[51] David Katz was involved formally in the affairs of the Leikin Group for some time before the transaction. From 2001 until 2003 he acted as a consultant to the Leikin Group. He then served as the President of the Leikin Group from June, 2003 until May, 2004, when some of the directors required him to resign.

[52] At the material times in 2004 and 2005 the boards of directors of the Leikin Group of companies consisted of Barbara Farber, Andrew Katz, Rick Kesler, David Spieler and Josephine Harris – i.e. the boards consisted of three Selling Shareholders (Kesler, Spieler and Harris) and two Non-Selling Shareholders (Farber and Andrew Katz).

VII. January – April 15, 2004: The initiation of the share sale process[9]

[53] At a board meeting on February 6, 2004, Josephine Harris informed the other directors that the Harris Plaintiffs wanted to sell their shares in the Leikin Group and had retained a Chicago lawyer and accountant, James Mainzer, to advise them on the sale. Mainzer specialized in federal income tax and estate planning. The Harris Family did not like the management style of Barbara Farber or the involvement of David Katz in the business, and they wanted to liquidate the value of their interests in the business. As Harris testified: "My children needed to redeem or rescue their shareholdings which we felt were not in safe hands." Mainzer sought and obtained information from the Accountant Defendants so the Harris Plaintiffs could assess the value of the shares.

[54] David Spieler's initial reaction to the proposal of the Harris Family was not positive. He emailed Ms. Farber on February 10 querying why "our company should pay full value for redeemed shares to quitters and make it easy to go while we hold the bag".

[55] Farber circulated a letter to all shareholders on February 12, 2004 telling them of the decision of the Harris Plaintiffs and stating that because the companies lacked sufficient cash to fund the share purchase without incurring debt, undoubtedly the cost of servicing any debt required to buy-out the shares would have a material impact on the companies' ability to pay dividends. Farber also wrote that neither she, David Katz nor Andy Katz were interested in selling their shares and she requested any other shareholder interested in selling their shares to let her know by February 20, 2004 so that the companies could have a clear idea of the amount needed to buy the shares.

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[9] The evidence which was before the court on the summary judgment motions was referenced at paragraphs 47 to 55 of the SJ Reasons.

[56] Around this time the Katz Family shareholders discussed the possible retainer of CIBC Mid-Market Investment Banking to provide advice regarding the Harris Family's interest in selling their shares. No retainer with CIBC was entered into at that time.

[57] On February 24 Barbara Farber emailed all shareholders and directors a one-page memo setting out how a common shareholder could submit an offer to sell all of his or her shares. That elicited a February 25 memo from Rick Kesler to all shareholders, on the letterhead of Fraser Milner Casgrain, in which he observed that if a sufficient number of shareholders wanted to sell their shares, the corporation might have to purchase them and that, in turn, would require the consideration of various financing options. Mr. Kesler called for a directors' meeting to consider those issues. On February 27 Rick Kesler told Mainzer that at the next Board meeting he planned to propose the liquidation of all the entities rather than using a process under which shareholders could sell their shares.

[58] Mainzer asked Gerald Levitz, the accountant for the Leikin Group, to provide financial information about the company to assist his clients in selling their shares in the Leikin Group. Levitz did so on February 26, 2004. Harris deposed that the information was used by Mr. Mainzer, their advisor, to "attempt to figure out what a potential value of the shares would be." Based on information he had obtained from GGFL, Mainzer prepared a spreadsheet around March 29 on which he listed the gross value of College Square at $60 million. He passed that information along to Kesler, who in turn sent it to one of his FMC partners, Mr. Jules Lewy.

[59] On March 12 Steven Kesler sent Farber a letter offering to sell his shares in the Leikin Group for $5.3 million.

[60] On April 14 Mainzer sent Farber a letter containing an offer by the Harris Plaintiffs to sell their shares for $6.2 million for each interest (or $24.8 million in total). According to Mainzer had "put a value" on the shares based, he said, on the information which had been provided by GGFL. Harris testified that although the letter talked of a sale of the shares to the remaining shareholders, she always understood that the transaction would require a redemption of their shares by the corporation. At trial Mainzer described the expectations of his clients at the time of their offer as follows:

> Q. And it would be fair to say that with your experience and what you knew on April 14, 2004 that after your clients had sold their shares, the remaining shareholders, and the remaining corporate entities would've been free to do whatever they wanted with the properties?
>
> A. Yes.

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> Q. And was there any consideration with the Harris family children that if they sold their shares, pursuant to the terms of the April 14th letter, and they found out later on that the properties had increased in value that they would – they would consider coming back and suing the selling shareholders?
>
> A. I have no idea.
>
> Q. That wasn't discussed?
>
> A. No.

[61] On May 12 Kesler offered to sell his shares for $6 million which reflected his best guess at the value of his shares. Combined, these offers would require the Leikin Group to fund buy-outs totaling $36 million.

[62] Although each offer to sell contained an expiration date, Farber did not respond to the offers by those dates because, she deposed, to purchase or redeem the proffered shareholdings would require over $36 million and "it was unclear as to whether such transactions would even be possible."

VIII. The dealings between Katz and First Capital Realty prior to the April 15, 2004 Board meeting[10]

A. The initial contact

[63] The Leikin Group held a Board meeting on April 15, 2004. Prior to that meeting David Katz had engaged in some discussions with FCR about entering into a development and acquisition arrangement for non-enclosed retail developments within the greater Ottawa area. Katz described this as discussing a possible "strategic alliance". Katz regarded the College Square development as an integral part of the strategic alliance he wished to discuss with FCR, including the sale of a partial interest to FCR.

[64] The contact between Katz and FCR came about in the following way. At the time Sylvie Lachance was the Executive Vice-President and Chief Operating Officer of First Capital. FCR focused on owning, developing and operating supermarket and drugstore-anchored shopping centres. Lachance's job was to search for new properties.

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[10] The evidence which was before the court on the summary judgment motion can be found in paragraphs 64 to 76 of the SJ Reasons.

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[65] In December, 2003, as a result of a discussion at a trade conference, David Katz had sent FCR a list of some properties which might be of interest to it; College Square was not on the list. Lachance could not recall who next called whom, but in early 2004 she began to deal with Katz about a strategic alliance, including a co-tenancy arrangement for College Square. She dealt with David Katz because she understood that he was a representative for the shopping centre's owners which she knew were a group of family members. Lachance described Katz as a very reputable business person.

[66] Lachance testified that FCR generally used a multi-stage approach to acquiring properties: first pursuing exploratory discussions, followed by signing a non-binding letter of intent or expression of interest, then conducting due diligence, seeking senior management approval, and then executing a binding agreement of purchase and sale.

[67] FCR signed a confidential disclosure agreement dated February 9, 2004 which had been requested by David Katz in anticipation of the discussions in order to protect financial information regarding College Square which David Katz planned to disclose to FCR. Lachance regarded the request as "customary". The disclosure agreement described the confidential information to be disclosed as "general business opportunities" and stated that any information would be used only for the purpose of "evaluating for possible investment in the retail development known as College Square…" Lachance testified that FCR normally was interested in purchasing 100% of a shopping centre, but it was open to acquiring a partial interest in College Square. Katz confirmed at that trial that by that point in time FCR had indicated to him that it was interested in College Square.

[68] Katz sent FCR an analysis of the College Square 10-year projected rental income stream which led him to estimate the market value of College Square as of February 10, 2004 at $72 million calculated on a discounted cash flow basis. He also sent to FCR a site plan, lease summary, and rent roll for College Square. Katz acknowledged that he obtained that information about College Square at a time when he was the President of the Leikin Group. At trial Katz was asked how he had arrived at the $72 million number. He replied:

> Well the main purpose of sending this report was really to give Ms. LaChance an understanding of the tenant mix and the cash flow, and the net operating income that was generated by the tenant mix. The valuation number of $72 million is not a market supported valuation, it wasn't tied to an appraisal or any relevant market activity. For me it represented an inflated value of College Square which was intentional on my part to commence discussions with Sylvie LaChance.

[69] Katz did not receive any response from FCR to this $72 million DCF analysis. He did not disclose that communication with Lachance to Farber or any other director on the Board.

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When asked why he had not, Katz stated that he did not think that it was relevant for them to see that information.

[70] Using that information FCR prepared an internal Pro Forma Analysis – what Lachance called a "blue package" - in February, 2004, disclosing that the vendor, the Leikin Group, would be looking for $72 million to sell College Square, whereas FCR had run numbers suggesting a $66 million price. FCR used its "blue package" to start "conversations with the vendor." The cap rate used in the analysis was selected by a FCR analyst who was not preparing a valuation, but a range of indicative numbers. Lachance described the "blue package" as "a working document that we use internally so that we can discuss the asset internally." David Katz did not see a copy of the pro forma at the time.

[71] Lachance recalled that at the time "cap rates and value of properties were climbing…the market was changing constantly and it had reached its peak around 2006." Lachance remembered that in 2004 she discussed numbers with David Katz "in the neighbourhood of low 70 million", but "the real discussion took place in 2005". Katz testified that during the first two months of 2004 he did not talk with Lachance about a possible acquisition price using a 100% value for College Square in the low $70 million. He said he had transmitted the $72 million number to Lachance, but she had not responded at that time.

[72] In my Summary Judgment Reasons I made the following findings of fact:

(i) What First Capital did, as early as January, 2004, was to express an interest in acquiring part of College Square and it engaged in some discussions with David Katz to that end in January and February, 2004, as well as in the August to October, 2004 time period;

(ii) During their discussions in January and February, 2004, David Katz and Sylvie Lachance had talked about a possible acquisition price using a 100% value for College Square in the low 70 millions.

As referenced in the Summary Judgment Reasons, the latter finding was based on the evidence given by Lachance on her pre-trial cross-examination, specifically the following passage:

> Q. 130. Okay, but this was the numbers that you were using to frame your discussion with Mr. Katz.
>
> A. The numbers that I recall we were discussing with Mr. Katz were in the neighbourhood of low 70 million.

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Q. 131. Okay. Thank you. And that's the number you were discussing in February of 2004?

A. That's the number that I – in that period of time with Mr. Katz you mean?

Q. 132. Yes.

A. Yes. Now, "discussing" is a big word. We never had a firm discussion about price with Mr. Katz because we didn't have at that time an agreement. We never concluded anything in 2004, as you know. The real discussion took place in 2005.

[73] Lachance's qualification that "discussing" was "a big word" was an apt one. When taken in context, Katz's early February transmittal to FCR of a $72 million DCF-derived value for College Square was in the nature of a trial balloon floated by him to gauge FCR's interest in College Square. While FCR was interested in continuing discussions with Katz about co-tenancy principles, both generally and as they could apply to College Square, Katz had not received any sort of response from FCR to the $72 million number prior to the April 15, 2004 Leikin Group Board meeting. By the time of that meeting the $72 million remained simply a trial balloon floated by Katz.

B. The March discussions on co-tenancy principles

[74] Katz met with Lachance in Montreal on March 4, 2004. He testified that it was at that time the "our discussions really commenced in earnest". He mooted the idea of the Leikin Group and FCR working together in furthering their interests within the Ottawa market through a strategic alliance by identifying and pursuing opportunities for the betterment of both companies. College Square was mentioned in the course of that discussion. Katz testified:

> I was well aware of the fact that First Capital would covet the College Square property, the College Square property represented a best of class property that their portfolio consisted of. First Capital was a company that acquired properties such as College Square which were not enclosed Shopping Centres, that were food anchored, and College Square represented the very best of that class of asset, so that I knew that it would have First Capital's interest and I intentionally discussed it with them as an integral part of the strategic alliance discussion.
>
> …
>
> Well College Square was discussed within the context of a strategic alliance and it involved First Capital participating in the ownership of College Square, which would've involved Leikin Group selling a partial interest of College Square to First Capital as part of the strategic alliance.

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[75] On March 5, following their meeting, Katz sent Lachance a memorandum describing a possible strategic relationship between the Leikin Group and FCR in the Ottawa market. In the memo Katz described the purpose of a strategic alliance in the following terms:

> For First Capital Realty and the Leikin Group to work in a collaborative manner in acquiring retail/commercial redevelopment opportunities and/or acquiring property for retail/commercial development within the Greater Ottawa Market, with the intention of becoming the dominant non-enclosed retail centre developer/asset manager within the market.

Katz proposed that the parties would hold their respective interests in properties as undivided co-ownership interests in proportions to be determined, and he contemplated that the co-ownership venture by the two companies could include College Square. Katz wrote that if the co-ownership arrangement did not reach a stipulated level of net income by the end of its first 10 year term:

> [T]he Leikin Group shall have the right to repurchase the minority interest in the asset known as College Square that it is intending to sell to First Capital Realty Inc., at a price that is equal to the price paid by First Capital Realty in acquiring such minority interest.

[76] From this memo it is clear that Katz was contemplating that as part of a larger strategic alliance between the two companies in the Ottawa area, FCR would acquire a minority interest in College Square. On cross at trial Katz stated: "I was in effect using College Square as a bit of a carrot I would say to attract First Capital and attract their interest and hopefully maintain their interest in discussing a strategic alliance…"

[77] Lachance secured a memorandum dated March 9, 2004 from Ms. Rita de Santis, a lawyer at Davies Ward Phillips & Vineberg, FCR's counsel, addressing a number of issues surrounding a co-ownership arrangement with the Leikin Group for College Square – the "re" line on the memo referenced "College Square" - and she sent the memo to David Katz. He, in turn, sent Lachance a memo dated March 12, 2004 giving his views on FCR's lawyer's memo. In that memo Katz wrote about "the fundamental principles which must govern the co-ownership arrangement pertaining to College Square…" Katz's thinking at that time about the reason for talking with FCR about College Square was captured in the following portion of his memo to Lachance:

> [The Lekin Group's] interest in selling a minority interest in [College Square] to [FCR] would be strictly and solely for the purposes of encouraging and facilitating the parties in entering into a co-ownership based development and acquisition arrangement, for non-enclosed retail developments within the Greater Ottawa Market ("Ottawa Co-ownership Agreement"), which would be substantially based on the draft outline transmitted on March 5th.

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There was no suggestion by Katz in that memo that his interest in discussing a co-ownership arrangement with FCR for College Square had anything to do with the need to find financing for a potential purchase of the shares of some of the Leikin Group's shareholders.

[78] On his cross-examination on the summary judgment motion Katz had disagreed with the suggestion that by that point of time he was negotiating with Lachance: "We were discussing a co-ownership outline...It's not a product of negotiating." He described his discussions with Lachance as "exploratory". As he put it during that cross-examination:

> Q.: And if you reached a consensus of opinion, as you have stated it, would that not be then reflected in a co-ownership agreement that both of you could accept?
>
> A. If it was the intention of the parties to ultimately create a definitive co-ownership agreement, I would agree with you but that wasn't the intention here. The intention here, as I've mentioned, was to determine if we could reach consensus of opinion on co-ownership issues, nothing more.
>
> …
>
> It's not a negotiation. First Capital transmitted basic terms of a co-ownership outline for my review and I commented on that co-ownership outline through my memo of March the 12th. That's what was taking place.

[79] At this point a long lull occurred in the discussions between David Katz and Lachance. Katz testified that Lachance did not respond to his memo of March 12, 2004, and he had no further contact with Lachance prior to the April 15, 2005 Leikin Group Board meeting about College Square. (Some contact took place between them about a potential offer by FCR for another property, Perth Mews.) They only resumed their discussions in earnest in August, 2004, and I will return to those events later in these reasons. I should note that Ms. Lachance testified that she was not aware that Mr. Katz had resigned as the President of the Leikin Group in May, 2004, but, as she stated: "why should I have been concerned at this early stage?"

[80] Barbara Farber testified at trial that prior to the April 15 Board meeting she had not been aware of any discussions between her brother and FCR, save for one occasion when her brother had brought Lachance through their offices.

[81] Harris and Kesler had not been aware of the contact between Katz and Lachance prior to the April 15 Board meeting. Harris deposed that from her perspective, the March memoranda passing between Katz and FCR showed that "David Katz had engaged in negotiations with First Capital Realty regarding its acquisition of an interest in College Square", and that neither she nor

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her children had been aware of those negotiations at the time of the April, 2004 Board meeting. Rick Kesler stated that he, too, had not been aware of those discussions with FCR.

C. Findings of fact

[82] I make the following findings of fact regarding the nature of the discussions which took place between Katz and FCR in 2004 prior to the April 15, 2004 Leikin Group Board meeting:

(i) As the President of the Leikin Group, David Katz was interested in positioning the company as a significant player in the Ottawa region shopping centre development business. Given the modest size of the Leikin Group, he decided that the company had to link up with a larger, established player through some form of strategic alliance;

(ii) Katz viewed FCR as a company which fit the bill for a possible strategic alliance;

(iii) In his initial overture to Lachance in early February, 2004, Katz tried to whet FCR's appetite for an alliance by indicating it would include an interest in College Square;

(iv) The $72 million estimate of value generated by Katz and sent to FCR was not based on any appraised value for College Square. Using his own assumptions about internal rates of return and capitalization rates, Katz ventured a $72 million value for the property. That number was in the nature of a trial balloon designed to gauge FCR's willingness to pursue discussions about a strategic alliance;

(v) Prior to the April 15 Board meeting FCR did not respond to Katz's trial balloon of $72 million. That said, FCR did express its willingness to talk about the general principles which would surround a co-tenancy strategic alliance between the two companies for various properties, including College Square, and it engaged with Katz in discussing some co-tenancy principles in the first part of March. But, by the time of the April 15 Board meeting over a month had elapsed since Katz had sent FCR his March 12 memo, and Katz had heard nothing further from FCR about College Square; and,

(vi) I accept, as an accurate description of the nature of these initial discussions between Katz and Lachance, Katz's description of them as "exploratory".

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IX. The April 15, 2004 Board meeting[11]

[83] A meeting of the Board of the Leikin Group was held on April 15, 2004. Harris participated in the April 15 Leikin Group Board meeting by way of telephone. The directors received an agenda in advance of the meeting. Item 4 on the agenda was a "review and approval of short and medium term strategic objectives"; Item 5 involved a "report on Leimerk".

[84] For the meeting Katz had prepared a PowerPoint presentation entitled, "Short & Medium Term Strategic Objectives". The presentation contained a number of slides dealing with a possible "Leikin Group-First Capital Realty Strategic Alliance". The slides described the purpose of the proposed alliance as working "in a collaborative manner in acquiring retail/commercial redevelopment opportunities and/or acquiring property for retail/commercial development within the Greater Ottawa Market…" A copy of Mr. Katz's PowerPoint presentation had been circulated to most directors prior to the meeting, although Harris did not recall receiving a copy before the Board meeting.

[85] A dispute existed between the Leikin family parties as to what David Katz told the Board at that meeting about his discussions with FCR, specifically as those discussions had related to College Square. I will first set out the evidence of each witness, and then make findings of fact.

A. The evidence

Josephine Harris

[86] In her pre-trial affidavit Ms. Harris had given the following evidence about her recollection of what transpired at the April 15 Board meeting:

> David Katz began to make a presentation to the Board with respect to his position that the Leikin Group of Companies should enter into a strategic alliance with an arm's length third-party, First Capital Realty. During the presentation and the discussions, it was disclosed that David Katz had brought First Capital Realty through the Leikin Group of Companies corporate office located at College Square and to the Perth Mews shopping centre.

In his pre-trial affidavit Rick Kesler had deposed in respect of that recounting by his aunt of the events at the Board meeting:

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[11] The evidence before the court on the summary judgment motion can be found at paragraphs 56 to 60 of the SJ Reasons.

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My recollection of those events accords with Jo's recollection; however, I also recall that at the meeting Grant Jameson advised the Board that David Katz' actions were highly inappropriate and that he had breached his fiduciary duty to the companies.

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[87] At trial, in chief, Ms. Harris recalled that David Katz had started to talk about Leimerk (Agenda Item 5) when the meeting came to a screeching halt and Katz did not get to finish his presentation because of an issue respecting the interest of Loblaws in Leimerk's Perth Mews shopping mall. On cross she stated that she did not know how far David Katz got in the agenda, but he did talk separately about Perth Mews and a strategic alliance with FCR. Harris recalled that Katz informed the Board that he had taken business people from Montreal to look at the Perth Mews shopping centre, and, as well, he had brought them to College Park and the company's business office. Harris found that "shocking". At the meeting Katz had identified the business people as from FCR.

[88] As to whether there was any mention at the Board meeting of an interest by FCR in acquiring an interest in College Square, at trial, in chief, Harris testified:

Q. Ms. Harris at the April 15th board meeting was there any discussion with respect to College Square?

A. No.

Q. At any time during the board meeting do you recall whether there was a mention of anyone buying College Square or College Square being sold?

A. Oh, no, no, on my first answer did we talk about College Square, I think it was such a source of pride that we rarely gathered that we didn't say this is good, and that the - our offices were good, and so on. So in that very – in that very familial way we may have talked about College Square, but certainly the issue of it being sold to anyone was unthinkable.

Q. There was no discussion at that meeting regarding selling College Square?

A. No, no, no.

[89] By contrast, on cross-examination at trial, Harris testified:

Q. Well we've already gone over it First Cap – David Katz had presented a strategic alliance with First Capital and it was a relation to the Leikin Group. We've established that already Ms. Harris, and I'm indicating to you within that discussion of a strategic alliance between the Leikin Group, and First Capital Realty he indicated that First Capital had an interest in College Square as part of that strategic alliance?

A. I'm not – I'm not disagreeing with you, the answer would be yes, he indicated that.

[90] At trial on cross-examination Harris also testified:

Q. And I suggest to you that when dealing with this strategic alliance Mr. Katz informed the board that he had significant discussions with First Capital?

A. As a matter of fact I don't recall that, I do recall saying at that meeting how long have you been dealing with these people, and I said it sounds to me as though you've been – you've known about them for quite a long time.

Q. Right.

A. When did all this start, that was the line of questioning from me. It just it sounded as though it had gone back further than I was aware.

Q. My question is did Mr. Katz inform the board that there were ongoing discussions with First Capital, you would agree with that?

A. Yes.

Q. And he proposed to the board that the Leikin Group and First Capital would work together to grow the assets of the Leikin Group and First Capital in the Ottawa market?

A. Yes.

Q. And he advised the board, did he not, that no commitment was made with First Capital, did he not?

A. No commitment was made with First Capital at the time?

Q. With respect to the strategic alliance?

A. Umm-hmm. No, I don't recall – I don't recall that there was anything definite about a strategic alliance and the Leikin Group. I think he wanted that, that - that was what he hoped to do.

Q. And did Mr. Katz not say that it was his duty to bring these opportunities forward to receive the directions from the board to pursue with First Capital or not pursue with First Capital?

A. I think he said that, something like that, yes.

Q. And that all management was putting forward a framework which would be financially lucrative to both the Leikin Group and to First Capital?

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A. Well we would need to see more, know more, uh-huh -

Q. But he indicated that he would -

THE COURT: Let the witness finish please.

MR. VICTOR: Sorry.

THE COURT: You would need to see more?

MS. J. HARRIS: A. Yes, and know more about what had been the relationship between David Katz and First Capital, and how he wanted to involve the Leikin Group.

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[91] Ms. Harris testified that she was satisfied that David Katz had not made any commitment to FCR. She also acknowledged that based upon what she had heard at the Board meeting, her family did not withdraw its April 14 offer to sell their shares.

Rick Kesler

[92] Kesler recalled that the meeting lasted no more than 30 minutes because it came to a conclusion when David Katz began to talk about a business opportunity that more properly belonged to Leimerk. In chief at trial Mr. Kesler stated that there was no disclosure of any expression of interest by FCR in College Square. On that point he disagreed with the evidence of his aunt, Ms. Harris, saying that she was mistaken in her recollection. He testified that what Katz had disclosed at the meeting was that he had met with Ms. Lachance of FCR.

[93] At trial, in chief, Mr. Kesler disagreed with his aunt that at the meeting they learned that David Katz had taken FCR people through the Leikin Group properties and office. That evidence directly contradicted the evidence he had given in his pre-trial affidavit which had adopted his aunt's evidence on that point. On cross, at trial, Kesler contended that he did not learn that information until after this action had commenced, and he refused to acknowledge that the evidence he had given in his pre-trial affidavit was mistaken, although he conceded the inconsistency between his two statements. When asked why he had not disclosed before trial his view that his aunt was mistaken in her recollection on this point, Kesler responded that "it was not a significant matter that was raised". That his recollection did not accord with hers was something that "didn't jump off the page at me".

[94] Kesler did admit on cross-examination that at the meeting David Katz made an overhead presentation about a possible strategic alliance between FCR and the Leikin Group, but he contended that it was in connection with the Perth Mews property. Kesler agreed that that David Katz used a PowerPoint, or overhead, presentation, entitled, "Short & Medium Term Strategic

Objectives", but disagreed that Katz presented to the Board a presentation which he had made in February to the Leimerk Executive Committee. (Katz testified that he had planned to hand out the Leimerk document at the Board meeting, but he did not have an opportunity to present it.)

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[95] Kesler agreed that the matters recorded by Mr. Jameson in the notes of that meeting about David Katz's presentation were discussed.

David Spieler

[96] At trial Mr. Spieler testified that the Board meeting came to an end when David Katz raised the possibility of the Leikin Group acquiring a property at Perth Mews together with FCR. Mr. Spieler agreed that at the meeting Katz handed out a Leikin Group/FCR strategic alliance document, but one different from that identified by other participants. He did not recall Katz going through the ins and outs of the document because the meeting came to an end over the Leimerk issue. Spieler recalled no discussion about FCR having an interest in College Square.

David Katz

[97] Katz testified that the meeting went from about 9:30 a.m. until 3:00 p.m. Although at the April 15 Board meeting Katz informed the Board about discussions he was having with FCR concerning the Perth Mews property, he acknowledged that he had not included in his PowerPoint presentation to the Board any reference to College Square. On his pre-trial cross-examination Katz testified that he believed College Square was discussed at the meeting as part of the possible strategic alliance with FCR. Elsewhere in that cross-examination, however, when asked why he did not inform the Board of the Leikin Group at that time about his discussions with FCR, David Katz replied: "It would have been premature to review anything at this stage. It's very preliminary."

[98] Yet, at trial Katz testified as follows in chief:

> A. As I started to present the material … what I found was that I was being rushed through the presentation.
>
> Q. What do you mean being rushed through the presentation?
>
> A. Well this presentation was prepared to promote a lot of discussion, I expected to spend a couple of hours on the matters that were included in the presentation, I considered them to be important matters. I was excited about the idea of presenting these opportunities because in my view as president of the corporations they were truly opportunities that I felt were in the best interest of the corporations and it would enhance the value for shareholders, and I was expecting to present material, I was expecting to

have a lot of questions, provide a lot of answers, and I recognized having been in the real estate development business for 25 years that a strategic alliance opportunity is – can be, and in fact what I was attempting to present was a very sophisticated and complex opportunity, and my primary reason in presenting it at the April 15th meeting was to try to ensure that the board had a very good understanding as to what I was trying achieve with First Capital.

Q. Now when you were – did you inform the board about your discussions with First Capital Realty?

A. I informed them - as I was making the presentation I informed the board that I had discussions with First Capital, that I had exchanged memos with First Capital and that I had specifically discussed College Square with First Capital within the context of the strategic alliance opportunity.

Q. Now you had indicated before that you felt you were rushed through the – what did you mean by that?

A. It was made very clear to me that the three board members in particular Josephine Harris, who was on the phone, David Spieler, who was attending personally, and Rick Kesler, who was attending personally, were not much interested in what I had to say, they were more interested in getting through the slides and moving on to other things. So what I felt was going to be a opportunity that needed to be fully explored and reviewed and considered by the board, it was quite clear to me that these three directors had absolutely no interest in reviewing, discussing or even considering the opportunity, and the presentation lasted a very short time. *Essentially it lasted as long as it took me to flip through the slides and convey the preliminary information about my discussions with First Capital that took place in March, and First Capital's interest in College Square and in particular the exchange of memos that I had with First Capital in March.*

Q. And after – from the comments that were – from the comments that were made by Mrs. Harris, Mr. Spieler, and Mr. Kesler could you determine what their intention was at this meeting?

A. At the point of giving the strategic alliance presentation the only thing that I could determine is that they seemed to be rather anxious to get to the end of it to move on to something else. (emphasis added)

According to Katz, when he then moved to the next item on the agenda, Leimerk, and suggested that the Leikin Group and FCR pursue discussions to purchase Perth Mews, Jameson had cautioned him about the duty concerning corporate opportunities which he owed to Leimerk as a director, and Katz accepted the caution. He said there then was a lengthy discussion in which Josephine Harris, Kesler and Spieler requested his resignation "without specifying a particular reason".

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[99] When asked on cross at trial why he had even raised a possible strategic alliance with the Board in light of FCR's lack of response to his memo of March 12, Katz testified:

> Well the fact that I hadn't received a response from First Capital didn't – it didn't dissuade me from wanting to pursue a strategic alliance with First Capital, but I felt that in order for me to attempt to further the discussion with First Capital it would've been an appropriate time for me to at least educate the board as to what a strategic alliance meant, and conceptually what I was trying to achieve with First Capital. So it was an opportune time for me to provide a high level overview to the board, and in the hope that I would get a positive response from the board and an indication from the board that they would like me to pursue those discussions with First Capital.

[100] When asked in chief at trial about why he had not advised the Board at that meeting about the $72 million DCF analysis he had sent to FCR a few weeks before Katz testified:

> Principally for two reasons, one, the estimated value was not supported by market data, it wasn't tied to an appraisal, it represented an inflated price that I intentionally provided First Capital. First Capital never responded to that number, so it was further unqualified, and I think most importantly the board and the three directors in particular Josephine Harris, David Spieler and Rick Kesler showed absolutely no interest in reviewing, considering, or thinking about the strategic alliance, so whatever discussions I was going to – I was intending to have further discussions and further information that I was intending to provide became irrelevant.

[101] Much of the language Katz used in his March 5 memo to Lachance to describe the opportunity of a strategic alliance found its way into his PowerPoint presentation to the Leikin Group Board on April 15, 2004. However, Katz did not include in the Board presentation his reference to FCR acquiring a minority interest in College Square. When asked on cross why he had left that information out of his PowerPoint presentation Katz testified:

> Well there was a good reason for leaving it out. The March 5th memo that I sent to Sylvie LaChance was responded to with their March 9th memo, and you'll note in the March 9th memo they didn't address the term of agreement provision that I had in my March 5th memo, and I guess in short I can tell you that there was no discussion that I had with First Capital pertaining to the term of the agreement as I'm sure you'll agree with me Mr. Bennett the term of the agreement provision that I put in there was a one-sided agreement, and it's not surprising that First Capital chose not to discuss that section with me, and in fact they did not. So it would've been inappropriate for me to include that in my presentation, include in my presentation something that I had received no response from First Capital on.

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Barbara Farber

[102] Farber recalled that the meeting lasted a long time, from about 9:30 a.m. until mid to late afternoon. She recalled her brother's presentation about a strategic alliance taking place in a very tense atmosphere. Kesler and Spieler wanted Katz to just move on. As to what Katz said about FCR, Farber testified as follows:

> Q. During the course of the meeting did David inform the board about the discussions he had with First Capital Realty in the early part of the – that he had prior to the meeting?
>
> A. He only – no, he spoke about a strategic alliance with First Capital, that was part of the – that was part of what he was talking about, and if that's what you mean by discussions with it, yes.
>
> Q. And did he mention – was College Square discussed at the meeting?
>
> A. Absolutely, that was our contribution to the strategic alliance.

[103] She recalled that Harris, Kesler and Spieler jumped on Katz's remarks regarding Leimerk to suggest his resignation and the meeting "was pretty uncomfortable, pretty abusive". However, she denied evidence by Kesler that she had wanted to fire Katz as CEO of the Leikin Group – "at our lowest points in any of our relationship never did I ever dispute the fact that David's main interest was in the corporation."

Andrew Katz

[104] Andrew Katz attended the Board meeting. He knew that people from FCR had visited College Square in February and that David Katz had engaged in some co-ownership discussions with them.

[105] Andrew recalled that the meeting lasted from about 9:30 a.m. until the mid-afternoon. He recalled that David Katz started making a PowerPoint presentation about a possible strategic alliance with FCR, and he referred to FCR as a shopping centre developer who would have an interest in College Square. Andrew deposed that Harris, Kesler and Spieler repeatedly interrupted the presentation and demonstrated no interest in discussing a strategic alliance which might commit the corporation's financial resources; they wanted to monetize their interests in the Leikin Group.

Grant Jameson

[106] Grant Jameson recalled that the meeting had lasted all day and that David Katz had made a PowerPoint presentation about a strategic alliance with FCR at that meeting.

[107] Jameson made handwritten notes of the meeting which recorded a PowerPoint presentation by David Katz on short and medium-term objectives for the companies. His notes stated that David Katz informed the Board that he had held "significant + ongoing discussions with First Capital" and he proposed that the Leikin Group and First Capital work together "to grow the assets of [Leikin Group] + FCR in the Ott[awa] Mkt". At trial Jameson testified:

> I remember that David Katz was explaining the concept of a strategic alliance with First Capital Realty and he mentioned that he had conducted a – that he had shown First Capital Realty College Square. I believe he'd said that he'd given them a tour of College Square. He also referred to First Capital Realty in the context Leimerk Holdings, which the Leikin Group has an interest in.

Jameson testified that no discussion took place at the meeting about negotiations or discussions of value for College Square with FCR.

[108] The notes recorded a fair amount of discussion about Leimerk's Perth Mews shopping centre, an asset in which the Leikin Group indirectly held an interest. According to Jameson's notes, Josephine Harris posed a number of questions to David Katz which prompted this exchange:

> Numerous and ongoing discussions with First Capital about what we would do together. David purports to hold on discussions with First Realty. No commitment made with First Realty. Meetings and exchange of memos with First Capital. First Capital is aware that David Katz must refer to the Board. David Katz says it is his duty to bring these opportunities forward, to receive direction from the Board to pursue it with First Capital or not pursue it. Jo Harris got the impression that David Katz has already done business with First Capital. Clarify, most of his career reporting to a Board, won't happen. As a senior manager, must take discussion and meetings to a position where there is something to report to the Board. All that management has done is put forward a framework which would be financially lucrative for both companies.

[109] Although Jameson deposed that at the meeting David Katz presented the "concept that the Leikin Group and First Capital might enter into a co-ownership agreement in respect of the College Square property", he acknowledged on cross-examination that there was no specific reference to College Square in his notes of the meeting. He gave the following explanation for that statement he had made in his affidavit:

> Well, that was my recollection. That was what I remembered, and this is encompassed in – the notes, now that you have taken me back through them – because these are quick notes, things are happening fast, and I am not a shorthand reporter…

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> When I think back about that meeting and David's presentation at the meeting, I recollect some discussion of College Square…No, it didn't find its way into my notes.

[110] On his cross-examination on the summary judgment motion Jameson testified that he did not remember whether at the Board meeting David Katz reported that he had been exchanging numbers with First Capital with respect to College Square or that he had entered into a non-disclosure agreement with FCR.

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B. Findings of fact

[111] I make the following findings of fact regarding the April 15, 2004 Board meeting of the Leikin Group:

(i) The meeting lasted most of the day. Kesler's recollection on the length of the meeting was faulty: it was at odds with the recollection of the other participants and the length of the meeting as reflected in the contents of the agenda and Jameson's notes;

(ii) David Katz made a PowerPoint presentation which included slides about a possible strategic alliance between the Leikin Group and FCR. Whether the format was the one bearing a compass (as recalled by Speiler and Jameson)[12] or the one which did not[13] does not matter; the contents of both were identical;

(iii) David Katz told the Board that he was proposing a strategic alliance with FCR to acquire commercial redevelopment opportunities and acquire property in the Ottawa area to become the dominant non-enclosed retail centre developer/asset manager within the market;

(iv) In the course of that presentation David Katz told the Board that he had had discussions with FCR, exchanged some memos with them, and had brought FCR personnel through the College Square property. I reject Kesler's testimony at trial that Katz did not mention the latter point. In his initial affidavit Kesler had adopted his aunt's testimony on that point;

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[12] Ex. 2, Vol. 1, Tab 47.
[13] Ex. 2, Vol. 1, Tab 39.

(v) During the course of that presentation David Katz also suggested that a strategic alliance with FCR would involve FCR acquiring an interest in College Square. Farber, Andrew Katz and Jameson all recalled mention of that topic, as did Harris when cross-examined on the point. I discount Kesler's recollection of the meeting; it stands at odds with that of the other witnesses. I also do not accept the evidence given by Ms. Harris in chief at trial that the issue of College Square being sold to anyone was "unthinkable". With respect, that evidence made no sense, and I give it no credence. The Board meeting took place against the backdrop of the majority of the Leikin Group shareholders seeking to sell their shares and Kesler having told Mainzer on February 27 that he was going to propose that all Leikin Group entities should be liquidated. Further, on June 29, 2004, a lawyer, Ken Prehogan, wrote to Farber on behalf of the Kesler Family and the Harris Family to advise that his clients supported the sale of College Square. So much for the "unthinkable";

(vi) The reality of the matter was that by the time of the April 15 Board meeting the Harris Family and Kesler wanted to monetize their interests in the Leikin Group and were more than willing to see College Square sold if that was what was required for them to get their money out. By contrast, the Katz Family saw the College Square asset as a springboard from which to grow the Leikin Group. Simply put, one group wanted to cash out; the other group wanted to develop a business. Therein lay their differences in views about the future of the Leikin Group's core assets;

(vii) Therein also lay the reason for the different reactions to Katz's presentation on a strategic alliance with FCR. Harris and Kesler were indifferent; they simply wanted to get their families' money out. David Katz was disappointed because he saw an arrangement with FCR as a way to build the Leikin Group. In terms of their business objectives for the Leikin Group, the two family groups were like ships passing in the night; and,

(viii) Finally, at that meeting Katz did not tell the Board that as part of his exploratory discussions with FCR he had floated an estimated value of $72 million for College Square.

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X. The fall-out from the Board meeting: David Katz resigns as the President of the Leikin Group[14]

[112] The April 15 Board meeting ended on a sour note with Harris, Kesler and Spieler wanting to end David Katz's involvement in the management of the company. Kesler and Spieler proceeded to requisition a meeting of the Boards of the Leikin Group for May 3, 2004 to review the position of President held by David Katz. Although the meeting commenced on May 3, it came to an end when two directors - Andrew Katz and Barbara Farber - left, resulting in a loss of quorum, but the meeting resumed a few days later on May 7. At that time Barbara Farber advised that David Katz was prepared to resign as President provided he received fair and generous compensation for the completion of the services to the Leikin Group he had begun as a consultant. The Board accepted his resignation and authorized Farber to conclude the final arrangements with David Katz.

[113] One of the companies in the Leikin Group, Harzena Holdings Limited, then concluded a consulting agreement with David Katz dated May 11, 2004 under which Katz would provide consulting services, including advice on a leasing strategy for College Square. The agreement was to run until the end of 2004. One provision of the consulting agreement permitted Katz to utilize all information or documentation he had acquired during the course of his employment with the Leikin Group.

XI. May and June, 2004: the relationship between the two family groups[15]

[114] By May, 2004, a clear division had emerged amongst the owners of the Leikin Group: most of the cousins wished to monetize their interests in the companies' core assets, while a minority – the Katz siblings and David Spieler – wished to continue their interests in the core assets on a going-concern basis. I think the following evidence given at trial by David Katz accurately captured the divisions within the group of cousins:

> My particular interest was in taking a business that my grandfather had created and built and taking it to a more sophisticated and more productive level.
>
> …

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[14] The evidence before the court on the summary judgment motion can be found at paragraphs 61 to 63 of the SJ Reasons.

[15] The evidence before the court on the summary judgment motion can be found at paragraphs 77 to 83 of the SJ Reasons.

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> [I]t was difficult for me to reach consensus with my sister on those particular matters. She was accustomed to managing the assets in their existing state, and there was also the reality of knowing that I had several other shareholders, cousins of mine, that seemed to be just interested in money, and weren't much interested in creating value and in perpetuating the Leikin Group name for next generation, for our children, they were more interested in money that they could put in their pocket on an immediate basis. So there were a lot of conflicting interests, it wasn't just between myself and my sister, there were conflicting and competing interests.

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[115] Those who wished to remain – the group ultimately known as the Non-Selling Shareholders – began to run numbers to ascertain the potential payouts to shareholders under various sale scenarios. For example, on May 28, 2004, Katz emailed his brother and sister inquiring how quickly they could obtain from GGFL payout information assuming a sale value for College Square of $70 million. Barbara Farber passed on the request to Gerry Levitz, and Patricia Day (and others at GGFL) began to run the numbers. Before completing their work they received a further request from Katz on June 3 who "asked that we present a third scenario for June 7 – namely selling a 50% interest in the property to Loblaws for $35,000,000." Day testified that GGFL completed "a number of calculations on hypothetical transactions", using various figures of the value of College Square provided by either Farber or Katz. GGFL did not have any discussions about how the numbers were arrived at:

> We were told – management of the company asked us to perform these calculations and provided us with figures to utilize.

Day thought that the numbers represented David Katz's estimate of the value for the property.

[116] GGFL sent the requested calculations to Ms. Farber on June 7. The calculations used an estimated market value of $70 million for College Square, a number provided by management of the Leikin Group. On June 8 and 9 GGFL sent further sets of calculations to Farber, this time using $62 million as the estimated market value of College Square.

[117] On June 9, 2004, Farber circulated an email to all Board members, including Rick Kesler, David Spieler and Josephine Harris, in advance of a June 16, 2004 Board meeting. She proposed reconstituting the Board to bring in independent directors. Farber attached two GGFL-prepared documents to her email: (i) a calculation of possible distributions to the common shareholders, and (ii) an analysis of the estimated proceeds on an assumed sale of College Square and Zena's Fisher Heights Plaza. That analysis disclosed that management was estimating the fair market value of College Square at $62 million; the other calculations performed by GGFL using higher estimates of College Square's fair market value were not circulated to the Board. Kesler deposed

that he was "shocked" by Farber's proposal to reconstitute the board with independent directors given the family nature of the Leikin Group.

[118] Andrew Katz had seen the June 7 GGFL calculations which had used the number of $70 million for one scenario, as well as the June 8 GGFL calculations which had used $62 million as the estimated value of College Square. At trial he was asked why he did not inform the other directors, at the June 16 Board, that he had seen GGFL calculations using the $70 million number. He replied:

> I can't see why I would've said something like that… I was – did I advise them? I don't think I did. I think what was presented was management's best estimate. I thought $62 – when I look back $62 seems to be a much more realistic number in light of the appraisals that were to follow, so I think management probably provided a pretty good estimate.
>
> ...
>
> Ms. Erskine this is a pretty normal process, that's why they were called scenarios, and at some point management, and particularly I would say David Katz who had a better feel for real estate values than clearly any of us on the board arrived at a number of $62, which I found to be a reasonable presentation. I've been involved in a lot of presentations to boards and you go through various scenarios. That's what these were various scenarios based on management's judgment.

[119] On June 15 Mr. Kenneth Prehogan, a Toronto litigation lawyer, wrote to Ms. Farber on behalf of Steven Kesler advising that a majority of the common shareholders and directors wished to liquidate their interests in the Leikin Group of Companies, objected to the proposed reorganization of the boards to include non-family members, and stated that "if the majority of the shareholders cannot liquidate their respective interests by a sale to other family members, or to third parties, the only alternative left is to wind up the companies". Prehogan stated that his client's preference was to work out a business solution.

[120] Mr. Prehogan wrote again on June 29, this time on behalf of seven of the shareholders who wanted to sell their shares, stating:

> Our clients support the sale of College Square and Fisher Heights Plaza, and distribution of the net proceeds to the shareholders. We understand that the concept of partial liquidation was discussed in the recent directors meeting.

Noting that Farber had not responded to his first letter, Prehogan wrote that if she did not reply by July 9, "we will assume that you intend to take the course of action you threatened, and institute legal proceedings against you without further notice or delay". Prehogan wrote to

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Farber on July 16 re-iterating his clients' wishes to sell core assets of the companies, not shares, and opposing any change in the boards of directors.

[121] The College Square property was owned by Harry Leikin Holdings (40%) and Harzena Holdings (60%). Harzena also owned several farm lands. The Selling Shareholders' initial threat in Prehogan's June 15 letter that they wished to liquidate their interests in all the companies would have seen them forgo any participation in the future development of the farm lands. By Prehogan's June 29 letter they had limited their desire to monetize their interests to the two "core assets", College Square and Fisher Heights Plaza, but given Harzena's partial ownership interest in College Square, any transaction would have to find some way to separate the farm lands from that interest. In the result, the amalgamation/Newco structure proposed by CIBC enabled that to occur.

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[122] At trial David Katz was quite candid about how he reacted to Prehogan's letters:

> A. … I didn't receive Mr. Prehogan's letter directly, but I received a copy of that letter dated June 16, 2004, wherein Mr. Prehogan advised that if the shareholders were unable to divest of their interest within the Leikin Group of Companies then the only logical alternative would be for an application to be made by them for the winding up of the corporations. So for me that was a very dramatic moment in the history of the Leikin Group, it was clearly a polarization of the shareholder groups into those that wanted to sell and those not wanting to sell, and the threat of the corporations being wound up was something that I took very seriously, and as a shareholder of the Leikin Group of Companies that was interested in perpetuating the business and perpetuating in particular the business that my grandfather had created, *I had decided that I would do everything that I could to ensure that the corporations weren't wound up and that a methodology and process could be developed that would enable those that wanted to sell their interest to sell their interest while providing the opportunity for those shareholders that were not interested in selling their interests and were interested in continuing with the business to be able to do that.*
>
> Q. And to that end what did you do?
>
> A. I made contact with CIBC representatives to commence discussions with them about the possibility of them acting as a financial advisor to the corporations because I felt at that time the corporations needed a financial advisor, and I requested the GGFL, the accountants and auditors of the corporation begin to exam a particular methodology and process that would allow selling shareholders to divest of their interest in the core assets under favourable tax conditions while enabling the non-selling shareholders to achieve their objectives of retaining their interests and not giving up control of assets that the selling shareholders were interested in divesting of their interest in that. (emphasis added)

[123] Farber described the relationship between the selling and non-selling shareholders following the Prehogan letters as "pretty toxic": "Those letters hit me like a thunderbolt, I mean this was everything I had worked for for years before, threatening to be brought to an end."

XII. July, 2004: Initiating the formal process of buying-out the selling shareholders[16]

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A. CIBC retained as financial advisor

[124] Farber testified that by June, especially following the receipt of the letters from Prehogan, it had become clear that the Selling Shareholders wanted to effect a fundamental change in the operation and ownership of the Leikin Group and were also seeking a substantial payment for their shares. She concluded that as CEO of the Leikin Group she was obligated to investigate the mechanisms which might satisfy the plaintiffs' desires to monetize their interests in College Square while, at the same time, protecting the other shareholders' interests in the corporations. So, in early July, 2004, Farber, with David Katz's assistance, contacted CIBC Mid-Market Investment Banking for assistance in formulating an approach to the differences then manifest amongst the family shareholders.

[125] David Katz acknowledged that once CIBC had been retained, they would approach him on a day-to-day basis if they had questions, required input, or needed matters reviewed. Jameson regarded David Katz as the main point of contact between the CIBC and the Leikin Group.

[126] Jameson understood that since the reorganization would affect corporate structures, his role would be to document the transactions on behalf of the corporations. Farber instructed him, and she also told him that he could take instructions from David Katz.

[127] On June 30, 2004, prior to the formal retainer of the CIBC, David Katz had sent Eric Desrosiers an email attaching "the internally prepared valuation analysis of College Square as well as Gerry Levitz's analysis of the net after tax proceeds to the shareholders on the disposition of the two assets (College Square & Zena Plaza)." The GGFL analysis had been circulated at the June 16 Board meeting and showed that the management of the Leikin Group estimated the fair market value of College Square at $62 million and Fisher Heights Plaza at $5 million. Katz's internally prepared cash flow analysis of the leases at College Square estimated the June, 2004

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[16] The evidence before the court on the summary judgment motion can be found at paragraphs 84 to 95 of the SJ Reasons.

market value of the pad leases and land leases at $71.4 million. Katz described both analyses as "hypothetical scenarios". Katz explained how he had come up with the $71.4 million number:

> The 71.5 was a fairly crude calculation that was done at the time, but essentially I took 7/11, there were 7 shareholders that had expressed an absolute interest and desire in selling their interest in College Square, 7/11, we were 11 shareholders, so 11 being the denominator of the fraction. I divided that by 50%, which is the fifth – represents the 50% ownership that the non-selling shareholders would have to retain, and I multiplied the product of that by $55 million, which I felt at the time would represent an appraised value of College Square bearing in mind that an appraised value hadn't been completed at the time, so it was my best guess as to what I felt an appraised value would be. So 7 divided by 11, taking that dividing that by 50 and then multiplying it by $55 million generated the value of $71.5 million. And once I had determined crudely, but nevertheless determined that $71.5 million appeared to be the correct value that would have to be ascribed in a funding transaction I then used valuation parameters to end up generating a value that closely approximated the $71.5 million. So as you will see from the estimate that I sent to CIBC the value is generated with $71,394,000 or approximately $71.5, very difficult to end up with an even number when you do this type of analysis, so that was as close as I felt I needed to bring it.

Josephine Harris and Rick Kesler deposed that they did not see the Katz internal, management valuation of College Square until after the litigation had started.

[128] Katz explained why he had sent CIBC his own internal discounted cash flow analysis:

> I sent – first I wanted CIBC to be informed of the information that the board had reviewed in the June meeting and in particular the analysis – the proceeds analysis on an assumed sale of College Square, and at the same time I wanted to present them with my discounted cash flow analysis because by that time, and we're talking about June 30, 2004, I had determined that in order for the selling shareholders to achieve their objectives, their stated objectives of monetizing their interest in the core assets, including College Square, and in looking at the non-selling shareholders objectives of retaining their interest and retaining controlling interest of College Square there would have to be a value ascribed to a third party funding transaction. It would have to be higher than the value ascribed in a redemption of share transaction in order to generate sufficient proceeds to cover the cost of redeeming the selling shareholders shares while at the same time enabling the non-selling shareholders to retain at least a 50% interest in College Square.

[129] Katz also explained why he did not share his $71.4 million analysis with the selling shareholders:

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> Because this was a – this estimate of value $71,394,000 was not a market supported value, it wasn't tied to an appraisal, and it was created for the specific purposes of funding the buyout of the selling shareholders. So the funding side of the transaction and all matters relating to the funding side of the transaction I felt clearly was not information that was relevant or material to the selling shareholders.

Katz testified that he did not discuss this calculation with Farber or his brother, Andy. David Katz testified that he did not inform CIBC about the discussion he had held earlier in the year "with First Capital in reviewing co-ownership principles".

[130] Eric Desrosiers of CIBC had no specific recollection of those documents which were sent to him by Katz, and he stated that he did not recall discussing Katz's internal value estimate of $71 million with the Altus Group later that summer when they were preparing their formal appraisal of College Square. When asked why he did not think Katz's estimate relevant to the appraisal process Desrosiers testified:

> David Katz…was certainly not perceived as the third party objective group that was, you know, that was retained by us to provide a truly independent value for the assets…and what I can also tell you is that in my line of business I always deal with shareholders, CEOs, that think their company or their asset is worth whatever, very often much higher than it is actually worth, so I have a tendency to take this information, review it, but then rely on true facts and external sources to conclude on what the asset is actually worth.
>
> So, to me, this is an internally generated source. I'm not sure that David Katz is a real estate professional appraiser, so from that perspective it was not listed as an external document received…
>
> I don't call it an internal valuation, this is just a piece of paper with some views on value…if there were some third party offers that would have been relevant, but this was not a third party offer, and not evidence of a serious third party discussion, and that part was captured into our representation letter that was signed by the company CEO which, essentially, says that there were not, that there were no third party offers or serious discussions with third parties that they did not provide to us, those are the facts.

[131] Farber sent the directors a July 19, 2004 memorandum advising that she had been discussing the situation with CIBC "with a view to facilitating a mutually beneficial transaction between selling shareholders and the Leikin Group" and had retained them to provide advice, subject to board approval. She noted that CIBC "had been the principal banker to the Leikin Group for the last seven decades and has an intimate knowledge of our company structure and business activities". Farber asked for dates to hold a board meeting for the purpose of reviewing and approving the CIBC's mandate. In the memo Ms. Farber also addressed concerns voiced by

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some shareholders about introducing independent directors on to the Board and the holding of the AGM.

[132] The July 9 retainer letter prepared by the CIBC indicated that the "Leikin Group is interested in exploring liquidity options for the shares of the Leikin Group owned by the Selling Shareholders", and it specified that CIBC would conduct a valuation estimate of the fair market value of the shares owned by the Selling Shareholders as well as the feasibility of financing the proposed transaction. The CIBC would also provide the companies with advice in negotiating the transaction with the selling shareholders. All Board members received this letter.

[133] Mr. Desrosiers, the lead banker for CIBC, testified that CIBC regarded the Leikin Group of Companies as its client and he took instructions on the matter from its CEO, Barbara Farber, or her consultant, David Katz. However, he did have many discussions with Rick Kesler during the engagement.

[134] The Board met on July 23, 2004. David Katz was not invited to attend this meeting. The Board authorized the Leikin Group to enter into the advisory agreement with the CIBC. The minutes of the meeting made it clear that the CIBC would be providing the corporation with advice about "liquidity options available for the shares of the Leikin Group owned by seven of the holders of common shares".

[135] Josephine Harris voted to approve the agreement with the CIBC. However, in her June, 2010 affidavit Ms. Harris deposed that at the time she was not aware that the Katz Defendants had approached the CIBC earlier in the year to act as their advisor in respect of the acquisition of shares of the Leikin Group from other family members. Although no agreement was reached between the Katz Defendants and the CIBC at that time, Harris deposed that had she known of those discussions in July, 2004, "I would not have agreed to ratify the CIBC mandate in the July 9, 2004 letter." Rick Kesler also took the position in his affidavit that by reason of its February discussions with the Katz Family the CIBC was not an independent advisor, and he would not have approved CIBC's retainer had he known at the time about the February discussions. David Spieler deposed that he, too, was not aware of the prior discussions with CIBC when he voted as a director to approve its appointment.

[136] I put no stock in those complaints by Harris and Kesler about the role of CIBC. I regard them as mere "colouring" by both witnesses: no agreement in fact was entered into with the CIBC back in early 2004; the CIBC had been the long-standing bank for the Leikin Group; and the Selling Shareholders enjoyed access to and used the services of independent legal advisors in respect of the resulting September CIBC Report. I should note that the plaintiffs made no legal

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complaint about the work performed by the CIBC in respect of its reports; they did not sue the CIBC.

B. GGFL on-going work on a transaction structure

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[137] In early July GGFL continued to work on developing an appropriate structure to respond to the wish of a majority of the shareholders to sell their shares. Levitz prepared an internal memo dated July 8, 2004 setting out his thoughts. Day testified that in the end GGFL concluded that in order to ensure selling shareholders received capital dividends, it would be necessary to sell a portion of the properties to another entity – not a necessarily an arm's length third party – to trigger the income and capital gains. Thus arose the concept of a "Newco".

XIII. The July 14, 2004 meeting[17]

A. The purpose of the meeting

[138] A meeting took place on July 14, 2004 amongst Barbara Farber, David Katz and Grant Jameson. Gerry Levitz did not attend the meeting and his colleague, Patricia Day, arrived after the meeting had started.

[139] David Katz deposed that he arranged the meeting in order to meet with Day "to review the big picture and bring her up to speed on the agreement that I am concluding with CIBC to act as financial advisor to the Leikin Group." Katz also wanted Day to start assessing what proceeds would be available to selling shareholders on a share redemption transaction. Day understood that the purpose of the meeting was to allow GGFL and the company to understand the structure of the transaction.

[140] Grant Jameson attended the meeting. He understood its purpose was to discuss the form the proposed transaction might take. Between the April 15 Board meeting and the July 14 meeting Jameson had not received any updates from management about any discussions with First Capital.

B. The state of dealings between David Katz and FCR prior to the meeting

[141] Katz testified that between March 12 and July 14, 2004, he did not have any discussions with FCR about College Square, and he did not re-connect with FCR on that property until the

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[17] The evidence before the court on the summary judgment motion can be found at paragraphs 96 to 109 of the SJ Reasons.

latter part of August. Lachance's evidence was to the same effect. I accept Katz's evidence on the point, and I find that between March 12 and July 14, 2004, Katz did not have any further discussions with FCR concerning College Square.

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C. What was discussed at the July 14 meeting

[142] Jameson took notes at the meeting. The plaintiffs relied very heavily on entries in those notes to support their claims against all the defendants. I will turn to those notes in a moment, but first let me set out what Jameson recalled about that meeting. He testified that at the meeting David Katz described a structure which involved obtaining a market valuation for the core assets, which included College Square, and then financing the liquidation of the seven Selling Shareholders' interest in the subject properties by re-mortgaging the core assets. Katz also stated that another way to finance the transaction over the long term might be for the Non-Selling Shareholders (by then the sole shareholders of the corporation which would own College Square) to look for a third party equity investor to purchase a co-ownership interest in College Square within a short time after the closing of the transaction.

[143] Jameson's notes included the following entries:

> FCR First Capital Realty
>
> 71.5 MM College Square all cash
>
> <u>6.5MM FHP</u>
>
> 78 MM

[144] As to his recollection of the portion of the discussion on July 14 concerning First Capital, David Katz testified as follows on his cross-examination at the summary judgment motion:

> I never ever presented a situation to his meeting, to the attendees of this meeting, that involved or confirmed that I had a transaction arrangement with First Capital pertaining to a partial interest of College Square. Never did I advise any of the attendees at the meeting that I had such an arrangement. There was no arrangement with First Capital and I never suggested it and I never advised any of the attendees that there was such an arrangement.
>
> …
>
> [I]n order for a share redemption transaction to take place, and in order for the objectives of the selling shareholders to be achieved and the non-selling shareholders to be achieved…it would be important and essential that a funding arrangement with a third party for a partial interest in College Square be transacted at a rate that, in my view, had

> to be in the vicinity of 71-and-a-half million dollars…to enable the non-selling shareholders to achieve their objectives of retaining at least a 50 percent interest in the property and generating sufficient proceeds to cover the costs of the share redemption transaction.

Mr. Katz testified that he made his reference to First Capital in the following context:

> And what I was attempting to convey at the meeting, and I think I conveyed it very clearly to all of the attendees, I used First Capital as an example of the type of corporation that the non-selling shareholders would have to attract in order to generate a transaction that would achieve their objectives…I could have easily said RioCan…I could have said a number of companies. But the type of company that had the most meaning for somebody like Grant Jameson within the context of the Leikin Group was First Capital, and I used them as an example. In no way did I suggest to the attendees of this meeting that there was a transaction that was either discussed or agreed to with First Capital.

At trial Katz testified:

> Q. And what did you say about First Capital Realty?
>
> A. I used First Capital – I referenced First Capital as an example of a real estate operating company that I felt would be inclined to want to purchase an interest in College Square. I thought that First Capital was a good example, represented a good example of the type of a third party that we would have to transact with and that was for a few reasons, but primarily because First Capital was the type of company that was purchasing assets such in the same class as College Square. As I mentioned quite a while back, First Capital was purchasing in the order of $500 million to $600 million of assets on an annual basis, the assets that they were purchasing primarily consisted of non-enclosed shopping centres that were food anchored, and College Square fit that description. There were several other companies that were also interested in acquiring this class of asset and I could have easily named several others that would have been interested as well, but I felt that First Capital was a good name to use, it was a good example to use because First Capital had been referenced in the April 15th meeting, it was known based on what I advised the board that First Capital had expressed an interest in College Square, and was a – represented a very good example of the type of company that would be – that would be interested in purchasing a partial interest, so they were used as an example.

[145] As to his discussion at the meeting of the $71.4 million calculation he had made Katz testified:

> I advised the attendees of the meeting that I had come to the conclusion that a – in terms of our funding objective that a value, a higher value would have to be ascribed in a third

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> party funding transaction to generate sufficient proceeds to satisfy the selling shareholder requirements while at the same time enabling the non-selling shareholders to retain their interest in College Square. And I put forward the same analysis that I began to put forward with CIBC, which was informing the attendees of the meeting that in my view $71.5 million would have to be ascribed in a funding transaction and I indicated that that difference in – the difference in that ascribed funding value of $71.5 million, and what I felt the share redemption value would be that difference would assist and it would be – in fact would be required in order for the non-selling shareholders to retain their 50% interest. So if you recall the formulation that I had given you several minutes ago of 7 divided by 11, divided by 50, multiplied by 55, which generated the $71.5 million is what I presented to the meeting.

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[146] David Katz saw nothing in Jameson's notes inconsistent with his recollection of what he had discussed at the July 14 meeting. Under cross-examination before trial he testified that the exchange of information he had undertaken with First Capital earlier in 2004 "had absolutely nothing to do with the information that I was presenting at this July 14th meeting."

[147] At his pre-trial cross-examination Jameson testified about his recollection of that portion of the discussion:

> What this is in my recollection are notes of a conversation David Katz was having with Barb and I'm sitting in the room and I'm writing things down. This conversation was in my recollection predicated on what might happen if they were to do this deal. In other words, what might the upside be, what's in it for them to do this deal, why would they do this?

At trial Jameson testified:

> Q. All right, what was your understanding of the context of him using the First Capital name and those corporate names?
>
> A. My understanding was that this – these names were used as an example of the type of investor who might come in and be interested in purchasing a co-ownership interest in the shopping plaza.
>
> Q. Okay, were there any references in the discussion as you understood it to any deal with First Capital?
>
> A. No.
>
> Q. To any ongoing discussions with First Capital?
>
> A. No.

Q. To any negotiations about these terms with First Capital that had taken place?

A. No, not at all.

[148] At a later part of his notes Jameson wrote: "Why - FCR paid a precedent setting number of $71.5 million" and "Co-ownership Agt. w FCR – as if it was a 50/50 split". He testified on pre-trial cross-examination:

> I understood this was an example of the type of transaction which the remaining shareholders might be able to do after they acquired the property. You know, in six months or some additional period of time, there might be an upside…[M]y recollection is that this was not a discussion of what was going to happen; this was a discussion of what might happen.
>
> …
>
> *I didn't really see this as the exploitation of a corporate opportunity, certainly not at that time I didn't see that, and I viewed the reference to First Capital as an example.*
>
> …
>
> I thought [David Katz] was saying that some time in the future it might be sold at $71.5 million…you know, whether David thought that he could sell the property for $71 million or $80 million or any other number to me was pie in the sky.
>
> You know, I looked at the transaction as being one of having a real live third party proper valuation for the property and that was the number which was going to be used. And that would be the relevant number, what happened in the future is in the future.
>
> …
>
> [I]t was very much framed as someone like First Capital. It was not framed in my recollection as First Capital. (emphasis added)

[149] At trial Jameson offered the following evidence on that notation:

> Q. And on page 520, it's about half way down the page, there's a note that says, begins with the word why?
>
> A. Yes.
>
> Q. All right, and tell us as well as you can recollect what that note was about?
>
> A. Well that note was about why would this – why would this take place, why would – why would First Capital pay $71.5 million for the property, and it would only take place

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if it was a precedent setting number, it was expressed as if it would be something extraordinary in the circumstances of the day.

Q. And if you go further down the page, page 520, there's a note that says – it's the second last item, it starts with "Do Mez" and then someone has put in square brackets Mezzanine financing, do you see that?

A. Yes.

Q. All right so what – as well as you can recollect what led you to – what discussion led you to write that note?

A. Well my recollection is that David was explaining how the transaction might unfold with the purchase of 7/11 interest in College Square and the transaction would be one where the selling shareholders were sold out, were paid out, and the source of the funds to pay the selling shareholders would be through the use of a Mezzanine mortgage or interim financing by way of a mortgage, and the transaction would be closed on the basis of mortgage financing. And then at some point in the future the mortgage financing, the Mezzanine financing would have to be taken out by some sort of long term financing, and his expression of his – his expression of this First Capital Realty type transaction was an expression of one which might occur, and might provide the financing to take out the Mezzanine financing, so that was the reference to the Mezzanine mortgage.

[150] In his notes of that meeting Jameson also wrote: "First Capital Properties to have ability to deal with interest and assets so First Capital Properties has no public shareholder issues". David Katz had mentioned those names. That notation spawned the following exchange on the pre-trial cross-examination of Jameson:

Q. First Capital Properties is a subsidiary of First Capital Realty.

A. That's what I understood.

Q. That's a little more detailed than someone writing First Capital Realty, isn't it?

A. I agree and I was a little surprised with that level of detail at the time.

Q. Yes. That didn't trigger any alarm bells for you?

A. Well, it didn't say to me that there was a bought deal or that there a done deal. I mean, it didn't say that at all because the discussion was very much one of speculation.

You know, the line, "Why First Capital pays a precedent setting number of $71.5", I mean this to me again was something expressed as something which would be extraordinary and not something which was by any stretch of the imagination certain.

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At trial Jameson testified about that portion of his notes:

> Q. And did you ask any questions as to how we're now talking hypothetically, but we're talking about how we're going to structure the deal to fit not just with FCR, but how their structure might work for them with one of their subsidiary companies?
>
> A. I did not ask that question, again because it was clear to me that this was discussions of what might be, it was in the nature of a wish list, something which might occur in the future. I attributed this level of detail to the fact that I'd known at that point that David Katz was a very detailed thinker. He was clearly thinking this scenario through to the ultimate end, and I recalled that First Capital Realty had been mentioned previously in April. So that's how I reconciled this statement in my own mind at that time.

[151] Elsewhere in his notes Jameson wrote: "Be sure the structure fits with and FCR needs". On his pre-trial cross-examination Jameson was asked:

> Q. Again, are you telling me this is just a hypothetical?
>
> A: I can't explain that.
>
> Q. I mean, this is a specific company being referred to.
>
> A: Correct.

[152] At trial on cross it was suggested to Jameson that he knew about FCR's interest in acquiring College Square because at the time of the July 14 he had in his possession two of the March memoranda containing the co-ownership discussion between Katz and FCR. Jameson testified:

> Q. Are two memoranda from or related to First Capital Realty and College Square?
>
> A. Yes.
>
> Q. One is from Davis Ward Philips and Vineberg.
>
> A. Yes.
>
> Q. Dated March 9, and one is from Mr. Katz to Sylvie LaChance dated March 12, 2004, correct?
>
> A. Correct, yes.
>
> Q. You had these in your possession obviously?
>
> A. I did.

Q. And is it possible that you had these in July 12th when you were being asked to set up the meeting in Montreal on July 20?

A. Yes, it is possible.

Q. All right, so you had these memoranda or it's possible you had these memoranda, you attend this meeting on July 14th, where there's a discussion about First Capital buying an interest?

A. Well sir on July 14th going into that meeting I had no knowledge of first - of any interest which could be purchased by First Capital, so I had the memoranda, I think because I think I may have picked them up certainly at or after the April meeting, but I wasn't aware of them at the July 14th meeting.

Q. I'm sorry you just go back there, did you say you got them at the April 15th board meeting?

A. Well I didn't – I don't know where they came from. I don't think I had them before the April meeting, I certainly had them at the time they were sent to Mr. Cohen in a file, so.

Q. So somewhere between April 15, and July 20 you came into the possession of these memoranda's?

A. Yes.

[153] Farber recalled Katz mentioning the $71.5 million as a "funding number":

A. It was a funding number that he had come up with in order to determine what it would take for us to maintain our 50% and enough money left over to be able to buy the remaining – the selling shareholders.

Q. And during the course of the meeting did David refer to First Capital Realty?

A. He did – it – the way David always spoke to me, always still does talk to me, is he makes sure that I understand, that's the way he spoke to me, and spoke to Grant or Pat. It would've been a name that I would've heard, obviously Grant would've heard, I'm not sure that it would've meant anything to Pat, I don't know whether she'd heard of them before, but it was by way of example, so that we would understand that there was someone actually out there who could in fact fund that kind of deal.

At trial in chief Farber testified:

Q. And did David refer to a figure of $71.5 million?

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A. He did, it was –

Q. And did he expect –

A. I'm sorry, it was a funding number.

Q. I beg your pardon?

A. It was a funding number that he had come up with in order to determine what it would take for us to maintain our 50% and enough money left over to be able to buy the remaining – the selling shareholders.

Q. And during the course of the meeting did David refer to First Capital Realty?

A. He did – it – the way David always spoke to me, always still does talk to me, is he makes sure that I understand, that's the way he spoke to me, and spoke to Grant or Pat. It would've been a name that I would've heard, obviously Grant would've heard, I'm not sure that it would've meant anything to Pat, I don't know whether she'd heard of them before, but it was by way of example, so that we would understand that there was someone actually out there who could in fact fund that kind of deal.

On cross Farber acknowledged that on her examination for discovery she had stated that she did not remember specifically what had happened at that meeting and she could not remember whether information she now had about the July 14 meeting "is what I remember or what I've read or what I've heard." She affirmed that evidence at trial.

[154] Patricia Day of GGFL testified that she recalled no discussion regarding First Capital during the portion of the meeting she attended: "I do not believe First Capital was discussed in my presence at that meeting":

Q. You were present during the discussion regarding the amalgamation and needing the structure to fit with a purchase by a third party?

A. We had a discussion that a third party purchaser would likely need a high adjusted cost base on the property, and that we would try and do a structure that would allow that.

Q. And the structure needed to fit with what First Capital Property needed.

A. No.

I accept Ms. Day's evidence that FCR was not discussed in her presence at the portion of the meeting she attended.

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[155] Andrew Katz, who did not attend the meeting, deposed that in June and July, 2004, he was not aware that David Katz had prepared his own analysis of the net operating income stream of College Square nor that GGFL had prepared a variety of calculations on hypothetical transactions involving the sale of College Square.

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D. The evidence from the plaintiffs about that meeting

[156] Josephine Harris deposed as follows about what the plaintiffs took from the notes made by Mr. Jameson:

> I believe that at the time that Grant Jameson recommended the transaction, at a value of $55,000,000, to me and the other directors, he was in possession of information from David Katz regarding First Capital Realty's interest in College Square and the $72,000,000 valuation placed on that interest. Grant Jameson received this information on July 14, 2004…

Later in her affidavit Ms. Harris stated that this information indicated a proposed sale of an interest in College Square to FCR at a price in excess of $72 million. On cross-examination before trial Ms. Harris acknowledged that the assertions she had made in her affidavit were based solely on her reading of Jameson's notes of that meeting – she was not present at the meeting and had not asked Jameson what had transpired at the meeting.

[157] In his affidavit Mr. Kesler (who also was not present at the meeting) deposed as follows:

> At a meeting on July 14, 2004 attended by Barbara Farber, Grant Jameson, Gerry Levitz and Patricia Day, David Katz disclosed that First Capital Realty was interested in purchasing an interest in College Square at a value that exceeded $70 million.

[158] Kesler also agreed that his only source for this information was his interpretation of the notes prepared by Mr. Jameson of that meeting. At the same time, on cross before trial, Kesler stated that he and other directors "always disputed" the accuracy of the summaries Jameson prepared of Leikin Group board meetings.

[159] David Spieler deposed that even though in July, 2004, he had identified himself as a non-selling shareholder, David Katz did not tell him "that he was negotiating a co-ownership agreement with FCR with a potential value for Collge Square of more than $70,000,000". Had he been aware of that information, Spieler deposed, "I would have disclosed it to the selling shareholders and the Board." Spieler testified that he regarded Mr. Jameson's notes as revealing that two values for College Square were in play and that the deal with the Selling Shareholders "was known to be a fraudulent, illegal one".

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E. Findings of fact

[160] At the July 14 meeting David Katz obviously did not pull FCR's name out of thin air. No doubt Katz mentioned FCR because earlier in the year he had engaged in some exploratory discussions with Lachance about College Square in which Lachance had shown sufficient interest that she was prepared to spend some time in March discussing co-ownership principles with Katz and also to engage her lawyer at the Davies firm in that process. That information had been disclosed by Katz to the Board at the April 15 meeting. That said, by the time of the July 14 meeting Katz had not received any response from FCR to his trial balloon of $72 million in his March memo. In fact, the trail with FCR had gone cold following the exchange of the co-tenancy memoranda in the early part of March. From his own internal DCF calculations Katz thought that $71 million was the amount needed to "break-even" on a buy-out of the Selling Shareholders which would leave the remaining members of the Leikin family in control of the College Square asset. From Katz's perspective, following the receipt of correspondence from Prehogan in June, his main focus had been on figuring out a way to finance the buy-out of his cousins who wished to sell their shares.

[161] On his cross-examination at trial it was suggested to Katz that by the time of the July 14 meeting, FCR was "the intended purchaser at that point of time". Katz disagreed with that suggestion. He testified:

> Well given the fact that I had had no discussions with First Capital between March the 12th, and this date I don't know how I could've put forward a scenario to the attendees at this meeting that would suggest that First Capital had expressed to me a desire to purchase a partial interest in College Square at $71.5 million. It's just – it just didn't happen, and for me to have communicated something that didn't happen to the attendees at that meeting would've been totally inappropriate.

I accept Katz's evidence on that point. The context in which the July 14 meeting took place was that the trail with FCR had gone cold. That was the backdrop against which Katz went over those numbers with the participants at the July 14 meeting. I find that Katz did not tell those at the July 14 meeting that he thought he could do a deal with FCR at that price. Katz would have had no reasonable basis for making that assertion, and Katz struck me as a sophisticated business person experienced in the real estate field who would not go out on a limb representing what he could achieve without some reasonable basis for so doing.

[162] I also accept the evidence of Jameson that he did not understand Katz's references to FCR as amounting to assertions that a deal probably could be done with FCR for an interest in College Park. That Jameson did not learn at the July 14 meeting that FCR had, or was willing to, cut a deal for an interest in College Square was apparent from a July 27 email Jameson sent to

one of his partners, John Naccarato, which described the developing shareholder buy-out transaction structure as one in which there might be an "as yet unknown equity investor". Also, the evidence disclosed that Jameson was a corporate counsel who was alive to the issue of the permissible pursuit of possible corporate opportunities. Back at the April 15 Board meeting Jameson had cautioned David Katz against pursuing discussions regarding a Leimerk property which could be perceived as exploiting a conflict of interest. At the July 14 meeting Jameson did not see a similar problem. I accept Jameson's evidence about this meeting.

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XIV. July 15 to September 1, 2004[18]

A. The continuing work of the Lawyer Defendants

[163] On July 19 David Katz emailed Jameson: "I need to develop a co-ownership framework that would be suitable for me to propose to my 'white knight' candidates, with someone within your firm that is skilled in commercial real estate and co-ownership arrangements." Jameson testified that he did not know to what "white knight" candidates David Katz was referring. Katz testified that he was referring to eventual prospective purchasers who would assist in the financing of the share redemption transaction.

[164] On July 20 Jameson sent an email to one of his colleagues at another Ogilvy Renault office, Arnold Cohen. He attached "some documentation with respect to the Leikin Group of Companies". The attachments included Rita de Santis' memo to Sylvie Lachance dated March 9, 2004 discussing issues concerning a co-ownership with the Leikin Group for College Square, as well as David Katz's responding memo of March 12 dealing with the "fundamental principles" for a co-ownership arrangement with FCR for College Square.

[165] On July 21 Jameson attended part of a meeting amongst Cohen, Katz, Desrosiers and Farber to discuss a corporate transaction structure, but there was no mention at that meeting of any negotiations or agreement with FCR. In his notes of that meeting Cohen wrote:

> Potential spread between value for financing purposes which wd. potentially be more than the FMV to be determined
>
> …

---

[18] The evidence before the court on the summary judgment motion can be found at paragraphs 110 to 133 of the SJ Reasons.

> Transaxn will not permit a dragalong if there's a subsequent sale for a higher or lower value; transaxn will be for a fixed amt.

[166] On July 23 Jameson provided Farber with a memorandum summarizing the law respecting the winding-up of a company. He also sought to involve one of his tax partners, John Naccarato, to help structure the co-tenancy arrangements with an outside equity investor "once the dust settles on a proposed transaction with CIBC", an apparent reference to the proposed transaction with the Selling Shareholders.

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[167] Jameson understood that Pat Day was organizing the transaction structure. On July 26 Pat Day sent Farber and David Katz an email, copied to Gerald Levitz and Jameson, which included an attachment detailing the funds required to do the proposed transaction. At trial Day explained the larger context in which she performed these and some subsequent calculations:

> When we had done the calculation at July 26th we had determined there was a net cash flow shortfall when we based the selling to a third party at $71.5 with an ascribed value of $62 million for College Square. So now he's asking the question what value would we have to ascribe to College Square and to Fisher Heights Plaza in order to get a break even on the cash flow.
>
> …
>
> Well these were just calculations as I said in order to determine the cash flow that would be needed.

[168] Schedule 1 to Day's July 26 email noted, "Buy-out of 7/11 Shareholders", based on a buy-out of the Selling Shareholders at a price of $62 million for College Square. Then, when calculating the tax on a sale to a third party, the schedule used a "total gross sales price" for College Square of $71.5 million. Elsewhere, on Appendix B, Ms. Day used $62 million for the proceeds of the disposition of College Square. Ms. Day testified that GGFL was asked to prepare calculations using those numbers. David Katz testified he provided Ms. Day with that number:

> If I believe that 71.5 was, represented probably the maximum that we could expect in a funding transaction.

[169] Jameson did not recall receiving this memorandum. At this point in his pre-trial cross-examination Jameson was asked whether he was really suggesting that a re-sale transaction of an interest in College Square was only speculative in July, 2004, and Mr. Jameson answered:

> Yes, that's what I knew. I didn't have any other knowledge other than what I said to you about my understanding of the reference to First Capital in that meeting of July the 14th.

> …
>
> I will presume that I received this e-mail, but I can tell you that for all matters relating to the value of the property, the numerical analysis, I was paying no attention to this material.
>
> I would not have reviewed this document. I would not have gone down and looked at this document and said, "There's something here that says $71.5 million"…I am not involved in financial analysis. I took comfort in the fact and I relied on the fact in this transition that the value of the property for the purpose of the transaction would be determined by a professional appraiser and to me, that was the closing element….

I accept that evidence. It reasonably reflected the role which Jameson was playing as counsel to the corporation, and it is consistent with what I have found to be the nature of the references made to FCR at the April 15 Board meeting and the July 14 advisors' meeting.

[170] In her July 26 email Day raised an issue about land transfer tax. Jameson sought advice on the point from one of his partners, John Naccarato. In his July 27 email to Naccarato explaining the background to the question, Jameson indicated that the Leikin Group of companies were trying to arrive at a structure which would distribute value to the Selling Shareholders "leaving the 4 remaining shareholders (plus *some as yet unknown equity participant*) to own the Core Assets after the transaction is complete".[19] He noted that the structure under discussion would see "the 4 remaining shareholders take the Core Assets in some form of Newco with an outside equity investor. The co-tenancy agreement would involve the outside equity investor".

[171] David Katz deposed that in late July, 2004 he began to investigate financing options under which funding could be secured to buy-out the interests of the Selling Shareholders while the Non-Selling Shareholders maintained control and management of College Square. GGFL provided him with analyses of how much money would be required to fund such a transaction.

[172] David Katz also retained Fredric Carsley, a veteran Montreal real estate lawyer, then at the Mendelsohn firm, to provide legal advice on co-ownership issues. A specialist in commercial real estate, Carsley learned that Katz had been engaged in discussions with FCR, and Katz wanted his advice on the business and legal aspects of a co-ownership agreement. From a memo to file which he had prepared based on his discussions with Katz in early August, Carsley understood that Katz had formed the view, based on his discussions with FCR to that point of

[19] Emphasis added.

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time, that a possibility existed of purchasing his cousins' interest in College Square at a cap rate higher than that at which FCR might be prepared to purchase an undivided interest in that property. As Carsley recorded it:

> Owing to this spread, the two transactions are to remain independent of one another, but the FCR transaction clearly has to be made conditional upon the Cousins Group transaction being satisfactorily completed in favour of the Katz Group.

Jameson testified that prior to the initiation of this action, he had not heard of Carsley.

[173] On August 18, 2004 David Katz prepared a memo to file in which he wrote:

> Rick Kesler had a brief conversation with Gerry Levitz yesterday to obtain Gerry's opinion as to the benefits of the CIBC process. In addition, Rick asked Gerry what he thought would happen if the proposed transaction was unsuccessful.

That same day Carsley talked with David Katz and, according to the memo of the conversation which Carsley prepared the next day, Katz was of the view that FCR was looking to College Square "as a trophy property" and he thought FCR would be prepared to "aggressively invest" in such a property.

B. The state of dealings between David Katz and FCR: July to October, 2004

B.1 Prior to the August 25 meeting with FCR

[174] David Katz prepared a July 22 memo to Sylvie Lachance outlining his thoughts on key co-ownership issues. It was marked "Draft: not for circulation". No evidence was put before me that Katz ever sent the memo to Lachance.

B.2 The August 25 meeting

[175] A meeting was held on August 25, 2004 attended by David Katz, his lawyer, Fred Carsley, Sylvie Lachance, from FCR, and FCR's counsel, Rita de Santos.

[176] By this point of time Lachance had received approval from her superior, Mr. Dori Segal, to proceed with discussions concerning College Square. She called it an "exploratory process". Neither she nor Mr. Segal were authorized to transact on a specific price without going to senior management, and they did not approach senior management in 2004 about the College Square property. However, Lachance testified that she must have mentioned to Segal "at numerous occasions during the year that I was expecting low 70 million would be approximately the price that the asset would go for".

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[177] Carsley's notes of the meeting disclosed that the parties discussed numerous issues relating to a co-ownership structure for College Square; according to his testimony, "that was the entire discussion." Carsley prepared a memo about the meeting the day after it was held. In that memo he wrote:

> Prior to the meeting, David and Sylvie had a private discussion which was then relayed privately between Sylvie and Rita with regard to certain matters involving the buy-out of existing shareholders with the ownership group and its effects. In a private discussion with David after the meeting, he expects the CBIC World Markets evaluation of the property to come in at somewhere around 55 million, whereas First Capital has already agreed to a value of $71 million for which they would be purchasing a share.

Carsley testified that he was not party to the conversations engaged in by Lachance, and the information he obtained about a value of $71 million came from a post-meeting discussion by the elevators with David Katz who had told him that Ms. Lachance "was amenable to that type of pricing in the event that a transaction could be structured." Carsley stated that he was not present for any discussions at which the value of the investment or prices that would be paid were talked about with FCR. Carsley understood from Katz that the non-selling shareholders needed to find a buyer willing to pay about $71 million if the Selling Shareholders were to be paid out with the Non-Selling Shareholders maintaining control.

[178] David Katz testified that the purpose of his private discussion with Ms. Lachance was "to bring her up to speed on the reasons why there might be a potential opportunity for First Capital to purchase a partial interest in College Square which was completely and fully predicated on a re-organization of the company for the purpose of enabling selling shareholders to redeem their interest in the corporations that own College Square." At trial Katz testified:

> A. The purpose of that discussion was for me to make sure that Sylvie LaChance understood why I had requested the meeting. She needed to understand that the conditions surrounding the meeting were very different than when we had first discussed co-ownership principles in March of 2004. March 2004 was a period of time where First Capital was being provided an exclusive opportunity to enter into a strategic alliance with Leikin Group for the purposes of pursuing development opportunities within greater Ottawa – the greater Ottawa area. Sylvie needed to understand that in August at this time we were looking to sell a partial interest in College Square because of our need to fund a share redemption transaction, and she needed to understand that this was no longer an exclusive opportunity that was being provided to First Capital, but conveying to her that we would absolutely have a need to sell a partial interest of College Square to a third party for the purposes of funding that transaction, but that we could not discuss or get involved in the negotiation of a purchase and sale at that time because the internal matters of Leikin Group needed to be regulated first. We needed to resolve and reach consensus

amongst shareholders within the Leikin Group in order for us to then proceed to look for funding for the transaction. So at that time Sylvie LaChance understood that notwithstanding the fact that we were discussing co-ownership principles for College Square it was not a discussion that related in any way to a – to actual terms and conditions of a purchase or sale of College Square. It was to get back in to a discussion to understand if we could coexist within a co-ownership framework in the event that First Capital ended up being successful in acquiring an interest in College Square at some future date.

Q. Did you discuss the amount of the funding required?

A. Yes, I advised Sylvie that we would require $71.5 million, and I explained to her because I knew that that would come as a – as quite surprise that because $71.5 million was not representative of the prevailing market conditions and I advised Sylvie that the $71.5 million was not tied to an appraised value, it wasn't tied or supported by market data. It was nothing more than a value that I had determined we needed in order to assist us in covering the costs of the share redemption transaction while enabling the non-selling shareholders to retain a 50% interest. So it was important that she understood that, had I not told her that she wouldn't have been able to make any sense at all of $71.5 million.

Q. After you gave that explanation or made that explanation to her did she have any reaction?

A. No reaction at all, she took note of it, and we went back in to the general meeting.

Q. Did she say anything to you?

A. She didn't respond in any way.

[179] Lachance testified that First Capital had not agreed to buy College Square at this juncture, but was having discussions with David Katz with a price floating around the low 70s. Indeed, Ms. De Santis' notes of the meeting record: "property worth $70MM."

[180] In her notes of the meeting Ms. De Santis wrote: "4 shareholders are buying out 7 shareholders." De Santis understood that "there was going to be a prior transaction so that ultimately we would get a 48% interest in College Square":

But there was a prior transaction whereby the family – I didn't know who the shareholders were, that we would be dealing with ultimately owned 4 of the 11 shareholders who owned the property.

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Lachance knew a family reorganization would have to take place before the property could be sold to FCR, but she was not told about any of the details of the intra-family discussions, including the price of any sale. De Santis' evidence was to the same effect – she was never interested in knowing what David Katz was going to do with his family. Lachance was aware that any deal with FCR could not proceed until the family arrangements were finalized. She described the meeting as "an exploratory" one: "Rita De Santis had provided a general outline of principles guiding the partnership, and we sat to explore these issues".

[181] Ms. De Santis recalled that at the meeting they discussed a timeline under which an agreement amongst shareholders would be reached by the end of September or early October, and that agreement would be subject to David Katz arranging the financing to buy them out. David Katz stated on cross-examination that he might have been "too exuberant and maybe too optimistic in terms of timeline…Perhaps I was naïve enough to believe that the negotiations between the corporations and the selling shareholders would be wrapped up fairly quickly and I was wrong."

[182] On cross-examination before trial Carsley was questioned at some length about the portion of his August 26 memorandum where he wrote: "…whereas First Capital has already agreed to a value of $71 million for which they would be purchasing a share", information which he received from David Katz. The following exchange occurred:

> Q. And you put down here when you say "whereas First Capital has already agreed to a value of $71 million for which they would be purchasing a share", I suggest to you sir, that is not what he said to you and it was not part of that discussion?
>
> A. I can't tell you any more than what is here. I can tell you that what my understanding of what was being relayed was that given that Mr. Katz had done a financial analysis or had done at least some rough numbers.
>
> *And knew, and had a reasonable expectation of what he was going to have to pay to the departing shareholders. And he knew the debt levels of the property and the leveraging of the property at the time. And how much money he was going to have to raise in order to provide the liquidity necessary. That's if First Capital or anybody else who was going to look at this was not prepared to consider values at those levels, there was really nothing more to talk about.*
>
> *All of the discussions regarding co-ownership, buy, sells, and shotguns and carrying interest are all very interesting. But if you can't put the numbers together, you are basically wasting your time…*

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> Q. And – so that he never would have said as you marked down here, that – and I'm sure you don't mean that First Capital had already agreed to a value of $71 million? There was no agreement as to the $71 million?
>
> A. What I said and as far as I'm concerned what he meant, is that a deal could not be made from what I understood at less than the value of $71 million.
>
> But having said that, there was no meeting of the minds so to speak as to an agreement where two parties were bound to one another or had any rights with respect to one another…If there was already an agreement, there would not be the necessity of an agreement in principle. To put it bluntly, we were far from there…So in my mind there was never an agreement at that point. (emphasis added)

Katz testified that he had not told Carsley that FCR had agreed to a value of $71 million for purchasing an interest in College Square. He said he could not have told Carsley that because "I had no indication from First Capital that that was the case".

[183] On cross-examination on the summary judgment motion it was suggested to David Katz that in August, 2004, he had discussed with Lachance an actual sale of an interest in College Square. Here is the ensuing exchange:

> Q. Well, you're discussing an actual sale of an interest in the property?
>
> A. No, I was not, Mr. Bennett. What I was discussing with First Capital in August 04 were co-ownership principles. And what First Capital was aware of at that time, was my need to be able to fund a share redemption transaction. And they were aware of the fact that I would need a value ascribed to College Square in a third party transaction that would be what I felt at the time, would be in the low 70 million range. That's what was known. There was no agreement being transacted with First Capital at that time, there was no contemplating that an agreement would be transacted at that time…It's inappropriate for anybody, you or anybody else to characterize that August timeframe as a timeframe that involved First Capital and myself and perhaps other non-seller shareholders being in a transaction mode. We were most certainly not in a transaction mode…
>
> …
>
> It's very important to understand that any discussions we had about co-ownership were not on the basis that there was a transaction that we were about to engage in, it was on the basis that at some point in time given certain circumstances and conditions precedent, there may have been an opportunity for First Capital to purchase an interest in it.

Later in the transcript of that cross-examination of David Katz the following exchange occurred:

Q. You were discussing a co-ownership arrangement in October 2004 with First Capital?

A. I was discussing co-ownership principles.

Q. Okay.

A. And co-ownership framework. That does not constitute a sale, Mr. Bennett.

[184] Katz testified that he did not tell Farber, Andy Katz, Jameson or Day about the August 25 meeting he had with FCR. When asked why he had not, he responded:

> Because this – the discussions that I was having with First Capital in my view were very preliminary, it didn't involve – it wasn't – we weren't in a transaction mode. I was trying to satisfy myself first and foremost that co-ownership principles could be arranged in a manner that both sides could live with. I needed to understand that a co-ownership framework could be developed, and until I satisfied myself there was certainly not much point in involving my brother or sister.

Farber confirmed that Katz had not told her about the August 25 discussions; so too did Andrew Katz.

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B.3 After the August 25 meeting

[185] Following the August 25 meeting Rita de Santis prepared a revised memorandum outlining various issues concerning any co-ownership structure between FCR and the Leikin Group both for College Square and other properties they might co-own. The memo was sent to David Katz on September 8, who returned a marked-up copy to Sylvie Lachance on September 20, offering to meet with her to discuss it. In late August and early September, the Leikin Group sent FCR some information on an environmental issue at College Park, as well as a summary of the terms of two key leases. Lachance testified that she "was expecting that we could finalize something during the fall, I started inquiring and asking for some summary of documents":

> At this preliminary stage, I deemed it important to know what were the issues in the main two leases. So this is the beginning of the due diligence.
>
> …
>
> This is all part of preliminary dealing towards concluding, if possible, a transaction that will be followed by a complete due diligence process…

[186] Discussions between FCR and the Leikin Group did not proceed any further at that time. In mid-October Rita de Santis received a call from Fred Carsley who informed her "that for

reasons relating to conflict of interest, this file is on hold for at least 1 month." Lachance explained:

> There was a point in time where the deal died, disappeared, it didn't get finalized…
>
> [A]t a point of time in the fall, the deal could not be finalized, the deal could not happen. It simply disappeared, and the deal was not there. It was my understanding that the family reorganization had not occurred, had not happened, and that was it. There was no transaction that could be made. So everything suddenly disappeared. We didn't have a deal any more, and, unfortunately, we didn't finalize a transaction that fall.

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[187] Ms. De Santis did not recall the details of the call from Mr. Carsley; she simply understood that David Katz needed more time to settle with the selling shareholders. De Santis had no further involvement in the matter until the middle of May, 2005, when FCR learned about the RBC Capital-managed bid process for College Square. She had no discussions with the Leikin Group between October, 2004 and May, 2005.

[188] On his cross-examination on the summary judgment motion David Katz testified that he had not informed his fellow shareholders in the Leikin Group about his discussions with First Capital:

> Q. You didn't advise them that First Capital would – the co-ownership principles you were discussing related to co – to First Capital taking an ownership interest in College Square?
>
> A. That would have been terribly misleading.
>
> Q. …[Y]ou didn't disclose to the selling shareholders any of the discussions you had with First Capital from July 14th through October 12th, did you? You didn't disclose them to the selling shareholders?
>
> A. No, I did not.
>
> Q. …And you didn't disclose that First Capital had an interest in acquiring an ownership interest in College Square?
>
> A. There wouldn't have been a need to disclose something that the selling shareholders were already aware of.
>
> Q. Well, they weren't aware of it.
>
> A. Yes, they most certainly were, Mr. Bennett.
>
> Q. All right. Where did you make them aware of it?

A. April 15th, 2004 Board meeting.

B.4 Findings of fact

[189] Let me repeat some of the findings of fact which I made in my Summary Judgment Reasons about the dealings between FCR and Katz:

(i) What First Capital did, as early as January, 2004, was to express an interest in acquiring part of College Square and it engaged in some discussions with David Katz to that end in January and February, 2004, as well as in the August to October, 2004 time period;

(ii) At the time the shareholders executed the LOI on April 18, 2005, First Capital had not made any offer to acquire an interest in College Square, let alone enter into any binding agreement to do so. To the contrary, First Capital was told by the Leikin Group in October, 2004 that no further discussions could be held until the company had resolved its internal affairs;

(iii) First Capital made its first, and only, offer to purchase an interest in College Square by its LOI dated July 8, 2005;

(iv) David Katz commenced discussions with First Capital about the possibility of that company acquiring an interest in College Square in January, 2004. He continued those discussions in February, 2004, and from July until October, 2004. As was described in the engagement letter for RBC Capital, by October, 2004 those discussions had reached an "advanced" stage before they were terminated by the Leikin Group.

[190] The discussions which Katz held with Lachance on August 25, 2004, were more advanced than those they had held back in February and March. FCR evidently was taking the discussions more seriously since by August Lachance had received approval from her superior to proceed with the discussions, although she had no authority to transact on a specific price without authorization from her seniors. The communications between FCR and Katz in August, September and October, 2004, did not involve FCR expressing a price at which it might be interested in acquiring College Square, let alone the making of an offer to purchase. It would be fair to say that Katz appreciated he had found in FCR an entity willing to continue discussions with him about College Square, but that is as far as matters had progressed by October when Katz terminated the discussions.

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[191] I also accept Katz's evidence that the context in which the August discussions with FCR took place was very different than that in which the March discussions had taken place. Katz initiated discussions with FCR in early 2004 in an effort to find a partner for the Leikin Group which might be willing to consider a strategic alliance and which he could present to the Board as a potential co-venturer. Katz's efforts to interest the Board in a strategic alliance failed at the April 15 Board meeting – Harris, Kesler and Spieler showed no interest in any such alliance. Then came the Prehogan letters in June when it became clear that an unbridgeable divide over the core assets had emerged between two groups of shareholders, prompting the shareholders who wished to continue their ownership of College Square to search for ways to finance the buy-out of the other shareholders.

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[192] As that search evolved through July and August, securing the involvement of an equity investor emerged as an increasingly attractive financing option. As an experienced businessman, and as a shareholder interested in continuing his ownership interest in College Square, Katz knew that he had to gain some understanding whether third party equity participation was even possible at a level which would enable the buy-out of the Selling Shareholders. I find that it was in that context in which Katz resumed his discussions with Lachance in August, 2004.

XV. Barbara Farber's September 1, 2004 memo[20]

[193] As part of its mandate the CIBC retained the Altus Group, a real estate appraisal firm, to prepare a report. Mr. Richard Cyr, of Altus, prepared an August 16, 2004 Report which appraised the value of College Square at $55 million as of August 1, 2004. Altus described its report as a "current narrative appraisal report", the purpose of which was to provide an opinion "of the market value of the leased fee interest in [College Square] on an all-cash basis". CIBC transmitted the Altus Report to Ms. Farber on August 27, 2004.

[194] Josephine Harris testified that both she and Rick Kesler had concerns about the accuracy of the valuation by the Altus Group and wanted a peer review conducted. On his pre-trial cross-examination Kesler maintained that he had in fact suggested that another appraisal be conducted, not simply a peer review.

[195] It was against that background that on September 1, 2004, Ms. Farber emailed a memo to all shareholders. She opened her memo by describing what she perceived as the respective interests of the shareholders:

[20] The evidence before the court on the summary judgment motion can be found at paragraphs 133 to 138 of the SJ Reasons.

> Those wishing to sell and those not wishing to sell must acknowledge that they have perspectives and interests that are now totally opposite, and which will preclude them from enjoying a satisfying and productive business relationship with respect to the ownership and management of the core assets [i.e. College Square and Zena's Fisher Heights Plaza], on a going forward basis. As such, it will be necessary for both sellers and non-sellers to make every effort possible to enable an appropriate liquidity opportunity to be completed.

Josephine Harris agreed with that description by Farber of the then state of affairs.

[196] Farber advised that CIBC had retained a real estate appraiser whose "mandate is to provide a fair market valuation for both College Square and Zena's Fisher Heights Plaza, to assist selling shareholders in exploring liquidity options." She wrote that CIBC "is available to speak to any shareholder who has questions about any aspect of [its] mandate, the process being followed or the form of the report [it] will deliver". (Rick Kesler acknowledged that from time to time he did speak to Mr. Desrosiers at CIBC about matters relating to the transaction.) Farber indicated that the CIBC report should be available by mid-September. She wrote:

> I am confident that with CIBC's assistance we will be able to give the selling shareholders an equitable offer, based on the fair market value of the core assets. In addition, the company will work on a best efforts basis to obtain satisfactory financing/funding to permit the proposed buy-out transaction to proceed.

[197] In her September 1 memo Farber endorsed Kesler's suggestion that the Selling Shareholders select a real estate appraiser to conduct a peer review for the purposes of validating the CIBC's valuation of the core assets. As to her own intentions, Ms. Farber wrote:

> The other three shareholders and I, who want to preserve the core assets and continue to realize the goals of the companies, want to continue to work to enhance the value of the core assets as well as the other assets of the Leikin Group….In fact the non-selling shareholders' desire to retain ownership and management of the core assets will most likely result in the maximization of the value of the non-core assets of the Leikin Group, which will be retained by all current shareholders.

Ms. Farber concluded her memo by writing:

> I am extremely confident that all shareholders will approach the CIBC shareholder liquidity process with the knowledge that a successful outcome can only be achieved if it is beneficial to all shareholders.

[198] As part of their submissions at trial the plaintiff s pointed to this concluding language by Ms. Farber as an undertaking by the Non-Selling Shareholders to protect the interests of all shareholders. I find that it was nothing of the sort, and such an argument by the plaintiffs sought

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to twist certain of Farber's words out of their context. Read as a whole, Farber's September 1 memo highlighted the conflicting interests of the selling and non-selling shareholders and simply expressed a hope that all the shareholders would work through the sale share process in a way which would result in a transaction satisfactory to both sides. I will return to this point later in my analysis.

[199] Rick Kesler responded to Ms. Farber's email on September 8, 2004. He found her characterization of the overall situation "confrontational" – so much for the plaintiffs' assertion in this action that Farber had undertaken in this letter to protect their interests - and then made some pointed comments about the Altus Group Report, a draft of which he had reviewed:

a) He was opposed to the Altus Group preparing the report since it had performed an earlier valuation for mortgage financing purposes and he regarded their current report as a "re-cycling of the earlier valuation for mortgage financing purposes with little if any new input or consideration given to fair market value";

b) He could not imagine that "a full, fair market evaluation" could be done for the modest fee charged by the Altus Group;

c) He stated the Altus Group's "so called fair market value analysis is nothing more than a superficial review of their earlier work";

d) He proposed retaining "an independent evaluator for the purpose of preparing a report that provides us with an analysis of the fair market value of the core assets. Since this does not appear to be what the Altus Group has done, I am not suggesting a 'peer review'";

e) He argued that "we must establish the fair market value through an independent analysis"; and,

f) He recommended retaining David Atlin of Integris Real Estate "to perform a fair market value analysis in order to assure all shareholders that this exercise is open and transparent".

Kesler concluded by stating that he had communicated directly with Grant Jameson on an issue regarding share transfer provisions.

[200] On September 3, 2004, David Katz prepared a memo to file listing several matters requiring review. Item 5 was:

Funding and Cash Flow analysis for the buy-side newcos based on the sale of a 61% undivided interest in College Square based on the appraised value of $55 million with 100% ownership of Plaza and purchase based on the appraised value of $6.7 million, with a $4 million mortgage. This analysis is for the purposes of demonstrating to the sell side that the proposed transaction is fundable and to discourage any of the sell side from moving over to the buy-side.

XVI. The CIBC process: August – September, 2004[21]

A. The critique of the Altus Report at trial

[201] As mentioned, the Altus Group provided CIBC with an appraisal report valuing the College Square property at $55 million as of August 1, 2004. Time was spent at trial by the plaintiffs in attempting to demonstrate that information material to the property appraisal process – i.e. David Katz's discussions with FCR in August, 2004 – should have been disclosed to the Altus Group. A battle of experts ensued over what sort of information was material to the property appraisal process.

[202] At trial the plaintiffs called Mr. Kenneth Stroud, a certified appraiser, to give expert evidence in relation to the Altus Report. Specifically, Mr. Stroud opined that:

(i) in conventional due diligence on the part of an appraiser in formulating an opinion of value, the appraiser should refer to ongoing negotiations and/or discussions with an interested third party for the acquisition of the property, if the appraiser knows of those negotiations; and,

(ii) if ongoing negotiations and/or discussions were referenced in an appraisal report, they might, but not necessarily, have an impact on the opined value for the property; it would depend on the particular circumstances.

[203] In his evidence in chief at trial, Mr. Stroud expanded on his opinions:

> A. … In addition the negotiations or discussions would have to be meaningful; they would have to be substantive. If they were extremely preliminary, if there was only a few phone calls or a meeting, very premature, then the answer would be no, they wouldn't be referenced in the report, however when I reviewed the various transcripts that are noted in my scope of work, I tried to formulate a critical path timeline of events that transpired,

[21] The evidence before the court on the summary judgment motion can be found at paragraphs 132, 133 and 139 to 146 of the SJ Reasons.

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> and in my opinion those discussions or negotiations were substantive. Documentation exchanged hands, rent rolls, surveys, site plans, there a significant number of email exchanges, and in addition I would qualify it too by saying that if those discussions and negotiations were with someone on the street I would –
>
> THE COURT: What exactly do you mean by that?
>
> MR. STROUD: What I mean by that is First Capital is a very sophisticated player in the industry, they're highly informed, it's a very tight market out there in context of superior players that acquire property of this nature, and they are certainly one of them. So if they were stepping up to the plate I believe those negotiations or discussion would have traction.
>
> MR. BENNETT: Q. What do you mean have traction?
>
> A. There would be substance to them.

[204] In his report Stroud stated that the applicable standard for preparing appraisal reports in effect at the time of the Altus Report was that of the Canadian Standards of Professional Appraisal Practice ("CUSPAP") of the Appraisal Institute of Canada, in particular Lines 1695 to 1698 which provided:

> Agreement for Sale/Option/Listing
>
> - must be analyzed and reported if any agreement for sale, option or listing of the subject property occurred within one year prior to the date of valuation if such information is available to the appraiser in the normal course of business.

[205] On cross Stroud acknowledged that his inclusion of on-going negotiations or discussions in the conventional due diligence by an appraiser represented an "expansion" of the CUSPAP standard – "serious negotiations and discussions I believe fall into the category of the spirit and intent of that guideline". He conceded that each of the three events referred to in the standard – sale, option, listing – had a hard price number associated with it, whereas discussions did not. Stroud also agreed that nowhere in the CUSPAP standards do the words "negotiations" or "discussions" appear.

[206] Richard Cyr prepared the Altus Report. As part of his information-gathering efforts for preparing the report, Mr. Cyr sent CIBC an Information Request Form for College Square which inquired whether there were "any recent agreements or options to buy/sell the subject property" and whether the property was listed for sale. In chief at trial Cyr also testified that as part of preparing a valuation for a property he would investigate whether anyone had made a serious offer for the property. By that he meant:

> What I mean by offer is I mean it doesn't have to be finalized, it doesn't have to be necessarily concluded in order for me to report it. It has to move forward in the stage of the offer that it show seriousness between two parties where you have a willing vendor, and willing buyer that are at the table discussing in a serious manner about transacting a piece of real estate.

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[207] Cyr testified that the existence of discussions about a piece of property might or might not affect its valuation:

> It may and it may not depending on the information I get from the - and how much, you know, it gives you one of the benchmarks. As an appraiser when you conclude based on facts you bring all those facts together being transactions, interviews, etcetera, and that piece of information would be an additional piece of information that would come as part of the puzzle. It doesn't mean that it would automatically influence the value or not.

In the case of his valuation of the College Square property, he did not make any inquiries as to whether there were any discussions or negotiations underway concerning the property.

[208] At trial the Katz Defendants called Wayne Crawford, a certified appraiser, to comment on Stroud's opinion. Crawford opined in his report that:

> Since negotiations or discussions are not specifically referenced under Lines 1695-1698 [of the CUSPAP], I have concluded that reference to them in the appraisal report or knowledge of their existence would only have been beneficial to the Altus appraiser had the talks reached a point where there was an agreed upon purchase price and a well-defined specified interest in the property was being acquired.

Crawford explained the rationale underlying the reporting requirement for agreements, options and listings in the CUSPAP:

> Q. Now why are agreements for sale, options and listings mandated under the standard as something that you are required to explore?
>
> A. The appraiser is typically being asked to evaluate the real property, and to provide a fixed number for that property. It is important for them to understand whether or not there is an existing or proposed Agreement of Purchase and Sale being worked, whether or not there is an option to purchase, because that option may or may not reflect market value but we would need to know of its existence, and a listing is very important because that is a number that is typically set by the vendor and its realtor, and it's basically their wish list. That's what they would like to achieve for the property and it's up to the market to work that number with the vendor.

Q. And all three – am I correct all three of those categories of event, agreement, option, or listing disclose hard numbers for value?

A. That's correct.

[209] As to the obligation of an appraiser to inquire into the existence of discussions or negotiations as part of a valuation process, Crawford testified that making such an inquiry would be "above and beyond the standard".

[210] I prefer Crawford's evidence on this issue since it reflects the actual language of the applicable CUSPAP standards.

B. Leikin Group certificate to CIBC

[211] Mr. Desrosiers of CIBC testified that as part of CIBC's mandate to prepare a report it obtained from Leikin a Form of Certificate signed by Barbara Farber on September 23, 2004. In that Form Barbara Leikin certified:

> To the best of my knowledge and belief, no verbal or written offers or serious negotiations for, at any one time, the Core Assets or all or a material part of the properties and assets owned by or the securities of the Leikin Group or any of its affiliates have been made or occurred within the two years preceding the date hereof which have not been disclosed to CIBC IB.

[212] According to Mr. Desrosiers, neither David Katz nor Barbara Farber advised CIBC that there had been negotiations with FCR or that numbers had been exchanged concerning College Square, although he had actually asked.

[213] Farber testified that she did not make any inquiries before she made that representation. When asked why she had not, given Katz's mention of a $71 million number and the name of FCR at the July 14 meeting, Farber testified:

Q. And David Katz at this point was acting as a consultant to Harzena Holdings, correct?

A. Yes.

Q. And you'd given him permission or asked him to assist you with the CIBC transaction, the share redemption transaction, correct?

A. Yes.

Q. And he's talking about a way of funding the transaction, correct?

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A. Yes.

Q. And you didn't make a single inquiry of Mr. Katz after having heard that presentation on July 14th to say have you engaged in any discussions because I've got to make a representation to CIBC?

A. No.

Q. Was it?

A. I knew that David had ideas of how we could fund the transaction, what kind of monies we were going to require to fund the transaction. He gave an example, and to the best of my knowledge and belief that was all I knew.

Q. But you made no inquiries of Mr. Katz at this point in time?

A. No, I didn't.

[214] Farber testified that in September, 2004, she had been unaware of the discussions which David Katz had held with FCR in August. I accept her evidence on that point; David Katz testified that he did not tell Farber or Andrew Katz about those discussions.

C. The CIBC Report

[215] On September 23, 2004, the CIBC sent its Report to the directors of the Leikin Group. The CIBC Report provided an estimate of the fair market value of the shares owned by the Selling Shareholders and presented a financing plan and term sheet for the proposed buy-out transaction. The CIBC Report, relying on the Altus Group Report, placed a fair market value of $55 million on College Square and proposed a transaction under which the shares of the Selling Shareholders would be bought for $2.96 million for each selling shareholder, subject to arranging financing for the proposed transaction.

[216] The Report described two possible financing scenarios for the proposed transaction. Each would involve some debt financing, and one would see the sale of a 52% co-tenancy interest in College Square, the other the sale of a 64% co-tenancy interest. CIBC contemplated an ownership structure under which the Non-Selling Shareholders would own a Newco which, in turn, would jointly own College Square with a third party investor. Appendix "F" to the CIBC Report, "Reorganization Flowchart", graphically showed that following the amalgamation of the two companies which owned the College Square property and the creation of a Newco to hold a 7/11 interest in College Square, the Selling Shareholders would be bought out by way of a redemption of their shares in the amalgamated company. Once that was done, "Newco sells to 3rd party an interest in College Square". The "Step 4" graphic showing this final step in the

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transaction did not ascribe any percentage ownership in College Square to the Amalco, Newco or 3rd Party purchaser. The Report observed that a co-tenancy agreement between the Non-Selling Shareholders and the third party investors would have to be negotiated, and "[m]anagement of College Square may or may not be retained by NewCo" – i.e. by the Non-Selling Shareholders.

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[217] The Appendix "F" graphic in the CIBC Report signaled to the directors, and later to the Selling Shareholders who received the CIBC Report, that the proposed transaction would see a third party investor brought in to participate in the ownership of the College Square property, with the extent of that third party's interest to be determined at a future date.

[218] When one reads the CIBC Report in its entirety, several key points emerge:

(i) The re-organization and transaction proposed by CIBC to buy-out the interests of the Selling Shareholders in College Square would result in some third party investor owning an interest in College Square;

(ii) The Report presented two scenarios of different levels of third party co-ownership, but it would be clear to any reader that the ownership levels were being presented for demonstration purposes only to make it possible to run financial numbers. Appendix "F" showed that the ultimate degree of co-ownership by a third party was not known at the time. As Appendix "F" noted: *"% Participation is contingent on Financing Scenario"*; and,

(iii) The Report made no representation about the price at which a third party would purchase a co-ownership interest in College Square. The Report ran two scenarios which, of necessity, had to assume – the word "assumption" was clearly used on page 36 of the Report – the amount of an equity placement, but those numbers were, as they were described, merely assumptions.

It would have been, or should have been, obvious to the reader of the CIBC Report that the monetary specifics of financing the proposed buy-out of the Selling Shareholders remained up in the air and would have to be addressed either in the contemplated negotiations between the two sides over the terms of the LOI or otherwise. In the result, as the evidence I will review below will disclose, the Selling Shareholders signed a LOI which ceded to the Non-Selling Shareholders complete discretion over how to secure the financing for the share buy-out, as well as the potential benefit of any such financing.

[219] Rick Kesler received the CIBC Report before the September 28 Board meeting, and he understood that the Report contemplated that "there would be a potential financing that would be

negotiated in the 120 day period after the letter of intent was signed" between the Selling and Non-Selling Shareholders.

[220] On the same day, September 23, Grant Jameson sent all directors (i) a memo containing recommendations regarding the obligations of directors when reviewing and considering the CIBC Report, (ii) a draft letter of intent for the sale of shares, and (iii) a resolution authorizing the distribution of the CIBC Report to all shareholders and the holding of a special meeting of the shareholders to consider the report. In his email Jameson wrote:

> I thought it would be useful to send this memorandum because in our view each director of the Leikin Group is in a conflict of interest in this situation. I will ask each director to declare the conflict at the commencement of the directors meeting next week so that the minutes show that the directors have followed proper procedure.

[221] In his memorandum describing the directors' duties to the Leikin Group in respect of the CIBC Report and the proposed transaction, Jameson stated: "The best interest of the Leikin Group include the interests of all of the Leikin Group's shareholders." The memo noted that all members of the board stood in a conflict of interest position with respect to the proposed transaction and, "as a result, the Board should not vote on or approve the Proposed Transactions." Jameson recommended that "the Board critically review and examine the CIBC Report as outlined above and call a meeting of the shareholders of the Leikin Group to approve the Proposed Transaction." Jameson testified that since all Board members had conflicts with respect to the transaction, his advice was that all of the shareholders had to approve it. Jameson noted that "the report makes it clear that CIBC is not making any recommendations and the Board will need to consider the Proposed Transactions and reach a conclusion on whether to move forward".

[222] At trial the plaintiffs submitted that Jameson's statement that the Board call a shareholders' meeting "to approve the Proposed Transaction" amounted to a recommendation by him that the shareholders should approve the transaction. I do not read Jameson's statement that way at all. I accept Jameson's evidence that the sentence simply meant that a shareholders' meeting was required to consider whether to approve the transaction. That was evident from the October 1, 2004 letter Jameson sent to each shareholder which made it crystal clear that the decision whether or not to sign the letter of intent was for each individual shareholder to make.

[223] Josephine Harris acknowledged that the directors had their own personal conflicts of interest in respect of the proposed transaction. Rick Kesler also agreed that by this point of time as a director he was in a conflict of interest situation. Harris also acknowledged that Jameson did not give them advice about the actual price for the sale of their shares and she agreed that it was Jameson's job to advise the directors and shareholders about corporate, not personal, matters.

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XVII. The September 28, 2004 Board meeting[22]

A. What was discussed at the meeting

[224] The boards of the Leikin Group met on September 28, 2004. David Katz did not attend the meeting because he was not a director.

[225] The Boards received a presentation from CIBC on its Report. The boards approved its circulation, together with the draft LOI, to all shareholders, decided to retain another appraisal firm to review the Altus Report – Rick Kesler was to choose the appraiser from a list identified by CIBC – and decided to call a special meeting of shareholders to allow them access to the professional advisors so they could fully understand the CIBC Report and the form of the proposed share redemption transaction. At the meeting the directors declared their conflicts of interest. The draft minutes of the board meetings contained the following entry at Item J about discussion of the valuation issue:

> Several discussions ensued regarding valuation issues, including discrepancies between CIBC's valuation of $55 million and the $62 million valuation provided by Ginsberg Gluzman Fage & Levitz.
>
>> Barbara Farber advised that prior valuations were only best estimates by management.
>>
>> *Gerald Levitz indicated that prior estimates were not valuation opinions but that they were merely stating that a valuation of $60 million was possible and that it may be worth doing the calculations.*
>>
>> Rick Kesler asked whether prior management valuations were considered in the Altus valuation to which Richard Cyr [Altus Group] responded that they did not as they were not asked to. He indicated, however, that the valuation would not be different, regardless.
>>
>> Rick Kesler then asked Richard Cyr whether the valuation uncertainty could be as high as 15% to which Richard Cyr responded that a reasonable uncertainty would be no greater than approximately 5%, not 15%.
>>
>> Josephine Harris asked where the management estimate had come from. Barbara Farber responded and explained. A discussion ensued.

[22] The evidence before the court on the summary judgment motion can be found at paragraphs 147 to 152 of the SJ Reasons.

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> Eric Desrosiers [CIBC] clarified that the valuation report was not an opinion and that an opinion could be given at additional cost.

[226] The Minutes then went on to record a discussion about the financing of the transaction:

> James Brooks [CIBC] stated that CIBC could undertake the financing, marketing and completion of the transaction described in the report within 120 days. Rick Kesler asked whether preliminary discussions with potential investors had occurred to which Eric Desrosiers responded that since CIBC had not been retained to do so, the matter was kept internal and confidential. Calvin Younger [CIBC] indicated that he felt it would imprudent to enter into discussions with investors at this point.

Kesler accepted the accuracy of those Minutes. Kesler testified that at the meeting he had asked whether any third party had inquired about the financing or acquisition of College Square. He accepted that no such question was recorded in the Board's minutes, nor had he, prior to the trial, taken the position that the minutes of the meeting were inaccurate. Jameson testified that at that time he had no information about preliminary discussions with potential investors either conducted by CIBC or by anyone else. Farber, who was present at the meeting, testified that at that point of time she did not know about the discussions David Katz had held with FCR in August, and I have accepted her evidence on that point.

[227] At trial Patricia Day commented on the minute recording Levitz's statement that prior estimates performed by GGFL were not valuation opinions:

> Well I think there was concern about the $62 million and I think generally as it says in here that the $62 million was not a valuation, it was just a calculation we had done.

B. The plaintiffs' allegations concerning the non-disclosure of material information at the September 28 Board meeting

[228] Josephine Harris deposed that she gave her approval to the circulation of the CIBC and Altus Reports based on incomplete information:

> The information obtained by Grant Jameson in the July 14, 2004 meeting, as verified by his handwritten notes, with respect to the structure of the Proposed Transaction and the proposed sale of an interest in College Square to First Capital Realty at a price in excess of $70,000,000 was material information. It would have caused me to reject both the circulation of the CIBC Report and to instigate a further inquiry into how CIBC and or Altus had arrived at a valuation more than 20 per cent below that estimated by a former officer of the company, who had far more access to information than any of the Selling Shareholders or their director representatives on the Board. Further, I am advised by my four children and believe that this material information would have impacted on their decision on whether or not to approve the Proposed Transaction.

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[229] On cross-examination, however, Ms. Harris agreed that she had not accepted the $55 million valuation figure reached by the Altus Group at face value and was concerned about the "sliding scale of the valuations."

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[230] Rick Kesler deposed that Grant Jameson failed to disclose at the September 28 Board meeting the information he had obtained regarding FCR during the July 14, 2004 meeting. Kesler stated that during the meeting he was actively asking questions of the various professional advisors. At trial Kelser testified that he had asked the CIBC people and the other directors whether there had been any inquiries from third parties in connection with the financing or sale of College Square.

[231] Patricia Day acknowledged that there was no discussion at the Board meeting of the numerous calculations GGFL had performed; the calculations had been prepared for the company. Farber testified that she did not disclose the $71 million number which Katz had mentioned at the July 14 meeting because:

> Q. You did not disclose the $71 million figure referred to at the July 14th meeting, why not?
>
> A. There was nothing to disclose it was – it was a funding number, it wasn't a value that was put on anything, it wasn't – it was a funding number. There wasn't anything to disclose to anyone.

[232] Andrew Katz participated by phone in the Board meeting. He believed "that there was a clear knowledge and understanding on the part of all of the directors that a third party purchaser would become involved with the Non-Selling Shareholders in order to facilitate the transaction, once an agreement between the shareholders had been reached."

XVIII. From the September 28 Board meeting to the start of the buy-out negotiations[23]

[233] Following the board meeting Ms. Farber asked CIBC to conduct an analysis of the Leikin Group's projected financial performance and its ability to pay dividends over the next two years. In June, 2004, Farber had circulated calculations projecting dividends of $200,000 for each shareholder in 2005 and 2006; the October analysis prepared by CIBC revised those projections downwards to $86,000 and $107,000 per shareholder for each of 2005 and 2006. In his affidavit Mr. Kesler characterized the revised projections as threats from Ms. Farber to reduce dividend

[23] The evidence before the court on the summary judgment motion can be found at paragraphs 153 to 184 of the SJ Reasons.

payments unless the Selling Shareholders proceeded with the share redemption transaction. I place no stock in that allegation. The CIBC process represented a good faith effort to find a transaction structure which could work. It is noteworthy that during the negotiations over the LOI that the plaintiffs' professional advisors did not propose an alternative structure.

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[234] In a memo he sent to Barbara Farber, Grant Jameson, Gerald Levitz and Eric Desrosiers on September 30, 2004, David Katz wrote: "Rick [Kesler] is using the $62 million College Square value as the relevant benchmark, on the basis that management provided it and the auditor accepted it. The $62 million value was crudely arrived at by management…The $62 million value was transmitted by management to the auditors, on the basis that it would be used for illustrative purposes in determining an approximate and aggressive net proceeds analysis on the basis that 100% of the asset would be sold."

A. The first draft Letter of Intent

[235] On October 1, 2004, Jameson sent all shareholders a memorandum outlining "a form of proposed transaction', as well as a draft LOI. Mr. Jameson described the purpose of the transaction in the following terms:

> The transaction proposed in the CIBC Report is intended to give the seven shareholders who seek the sale of the Core Assets access to their share of the value of those Core Assets while at the same time, allowing the four shareholders who do not want to sell the Core Assets, a way to preserve their interests in the Core Assets while enabling all shareholders to continue to support the goals and objectives of the family business.

Jameson advised that a meeting of all shareholders would be held on October 25, 2004 to give shareholders an opportunity to review the CIBC Report and the proposed transaction with all the consultants who had been involved in the process. As events unfolded, no such meeting was held.

[236] At trial Jameson commented on the distinctive structure of the proposed transaction:

> The draft Letter of Intent really set out the structure, the legal structure of the transaction. This was a bit of a – perhaps an odd transaction in that there – it wasn't an agreement of purchase and sale between a buyer and a seller. It was a corporate transaction where the corporations were suggesting or were entering into an agreement with some of its common shareholders, but those common shareholders described as selling shareholders would be exchanging shares for a certain value, the value being the appraised value of the College Square assets in this case. So the Letter of Intent was between the corporations and the shareholders.

[237] The draft LOI set the purchase price of each shareholder's holdings at $2.96 million, the purchase price found in the CIBC's report. The LOI contemplated a closing date 120 days following its execution and stated, as a condition of closing, that "the Leikin Group shall have arranged satisfactory financing to complete the Pre-Closing Transactions and the Transaction contemplated by this letter". If that condition was not satisfied or waived, the LOI would terminate. More simply put, if satisfactory financing was not found, the share buy-out would not happen. That was the fundamental business reality surrounding the whole deal, a reality which I sensed during the trial that the plaintiffs had lost sight of.

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B. The plaintiffs' legal advisors

[238] By this point of time the Selling Shareholders had retained some professional advisors. On October 6 Rick Kesler advised that Mr. Jules Lewy, his partner at the FMC firm, would "be reviewing the transaction on my behalf". Lewy practised corporate and tax law and, at that point of time, had been in practice just under 30 years. He testified that Kesler retained him to assist in "dealing with the shares of the various Leikin Companies". The Harris family also retained him to deal with Canadian tax law matters. Lewy also acted as a go-between "between the various members of the families to set out their views to the other side, to the Farber side".

[239] Mainzer, the Chicago lawyer and accountant, was already advising the Harris Plaintiffs, and he described his role in the following terms:

> I reviewed documents, I reviewed information I received from the accountant, I prepared a synopsis of what the accountants inform – the information the accountant gave me, and I discussed the matters with the Harris' on an ad-hoc basis.

Mainzer testified that the Harris family was trying to achieve the maximum value for their shares. According to Sheira Harris, the flow of transaction-related information within the Harris family usually involved her mother, Josephine, circulating reports or communications provided by Lewy or Mainzer.

[240] On her cross-examination on the summary judgment motion Josephine Harris acknowledged that throughout the course of the negotiations her family relied upon the advice of their own professional advisors – lawyers and real estate appraisers. Her daughter, Sheira Harris, testified that she had relied on her mother, Josephine, and Mainzer to protect her interests throughout the transaction.

[241] At trial Josephine Harris stated that she did not ask Jameson for advice on the redemption transaction. By contrast, she contended that she "absolutely" had sought advice from Mr. Levitz, at one meeting asking him to give her a course on "cap rates 110".

[242] Mr. Prehogan and William Ross of the Weir Foulds firm already had provided some advice to Steven Kesler and the other plaintiffs, and Prehogan had sent the demand letters back in June. Ivan Kesler was receiving independent legal advice from Greg Sanders, an Ottawa lawyer.

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[243] Starting in February, 2005 David Spieler retained a lawyer at Davis LLP, Sandra Appel, to provide him with independent legal advice. Ms. Appel practiced in the area of commercial transactions.

[244] In his affidavit Rick Kesler asserted that he was dependent on the Katz siblings, Ogilvy Renault and GGFL "to provide me with all of the material information regarding the Proposed Transactions and the two properties so that I could make an informed decision on terms in the Letter of Intent drafted by Grant Jameson and the Ogilvy Renault LLP Defendants." On his pre-trial cross Kesler admitted that he had relied on the advice given to him by his professional advisors in signing the LOI. At trial, on cross, he disagreed that he was not relying on the Lawyer Defendants to represent his personal interests as a shareholder, although he conceded he could not point to a retainer letter with them to that effect. Kesler testified that he was relying on Jameson "to endorse the valuations that we were getting and the fairness of the overall transaction", and he was not prepared to agree that the only basis on which Jameson could assess the fairness of the price was the valuation of the property contained in the different appraisal reports.

[245] At trial Mr. Kesler was asked whether he thought that the interests of the selling shareholders diverged from those of the remaining shareholders. He testified that they did not:

> Q. Isn't it true sir that you acknowledged that there would have been points in the course of the negotiation where the interests of the selling shareholders were not the same as the corporation and the remaining shareholders?
>
> A. No, I disagree with that.
>
> Q. So when you say as we read at question 859 that your interest was in maximizing the price paid, and the company wanted to control or limit the amount that you would be paid, you don't consider that to be an opposing or conflicting interest?
>
> A. I don't regard it as opposing or conflicting, I regard it as two sides of a discussion.

I do not accept Mr. Kesler's evidence on this point. He was a lawyer specializing in one aspect of commercial tax law – customs and excise - who was practising at a national law firm. As such he would have been quite familiar with the concept of commercial conflicts of interest which are based on the existence of divergent interests held by different parties to a transaction. For Mr.

Kesler to testify that in a share buy-out transaction the interests of selling shareholders would not have differed from those of purchasing shareholders undermined his overall credibility.

C. Plaintiffs' legal advisors seek information about the transaction

[246] Some of the plaintiffs' professional advisors sought information from the advisors to the Leikin Corporation. For example, Patricia Day, of the GGFL accounting firm, sent Lewy and Rick Kesler an email on October 8 attaching a memorandum regarding the proposed share redemption transaction structure. She stated "if there is additional detail required please do not hesitate to contact me." Day enclosed a memorandum dated August 16, 2004 to Barbara Farber which set out the key principles underpinning the proposed redemption transaction. One of the principles regarding the College Square aspect of the proposed corporate structure Day described as follows:

> Assuming that a third party is brought in to own 50% of College Square, 11/22 of College Square will be sold to a third party by Newco. The third party will have a cost base in the property equal to the fair market value. A co-tenancy would now exist with Harry Leikin Holdings Limited, Newco, and the third party.

The calculations prepared by GGFL to accompany the memorandum estimated sale proceeds from College Square assuming a value of $55 million. Day acknowledged on cross that she did not provide Mr. Kesler with the calculations using the higher estimates of fair market value for College Square. Josephine Harris acknowledged that in October, 2004 she was aware of a possible structure under which a third party would own 50% of College Square.

[247] At trial time was spent comparing the August 16 memo which Day had sent to Lewy on October 8 with another, shorter version of the GGFL memo, also dated August 16, 2004, transmitted to Barbara Farber and David Katz back on August 16. Kesler testified that he had received the October 8 version of the memo, but not August 16 one sent to Farber and Katz. That earlier memo included the following bullet point:

> Assuming that at (sic) third party is brought in to own 50% of College Square, 11/22 of College Square will be sold to a third party by Newco. Newco will have a capital gain for the excess of the fair market value of the property as paid by the third party over that used to buy from the Selling Shareholders (if any). The third party will have a cost base in the property equal to the fair market value. A co-tenancy would now exist with Harry Leikin Holdings Limited, Newco, and the third party.

In the latter, October 8 version of the memo, the second sentence, underlined above, was not included, although that was only one of a number of differences between the two memos, and in

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some cases the second version of the memo contained information not found in the first. Kesler expressed the plaintiffs' complaint with GGFL on this point as follows:

> Q. Are you suggesting to His Honour that Ms. Day did something dishonest in preparing two separate memos, both which on the face have an August 16, 2004 date?
>
> A. I'm suggesting that Ms. Day should have, as we asked her to, sent us all of the information that she was sending to all of the parties.
>
> Q. All right, so you're not suggesting she did something dishonest?
>
> A. I hesitate to use the word dishonest.
>
> Q. All right, are you suggesting she did something improper by having two memorandums dated August 16, 2004?
>
> A. Yes, I do.

Kesler was not prepared to accept, as a reasonable explanation for the two memos bearing the same date, Day's testimony that, when she had updated the memo in October, she had forgotten to change the August date.[24]

[248] Day gave the following testimony regarding the absence from the second version of the memo of the sentence about which Kesler expressed concerns:

> It's difficult for me to recall that now. Potentially I may have taken it out because I didn't think it was really part of the concerns of the selling shareholders. The capital gain in Newco would've been the responsibility of the remaining shareholders.

Day also testified that when she had prepared the August 16 memo, she did not have any knowledge of a third party agreement to acquire part or a whole interest in College Square.

[249] At trial, on cross, Kesler was asked questions about the implications of the portion of the GGFL memorandum which referred to a third party being brought in to own 50% of College Square:

> Q. Okay, well let me just try to keep it simple for the purposes of what I'm dealing with Mr. Kesler. Is it fair to say that this document, which you did receive on its face at bullet number 5 on page 2 reflects that there may be a sale of the interest in College Square to a

---

[24] Day produced a document (Ex. 51) which showed the last edit date for the August 16 memo as October 8, 2004.

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> third party after the selling shareholders had sold their interest? Does that document not say that to you?
>
> A. No.

Mr. Kesler explained the reasoning underlying that position as follows:

> Q. Well we all know what it says, I'm just asking you with you background, your experience did you not – do you not take that as meaning that, and you can either agree or you can disagree?
>
> A. I disagree because we were proceeding on the basis of the CIBC report which contemplated that there might be for example a refinancing of College Square or indeed Fisher Heights Plaza or indeed the sale of Fisher Heights Plaza as part of raising the necessary funds.

[250] Those answers, coming from an experienced tax lawyer like Mr. Kesler, simply are not credible. First, the GGFL memo he received on October 8 clearly identified the possibility that a sale of an interest in College Square to a third party might be required to generate the funds to buy-out the shares of the Selling Shareholders. I would note that over a month later, on November 22, 2004, Greg Sanders, the lawyer acting for Ivan Kesler, circulated an email to the lawyers representing the other Selling Shareholders which clearly revealed that he understood the GGFL memorandum was referring to "a subsequent sale of a portion of those assets to a third party to finance the operation…" Second, Mr. Kesler engaged in a selective reading of the CIBC Report. As set out above, that Report, in its "Financing Plan" section, described two possible financing structures which would see the Non-Selling Shareholders bring in a third party investor with a 52% - 64% equity position in College Square in order to finance the buy-out, and Appendix "F" clearly stated that the percentage participation by a third party investor would be dependent on the financing scenario selected. Third, during this same part of his cross-examination, Kesler gave the following evidence which, with respect, can only be described as fantastical:

> Q. Okay, and you would agree with me Mr. Kesler that any first year lawyer in the tax group of Fraser Milner Casgrave in the years you were there would understand what a capital gain is and what a capital loss is, correct?
>
> A. I'm not sure, but I appreciate your point.
>
> Q. Sorry?
>
> A. I said I'm not sure the correctness of that answer, but I appreciate your point.

Q. Do you disagree with me?

A. Yes, I'm not sure every first year lawyer would understand that distinction.

Mr. Kesler's inability to admit the obvious very seriously eroded his overall credibility on contested matters.

[251] Kesler's testimony on this point also was seriously undermined by the much more commercially reasonable evidence given by his lawyer, Mr. Lewy. When asked what significance he attached to the reference in Day's memo to bringing a third party in to own 50% of College Square, Lewy gave the following evidence:

> Q. What, if any, significance for you is there for the first sentence assuming that a third party is brought in to own 50% of College Square?
>
> A. It just says one of the possibilities in terms of how they would be structuring their transaction.
>
> Q. At this point did you know how the transaction would be structured from the non-selling shareholder side?
>
> A. *No, that was the whole reason for the Letter of Intent that we were not told how it would be structured, and the purchasers would then have time to figure out how to structure it and get the funds*. (emphasis added)

Lewy continued by testifying that the selling shareholders had understood there were no deals going on at that time – "they were fine with a profit later on, but not when the Letter of Intent was entered into".

D. The plaintiffs retain their own real estate appraiser: David Atlin

[252] Unbeknownst to the Non-Selling Shareholders at the time, in September, 2004, Rick Kesler had approached David Atlin, of Integris Real Estate Counsellors, to provide the Selling Shareholders with professional real estate consulting services. Kesler's lawyer, Mr. Lewy, had introduced Mr. Atlin to Mr. Kesler.

[253] Josephine Harris testified that they had retained Atlin to provide them with advice about the value of College Square. The Selling Shareholders did not disclose their retainer of Atlin to the Non-Selling Shareholders because, according to Ms. Harris, at that point of time the atmosphere was full of mis-trust and the Selling Shareholders were looking after their own interests.

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[254] Rick Kesler had developed concerns about the accuracy of the valuations secured through the CIBC process. As he put it in his affidavit:

> Even after the peer review of the valuation of College Square by MacKenzie, Ray Heron & Edwardh and the revised fair market value by CIBC of $58.9 million for College Square, I continued to have concerns that this was not the fair market value for College Square. I was concerned that the non-selling shareholders, and in particular David Katz, Barbara Farber and Andrew Katz had already negotiated a deal with a third party to purchase an interest in College Square at a value in excess of $58.9 million.

Kesler acted as the selling group's contact with Atlin. He provided Atlin with the Altus and Edwardh Reports.

[255] At trial Kesler and Atlin disagreed on what advice Atlin had provided to Kesler about the value of College Square. Atlin testified that he provided Kesler with advice both in the fall of 2004 and the spring of 2005. As to the former, Atlin testified that after reviewing the initial Altus Group Report he had told Kesler that his initial inclination, before doing any work, was that the value was too low because the market was moving rapidly and capitalization rates were more aggressive. Atlin testified that although he had some discussion with Kesler about conducting a formal appraisal report, in the end it was decided he would not, and at no time did he provide an opinion of value in the context of an appraisal.

[256] Atlin testified that after receiving the updated Altus Report, he had some further telephone conversations with Kesler:

> At that point it was very much restricted to my providing my market knowledge of how market values had been changing over time for reasons of, in my view, continued compression of interest rates. That was a period of time that values were changing quite rapidly in the marketplace, and the in-flow of money, European money, Middle Eastern money, Israel, Germany, the lower interest rate environment we were in were all driving values up, so our conversations from that point forward were quite, they were almost repetitive.
>
> …
>
> I'm just saying the conversations were my providing information about the market, how market values are going up for reasons of the compression of interest rates and Mr. Kesler was simply, you know, presumably accept what I was saying and advise me that he was focusing on the tax structure of the deal on behalf of the Canadian vendors. That was pretty the extent of our conversations.

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[257] Finally, Atlin testified that in the March/April, 2005 time period he had performed some further sensitivity analysis on the value of College Square using the Altus cash flow numbers, and he had calculated a present value of College Square ranging from $64.59 to $66.76 million using discount rates from 8.5% to 8.0%, respectively. Although he did not sent Kesler the matrix table containing his analysis, Atlin testified that he had spoken with Kesler about the results. Atlin was then asked:

> Q. Did Mr. Kesler ever tell you at this period of time in mid April that the shareholders had arrived at a number of $60 million for the transaction?
>
> A. No.
>
> Q. Did he ever ask you whether $60 million was a good number?
>
> A. No.
>
> Q. Did you ever tell Mr. Kesler that $60 million sounds like a good number?
>
> A. No, I mean you can see that my file analysis, and I presume you're question is still referring to the same timeframe.
>
> Q. Yes.
>
> A. No, I don't know why I would say that. I didn't say that and I wouldn't have said that I've got an analysis of my file completely different.
>
> Q. Did Mr. Kesler ever tell you that the shareholders had signed a Letter of Intent?
>
> A. He did not.

[258] Kesler did acknowledge that in the September/October, 2004 time period Atlin provided him with comments about the prevailing cap rates, the compression of interest rates and market values. However, Kesler gave evidence on his summary judgment cross-examination denying that Atlin had told the Selling Shareholders that the value of these shopping centres was increasing.

[259] While Kesler did not testify about the sensitivity analysis Atlin contended he had performed in the Spring of 2005, Kesler did state that when, in April 2005, the Selling Shareholders had agreed on a $60 million share redemption price, Atlin told him it was a "good number and you can take it". Kesler said that the Selling Shareholders really did not have significant discussions with Atlin until they got close to the end and were prepared to accept the $60 million number:

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> We relied on Mr. Atlin at the end of the process; we were clear with him what we expected from him. We wanted him to look over our shoulder when we got to the end of the process to add his advice to whether or not the number was a number that we could rely on as a good number.

As noted, Atlin denied giving any such advice on the adequacy of the final share redemption price.

[260] I prefer the evidence of Atlin over Kesler on these points. First, Kesler conceded that in the fall of 2004 Atlin had provided him with information about the compression of rates, which supports Atlin's evidence that he was telling Kesler that the value of shopping centres was rising. Further, Atlin's advice on those rising values echoed what all the shareholders learned later in October when the Edwardh Report came out anticipating "downward pressure on investment rates subsequent to the Appraisal date" and when the updated Altus Report described a "frenzy" in the continued downward pressure with compression on yield expectations. Second, at trial Kesler's evidence regarding Atlin's role contradicted that which he gave on a prior cross-examination, and even then it took Kesler some time to admit the obvious meaning of a string of mails. On his pre-trial cross-examination Kesler had testified that Atlin had not spoken with the appraiser, Grant Edwardh. When, at trial, Mr. Kesler was taken to a string of October 19, 2004, emails between David Atlin and himself, he ultimately conceded that Atlin in fact had talked to Edwardh and that his evidence on his prior cross-examination was a mistake, although it took substantial effort to extract that admission. Third, I find implausible Kesler's testimony that Atlin would have validated the share redemption price ultimately reached in April, 2005. Appraisers tend to be a cautious lot, and generally do not go around validating prices without performing some analysis. Moreover, the sensitivity analysis which Atlin performed in the Spring of 2005 suggested values higher than that used for the share redemption price. I accept Atlin's evidence that in the Spring of 2005 he told Kesler that his sensitivity analysis showed values for College Square in the range of $64.5 to $66.7 million.

E. The Board seeks a review of the appraisal

[261] On October 8, 2004, Barbara Farber received an unsolicited letter from GWL Realty Advisors advising that College Square "is of interest for addition to our existing real estate portfolio." GWL requested access to the current rent roll and operating statements in order "to determine a fair value to be submitted in a formal Letter of Intent". Farber did not respond to the overture. David Katz believed that Rick Kesler had prompted it.

[262] The Board agreed to retain another real estate appraiser to review the conclusions contained in the Altus Report. Rick Kesler advised the Boards his preferred choice was Mr. Grant Edwardh. Josephine Harris agreed with Kesler's recommendation. On October 12, 2004

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the CIBC advised that it would contact Edwardh to conduct a review of the Altus Report. Edwardh testified that initially he was contacted by David Atlin to ascertain his availability to review an appraisal, and ultimately he was contacted by James Brooks at CIBC to formalize a retainer.

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[263] By memo dated October 15, 2004, Farber informed the shareholders of the boards' decision to retain Mr. Edwardh and that his report was expected by October 22. She advised that the special meeting of the shareholders to discuss the proposed transaction, review the appraisal reports, and consider the timing for the closing of the proposed transaction would be held on October 25, 2004. She continued:

> The following consultants and advisors will be attending the meeting: Eric Desrosiers, Antonio Boggia, James Brooks, Larry Waters, Grant Jameson, Gerry Levitz and Pat Day. CIBC will make arrangements to have Grant Edwardh available either in person or by phone.
>
> All shareholders participating in the meeting are welcome to invite their professionals to participate either in person or by phone.
>
> It would be appreciated if you could confirm your and or your professional's intention to attend (either in person or via conference call) by no later than Wednesday, October 20, 2004, so that appropriate arrangements can be made.

The proposed shareholders' meeting did not take place.

F. The Edwardh Report

[264] On October 22, 2004, Ms. Farber circulated an October 20 draft of the Edwardh Appraisal Review to other board members, and the Review was sent to all shareholders a few days later on October 25.

[265] This draft of the Edwardh Report stated that it was based on a review of the Altus Group Report and did not involve a site inspection. The purpose of the report was "to evaluate the conclusions and the completeness of the [Altus] report." The Edwardh Report used a value date of August 1, 2004, the same date used by the Altus Report. The draft Edwardh Report expressed the following conclusion and recommendation:

> **Conclusion**
>
> Based on the evidence provided in the report, we are of the opinion that the capitalization and discount rates were reasonable at the time of the Appraisal Report; given the secure quality of the income and the evidence of modest income growth in the near term.

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> Therefore, a review of the value analysis as presented in the Appraisal Report, causes us to conclude that the Appraisal reasonably reflects the value as of August 1, 2004 were there no purchase options in the Home Depot and Loblaws leases. *We have not considered any market activity subsequent to the valuation date of August 1, 2004.*
>
> **Recommendation**
>
> While we are of the opinion that our interpretation of the purchase clauses in the Home Depot and Loblaws leases is correct, we would strongly suggest that a legal opinion of the interpretation of these clauses and a defining of the Landlord's Adjoining Land (Loblaws) is warranted and would recommend that the Altus Group be directed to reconsider their value in light of the purchase clauses and said legal opinion. (emphasis added)

[266] Rick Kesler then contacted James Brook, at CIBC, to indicate that some shareholders would like Edwardh to include commentary regarding market developments since August 1, 2004. A subsequent iteration of the Edwardh Report amended its conclusion by deleting the sentence advising that Edwardh had not considered any market activity since August 1, 2004, and inserting the following language:

> Subsequent to the effective date of the subject appraisal, we are aware of the announcement made in the Toronto Globe and Mail, on October 7, 2004 of the joint venture between RioCan Real Estate Investment Trust and Canada Pension Plan Investment Board, to invest $1 Billion in shopping centres which feature big box stores. *They view these as the hottest growth segment in the retail sector…*
>
> *Given this information, we are of the opinion that the market for big-box retail is becoming more competitive with buyers more aggressively seeking this type of investment. As a result, we anticipate downward pressure on investment rates subsequent to the Appraisal date*. (emphasis added)

[267] Josephine Harris reviewed the Edwardh Report around this time. She testified that "the hot thing and frenzy thing certainly got our attention" and she was "absolutely" aware that big box retail centres were increasing in value at a dramatic rate. On his cross-examination on the summary judgment motion Kesler vigorously maintained that he thought Edwardh would prepare a second appraisal, not a peer review, notwithstanding CBIC's description of the Edwardh report as an appraisal review. Kesler assumed he received a copy of the Edwardh Report, and if he did he would have read it, but he resisted agreeing that at that time he knew these sorts of shopping centres were a hot growth segment in the market. Ultimately Mr. Kesler agreed that he would have known what was in the Altus and Edwardh reports. I regard this as another instance where Mr. Kesler was not prepared to admit the obvious.

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G. Updated Altus Group Report

[268] The Altus Group updated its report in light of the recommendations in the Edwardh Report, and the CIBC circulated the update to all shareholders on October 29, 2004. The Altus Group maintained August 1, 2004 as the valuation date. It commented on changes witnessed in the market since that time:

> We have reviewed and discussed with market participants trends that have occurred in the marketplace since producing our original report. *Clearly, recent transactional evidence has confirmed that pricing continues its upward trend further to the aggressive stance beginning taken by investors when bidding on Tier One quality assets. This has resulted in continued downward pressure with compression on yield expectations since Second Quarter 2004. In fact, this frenzy has not been witnessed since the late 1980's and is, in part being fuelled by the imbalance in the marketplace, whereby demand for investment grade realty assets far outstrips supply.* (emphasis added)

The Update identified two major transactions which had been entered into over the past two months (although they had not yet closed) and noted that those transactions had used "aggressive valuation parameters". With respect to changes in market conditions the Update concluded:

> *Based on the foregoing market evidence, combined with the most recent Investment Trend Survey results has lead us to conclude that College Square would currently trade based on lower parameters than previously concluded in Summer 2004.* In our opinion, both the terminal capitalization rate used in the Discounted Cash Flow, as well as the Internal Rate of Return, must be reduced by approximately 50-basis point to properly capture and reflect current attitudes in the marketplace.
>
> Based on the foregoing, we refer the reader to the addenda section of our report where we conclude a revised value estimate by the discounted Cash Flow of $58,900,000. The result is based on a terminal capitalization rate of 8.25% and an internal rate of return of 9.05. (emphasis added)

[269] Kesler testified that Altus's comments about the state of the market did not hold any significant meaning at the time and did not cause him concerns that College Square might be undervalued in the reports. I do not accept Mr. Kesler's evidence on this point in light of his evidence that the whole reason he had retained Atlin in the first place was because of his belief that the initial Altus valuation was too low.

[270] Ms. Harris continued to have a concern that the Non-Selling Shareholders had already negotiated a deal with a third party to purchase an interest in College Square and that the Non-Selling Shareholders would receive an immediate monetary gain from the structuring of the

funding of the proposed transaction. Despite those concerns, her children proceeded to negotiate and conclude the LOI.

H. CIBC revised financing analysis

[271] On November 5 the CIBC circulated to all shareholders a revised financing analysis based on the updated Altus Group Report. The Introduction to the analysis noted that following the release of the updated Altus Group appraisal,

> *"CIBC received the following Non-Selling Shareholder feedback: Scenario II, which contemplated the sale of a 64% equity interest in College Square (in the event the conduit lender opposed a second mortgage), was dismissed as, under this arrangement, Newco would be left with no ability to influence major decisions pertaining to the ownership and management of the assets."* (emphasis added)

CIBC stated that it was asked to review the financing implications of an offer based on the Altus Group's revised appraisal for the consideration of the Non-Selling Shareholders, and it was making the analysis available to all shareholders.

[272] CIBC listed, as one of its "key findings", that "additional equity from a third party will have to be sought to make up the funding shortfall and will, likely result in Newco reducing its interest from 48% to 46%". That is to say, the CIBC revised its Scenario I, which envisaged using incremental debt to finance the share redemption, so that the sale of a co-ownership interest in College Square would increase from 52% to 54%. Its financial analysis used Altus' revised valuation of $58.9 million, and assessed the fair market value of the Selling Shareholders' interest in College Square "at approximately $19.7 million or $2.8 million for each Selling Shareholder".

[273] In his first affidavit David Katz deposed that "the Revised CIBC Report confirmed that Barbara, Andrew and I were unwilling to have our interests in College Square diluted to the extent that we would be giving up the control and management of the property that had been in the hands of the Leikin family for approximately 70 years." While that may not be precisely what the Revised CIBC Report stated, I accept Katz's evidence that the November 5 CIBC Report signaled to the Selling Shareholders that the Non-Selling Shareholders wanted the ability "to influence major decisions pertaining to the ownership and management" of College Square. Clearly the Non-Selling Shareholders were not looking to end up as the owners of a minority interest in College Square.

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XIX. Share sale negotiations and agreement[25]

[274] The negotiations over the terms of a Letter of Intent between the Selling and Non-Selling Shareholders began in earnest on November 23, 2004 and ended with the execution of a LOI dated April 15, 2005. A significant component of the plaintiffs' case consisted of their assertion that the transaction structure recommended in the CIBC Report shaped their understanding of how the deal for their shares would unfold. Mr. Kesler adverted to this point in his cross-examination at trial:

> Q. All right. Now I'm just going to deal with the first two sentences of Mr. Katz's memo, and the first one talks about you having a brief conversation with Gerry Levitz regarding the benefits of the CIBC process, do you see that?
>
> A. Yes, I do.
>
> Q. And I take it the CIBC process was – the valuation process of the CIBC was retained to conduct?
>
> A. Well the entire process, it was more than just a valuation process, it was the entire process.
>
> Q. So can we agree it's the valuation, and any other role the CIBC had in respect to this matter?
>
> A. Yes, it goes to the heart of the transaction how it would be structured, and how it would unfold, and how it would be financed, and –

[275] As the evidence below will reveal, the deal ultimately reached by the parties under which the plaintiffs were able to sell their shares was contained in the LOI dated April 15, 2005. That agreement was the product of hard bargaining, and while it tracked the share redemption structure proposed in the CIBC Report, the final terms of the bargain between the parties were reflected in the LOI, not in the CIBC Report. The scope of those negotiations and the self-interest pursued by the shareholders in those negotiations were described by Lewy in his evidence:

> Q. Yes, and during the period of time when the Letter of Intent was being finalized there were some open issues that were subject to negotiation, correct? One was, among others,

[25] The evidence before the court on the summary judgment motion can be found at paragraphs 185 to 240 of the SJ Reasons.

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price and the other broadly speaking was terms such as representations, warranties, those sorts of things, correct?

A. Yes.

Q. And in acting for Mr. Kesler I take it you considered him to be at liberty to attempt to maximize the benefits he would get from those aspects of the transaction?

A. Yes.

Q. And he could approach those matters in his own interest, fair enough?

A. Yes.

Q. And I take it you also considered that he was entitled in pursuing his interest to obtain information about the company's assets without sharing it, for example information from Mr. Atlin?

A. He was obtaining information, yes.

Q. And you were content that he could obtain information from Mr. Atlin that dealt with the value of the company's assets and not share it with the people with whom you were negotiating?

A. Yes.

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A. The negotiations

November

[276] On November 23, 2004, Jules Lewy, Rick Kesler's partner at FMC, emailed a six-page memorandum to Grant Jameson commenting on the draft LOI on behalf of "all of the seven 'selling shareholders' and their counsel." The memo was copied to other advisors of the plaintiffs: Ken Prehogan and Bill Ross of the Weir Foulds firm, Jim Mainzer in Chicago, and Gregory Sanders, the lawyer for Ivan Kesler**.** Lewy's memorandum dealt with a number of transaction-related issues and questions concerning the post-transaction shareholdings amongst the family members for the remaining, or non-core, assets. Three portions of his memorandum touched upon issues relevant to this action. He wrote:

Grant, we have reviewed the draft offer letter and would comment as follows:

(i) The purchase price should be based on a sale price for College Square of $58.9 million…

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> (vi) It is assumed that the Transactions and the Proposed transactions will only proceed once financing/purchase has been approved and that CIBC will be retained to find financing/purchaser as soon as possible. In this regard, it should be made clear that at the closing of the Transactions, the selling shareholders will receive cash and not promissory notes and that the financing/purchase will be for an amount required to complete the transactions. This should be clarified in the letter. In addition, *the letter should be clear that as soon as the letter is signed by the seven shareholders, the remaining shareholders will use their best efforts to find financing/purchaser and to consummate the transactions.*
>
> …
>
> (ix) The letter should include a representation from all the shareholders that they do not have any information or knowledge of any facts relating to the Pre-Closing Transactions or the Transactions which, if known to the other shareholders, might reasonably be expected to deter the parties from entering into the reorganization and completing the Pre-Closing Transactions and Transaction contemplated in the letter. Without limiting the generality of the foregoing, *the remaining shareholders should represent and warrant to the Vendors that they have no present intention of selling their interest in College Square and/or Fisher Heights Plaza. In addition, if the Transactions involves a sale to a new co-owner at a price greater than the price set out in (i), the selling shareholder should benefit from such increased price*. (emphasis added)

Lewy confirmed that the requests he was making in this memorandum were of the remaining, or non-selling, shareholders, and Lewy was expecting Jameson to obtain the position of the Non-Selling Shareholders and get back to him "in his capacity as being the conduit on the other side".

[277] Sheira Harris deposed that "during the negotiation of the share redemption transaction, I had concerns that the Non-Selling Shareholders were withholding material information that related to College Square." Zena Harris also deposed that she was "concerned that the Non-Selling Shareholders were withholding information from the Selling Shareholders". Mainzer stated that during the negotiations on the letter of intent the Selling Shareholders were "concerned that the Non-Selling Shareholders were withholding material information from them and that the Non-Selling Shareholders may have already arranged to sell an interest in College Square to a third party for a higher price."

[278] Zena Harris, one of the Selling Shareholders, testified on her cross-examination before trial that she was not aware that the Selling Shareholders had made a request to share in any greater price on a sale by the Non-Selling Shareholders and that their request had been rejected. Sheira's evidence was that she was aware of the request and its rejection by the Non-Selling Shareholders.

[279] In his affidavit David Katz described the role of Grant Jameson in these negotiations as counsel for the corporations, as well as a conduit for conveying the positions of the Non-Selling Shareholders to Lewy "on matters relating to the Agreement that affected their interests". Josephine Harris was aware that Mr. Jameson was communicating positions on behalf of the Non-Selling Shareholders.

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[280] On November 23, 2004, David Katz sent Grant Jameson a memorandum setting out his comments on Lewy's memo of earlier in the day. In his memo Katz made it clear (through copious double-underlining) that CIBC would not be retained to source the financing or purchaser for the transaction and that it was not fair to seek representations from the Non-Selling Shareholders relating to information and knowledge of facts. In the course of dealing with the latter point David Katz wrote:

> At this time, I have no specific information relating to the final transaction and outcome. In my view, no such representation should be required as the transaction should be strictly based on the selling shareholders agreeing to sell their interest in the core assets based on being paid their pro rata share based on a value that closely approximates FMV, nothing more…nothing less.

He also stated:

> *The non selling shareholders will not agree to the selling shareholder benefitting through some form of convoluted "tag along" or "put" provision, generated from the potential sale of a co-ownership interest in the College Square at a price that exceeds the value agreed upon for the purposes of transacting with the selling shareholders.* (emphasis added)

[281] At a meeting the next day, November 24, amongst CIBC, David Katz, Gerry Levitz and Grant Jameson, Jameson noted that David Katz was not prepared to agree to the tag along, but "if there were a T.P. Offer in hand, a tag along wd be appropriate, we don't have this". The notes also state: "if necessary DK will rep that there is no T.P. in waiting". Jameson explained:

> [T]here was a discussion of those concerns, and David Katz said that, if necessary, he would make the representation to the selling shareholders that there was no third party in waiting. In other words, there was no such transaction waiting to be done.

[282] Jameson responded to Lewy by memorandum dated November 24, 2004, which he copied to the directors and the various counsel for the plaintiffs. Jameson indicated that the Non-Selling Shareholders wanted to review Lewy's email in more detail, but Jameson wrote to advise about "a few serious issues which arose immediately":

> The assumption made in paragraph (vi) that CIBC will be retained to source the financing/purchaser is erroneous. *The non selling shareholders intend to be extremely proactive in sourcing the financing/purchaser. Given the fact that the non selling shareholders will be required to enter into a long term co-ownership relationship with the financing/purchaser, the non selling shareholders must be the parties involved in directing the sourcing of and eventually transacting with the third party that they feel will possess compatible business goals, objectives and corporate culture, to ensure a harmonious and mutually beneficial long term relationship.* The non selling shareholders might require the services of CIBC or possibly of some other investment banker but that decision would be made by the non selling shareholders.
>
> …
>
> *The representation set out in paragraph (ix) and the provisions of the last sentence of paragraph (ix) relating to the sale to a new co-owner at a price greater than the price upon which the purchase price of the shares is based, are not acceptable.*
>
> Paragraph (ix) is a very broadly drafted representation inviting shareholder liability on all sides of the transaction. In any event, this is not the type of transaction in which such a representation is appropriate.
>
> The last sentence of paragraph (ix) ignores the reality of the risk and uncertainties being assumed by the non-selling shareholders on a going forward basis and does not provide an opportunity for the non selling shareholders to achieve potential equilibrium between risk and reward. Each non selling shareholder takes the risk of a reduction in the value of the property as much as any potential increase. On the other hand, each selling shareholder receives his or her payment in full, in cash, at closing. (emphasis added)

In terms of next steps Jameson wrote:

> Would you please confirm that each of the seven shareholders who I have referred to as the seven selling shareholders are prepared to enter into the reorganization and complete the pre-closing transactions and transactions based on the terms and conditions outlined in the November 23 Memorandum.
>
> The four non-selling shareholders will meet and then provide the seven selling shareholders with comments on the Memorandum as soon as reasonably possible once we have received a satisfactory response to the foregoing.

[283] In her affidavit Josephine Harris viewed the refusal by the Non-Selling Shareholders to give the requested representations and "tag along" provision as a "withholding of information" in the face of "direct and specific requests." Ms. Harris did acknowledge that by November, 2004 the Non-Selling Shareholders were not agreeable to sharing any greater price with the Selling Shareholders and were only interested in concluding a share redemption transaction based on a

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fixed price. The Harris Family shareholders were prepared to proceed with a fixed price transaction.

[284] Lewy testified that he discussed the refusal of the Non-Selling Shareholders to share in any up-side on a resale of College Square with Kesler and the lawyers for the other selling shareholders. As a result of that discussion, they withdrew that specific request. As Lewy stated:

> Q. Okay and you would agree with Mr. Lewy that in any transaction like this after the sellers are gone, the selling shareholders, such as Mr. Kesler, there is always a possibility of a subsequent sale at a profit?
>
> A. That's what we tried to deal with in one of the clauses, correct.

[285] Mr. Spieler acknowledged that once the negotiations started a tension arose between the Selling Shareholders' interest in getting the most that they could and the non-selling shareholders' interest in not overpaying.

[286] The position of the Non-Selling Shareholders as set out in Jameson's memo raised some red flags for Rick Kesler: he was concerned "that the Letter of Intent was not being fairly negotiated by the non-selling shareholders." Kesler went so far as to tell Eric Desrosiers of CIBC on December 1 that he "believed that the non-selling shareholders were acting in bad faith and that they already had a deal with a third party based on a higher value than $58.9 million for College Square. I advised Eric that I felt that the non-selling shareholders were going to receive an immediate monetary gain from the structuring of the funding of the Proposed Transaction."

[287] Eric Desrosiers passed on to David Katz this comment from Rick Kesler. According to a memorandum of December 1 prepared by Mr. Katz following a discussion with Desrosiers, the Selling Shareholders were convinced that the "non selling shareholders are acting on a bad faith basis by arranging a 'bought deal' with a third party and based on a higher value than FMV. (Rick seems to be receiving advice that is suggesting that the third party transaction would be based on a value of $62-$64 MM)." He also wrote: "Rick believes that the non selling shareholders attempt to exclude CIBC from such involvement is an indication that the process is not clean and that we are concealing information that is favorable."

December

[288] In his December 1, 2004 memorandum David Katz requested Jameson approach Lewy and advise him as follows:

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> I would like you to advise Lewy that the sell side's concerns that appear to be centered on the non selling shareholders having a bought deal and desire to generate immediate financial gain by way of commission, finder's fees etc as a result of the Proposed Transaction are off base and factually incorrect. If these are in fact the two principal concerns, then we should be able to allay these based on providing very specific representation that will confirm that: i) the non selling shareholders do not have any pre arranged deal with a third party purchaser or for that matter with a financial/lending institution; ii) the non selling shareholders have no intentions and will not receive any financial remuneration or gain by way of commissions, finder's fees etc resulting from the financing/purchaser arrangements that they would enter into to fund the Proposed transaction. *For clarity, however, the non selling shareholders will not provide representations that would preclude them from sourcing and finalizing the most financially attractive funding arrangement possible and it will be important and necessary for the selling shareholders to get their heads around this issue if we are to transact…We have made no attempt to conceal the fact that we will try to avail ourselves of the most favorable funding opportunities possible and based on the most optimal values that are possible.* In addition, we are very comfortable making the kind of representations necessary that will confirm to the sell side that we are not trying to 'pull a fast one'." (emphasis added)

[289] Lewy testified that he expressed to Jameson the sellers' concern that there would be a side deal which would affect the transaction price. Jameson left Jules Lewy a voice-mail message on December 2, 2004. Lewy transcribed the message in which Jameson said, in part:

> Rick I think expressed to Eric concerns about the reason why the so-called buy side and the non-sellers would not want to have CIBC retained and I've never seen any indication, I guess the report seems to be that Rick feels that maybe there's a deal or something being cooked up here. Again, it's more of the conspiracy theory coming from Rick and the so-called sell side that the buy side is trying to pull a fast one on them and I've just seen absolutely no indication of that and I think it's as clear as and as simple as I set out in the memo of November 24th to you where those who are not selling feel that they need to be able to get the right person, the right group coming in, the right corporation, whatever it's going to be to be an investor because they're going to be locked in for a long time and if we're forced to take CIBC who is simply going to find someone who has money in order to implement this transaction that it's not necessarily going to be in the best long-term interest of those who are the non-sellers and who are stuck in a long-term relationship with a party that they may not necessarily be happy with, so I can assure you to the extent that anyone shares views with me, and I think they're all very open with me, that there is no hidden agenda here…

Lewy understood Jameson to mean that there were no deals being made at the time.

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[290] Rick Kesler regarded this message by Mr. Jameson as misleading because he did not disclose the information about he had learned at the July 14, 2004 meeting. Jameson acknowledged that the potential presence of a third party purchaser was an important issue to the Selling Shareholders, but he disagreed with Mr. Kesler's characterization of his message to Mr. Lewy:

> I wasn't thinking of the July 14th meeting at all. In fact, I had probably forgotten all about that meeting by the time November came along…
>
> [T]he July 14th meeting to me was purely speculative. It was something which might happen, not something which was going to happen.

[291] Jules Lewy spoke with Grant Jameson on December 6, 2004 concerning the November 24 memorandum. In a memo to file dated December 6, which he copied to the other counsel for the Selling Shareholders and to Rick Kesler, Lewy recorded that his conversation with Jameson had started with the latter "stating that he wanted to make clear that Barb and the other "Remaining Shareholders" did not have any prospective purchaser "lined-up". Two issues dominated the discussion: (i) whether the Non-Selling Shareholders would give a representation on the state of their knowledge and information and (ii) whether the Selling Shareholders would participate in the upside of any resale of an interest in College Park. Jameson indicated that the Non-Selling Shareholders were not prepared to agree to either, but that he would discuss the issues with them. Mr. Lewy and Mr. Jameson also discussed the latter's role in the negotiations:

> I concluded by stating that I just wanted to confirm that Grant was acting for the Leikin Group and not the Remaining Shareholders. Grant stated that his position has always been that he is acting for the Leikin Group. In respect of the memorandum he has sent to me, he stated that he was just relaying the concerns of the Remaining Shareholders but again repeated that he acts for the Leikin Group. He stated that, in the past, Barb has received independent legal advice when she considered it necessary to obtain independent legal advice and, if necessary, he would suggest that she obtain independent legal advice. Grant acknowledged that by setting out his views on the issue of price in his memorandum to me, it may appear that he is acting for the Remaining Shareholders but he wanted to make clear that he is merely relaying the position of the Remaining Shareholders.

[292] In early December Rick Kesler received a few calls from Eric Desrosiers asking to meet with Barbara Farber and himself to negotiate the final details of the share purchase transaction. That overture made Kesler feel "uncomfortable and I repeatedly told [Desrosiers] I would not negotiate in this fashion." This prompted Kesler to email Lewy and tell him about the conversations with Desrosiers, including the latter's communication that if such a negotiating meeting did not occur "Barbara Farber et al were going to 'pull the plug'". What ensued was a

telephone conference call on December 7 amongst Rick Kesler, Grant Jameson and Jules Lewy. Mr. Lewy's notes of that conversation indicated that Mr. Jameson conveyed the frustration of the Non-Selling Shareholders about the slow pace of negotiations, advised that the Non-Selling Shareholders were not prepared to negotiate price, and Ms. Farber wanted to meet with Mr. Kesler to discuss other issues including future governance.

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[293] The correspondence within the Selling Shareholders' group following this memorandum from Jameson revealed that the Selling Shareholders clearly understood that the Non-Selling Shareholders were not prepared to share in any "up-side" benefit they might obtain on a sale of a co-ownership interest in College Park to a third party. For example, in a December 9, 2004 email Gregory Sanders, Ivan Kesler's lawyer, sent to Jules Lewy, he wrote:

> The content of your discussion with Grant strongly suggests that the remaining shareholders are interested in having a fixed price and do not want to have to justify a difference between the price they pay the selling shareholders and the amount they get from a third party. I believe that this issue is a fundamental one for the remaining shareholders and will cause a collapse of the negotiations if pursued in its current form by the selling shareholders.
>
> My client's position [i.e. Ivan Kesler] has always been more focused on the treatment of the remaining assets more than anything else. Although maximizing the price is important, my client needs to know that the ongoing relationship with the remaining shareholders and the balance of the assets is properly addressed and can give him sufficient comfort so that he will not have to monitor the future relationship with the level of scrutiny that is now required.
>
> Based on the above, I have recommended to my client as follows:
>
> 1) To accept a fixed price for the assets being sold, subject to a representation that he has all the available information to make that decision. That means that there is no other information available at the time of signing the letter of intent that would influence that decision. He will also need a mechanism of disclosure to allow confirmation that this representation has been met.

[294] An email sent by Ivan Kesler that same day to his fellow Selling Shareholders indicated that he was aware that by accepting a fixed price for the transaction, he might be giving up the ability to participate in any up-side on a sale of a co-ownership interest to a third party:

> This position is based on my lawyer's advice and my understanding that the 4 Buyers are set on a sell price of $58.9M and will not accept anything else. That makes it a deal breaker.

> The estimations which I have done (that I know are NOT 100% accurate, I could be wrong, but I think are likely ball park) lead me to believe that what is being given up, at the outside, is possibly $567,000 - $736K Cdn, pre-tax, based on a sell of $67M, with everything more than $58.9M being shared between all 11 shareholders. This amount decreases as the amount shared decreases; and decreases also with after tax.
>
> So, for the money involved, what is critical to me is clearly establishing the governance structure in Newco now (one person/one vote-shareholders vote on substantive issues, not directors on behalf of shareholders), to avoid future difficulties of all sorts.

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[295] In a December 13 email Mr. Sanders wrote to Mr. Lewy: "The concept that you have to push forward is the idea that there is a belief that the value of the property could be in excess of the sale price and that we are only looking to share if it is substantially in excess of that price (more than 5%)." Mr. Lewy replied: "The responses from all of the Selling Shareholders are identical. I will relay their message to Grant today and request a written response."

[296] Lewy did email Jameson, on December 13, in which he communicated the position of the Selling Shareholders:

> I have spoken to the lawyers for all of the "Selling Shareholders" and each had confirmed to me that the minimum price that their clients are willing to accept for College Square is $58.9. As I explained to you last week, *the Selling Shareholders have always taken the position that if the value was higher (as represented by an actual transaction) they should share in such greater value. However, they have accepted the compromise that they would only share if the value was more than 5% higher…* (emphasis added)

[297] Less than an hour later on December 13 Jameson emailed Lewy the position of the Non-Selling Shareholders:

> The proposed formulation for determining selling price is completely rejected, as it is not based on the appraisal of fair market value analysis conducted by the Altus Group in August 2004 and updated in October 2004, ("FMV"), the whole as mandated by CIBC Mid-Market Investment Banking Group, in accordance with their agreement entered into with the Leikin Group on July 9, 2004 ("CIBC Agreement"). In addition to the foregoing and more particularly, the Remaining Shareholders have noted that the selling price formula proposed by the selling shareholders is based on the selling shareholder being rewarded for financing transaction(s) that are based on a higher valuation of College Square than FMV, with no acceptance of risk associated with financing transaction(s) that are based on a lower valuation of College Square than FMV and consider such formulation to be wholly unacceptable.

> As a result of the foregoing, the Remaining Shareholders have determined that they wish to terminate their participation effective immediately, in any and all further discussion and negotiations relating to the Proposed Transaction.

[298] Later that day Mr. Jameson sent an email to the directors, on behalf of Barbara Farber, advising that the Non-Selling Shareholders had advised the Selling Shareholders that they had terminated their participation in discussions regarding the proposed transaction.

[299] On December 13 Mr. Jameson had a telephone conversation with David Katz. According to Mr. Jameson's notes of that call, Mr. Katz told him: "No dealing to date with a third party. No idea what we would do."

[300] The next day, December 14, Sanders emailed Lewy asking him to contact Jameson "to ascertain what the real issues are." After setting out his understanding of the different perspectives taken by each side on the issue of price, Sanders wrote:

> While my client will not be happy if he knows that the remaining shareholders disproportionately benefitted from the buyout price, he is still prepared to accept the process adopted by CIBC and does not feel that it is necessary to terminate the negotiations solely on the basis of obtaining a few extra dollars.

[301] Later that day Lewy emailed Sanders and the other plaintiffs' legal advisors seeking the positions of the other Selling Shareholders. He communicated that Rick Kesler was of the view the Board should meet "to discuss the situation and ascertain whether there is a possible resolution" and, if there was not, "we should commence litigation".

[302] Lewy left a message with Jameson on December 16 requesting, on behalf of Rick Kesler and Harris, dates for a directors' meeting in early January. According to Jameson, the message continued:

> He also asked what the issue was which killed the deal. He thought that the non selling side had wanted to meet or at least would have sent a memo explaining why the sell side price requirements were not acceptable. There is therefore a way to restart the discussion in my view based on his comments.

[303] Farber advised Jameson that she was "not sure we should rush to respond to Lewy's call".

[304] On December 24 Mr. Jameson replied to Mr. Lewy. His email is an important one, and I shall reproduce a significant portion of it. Jameson indicated that although the Non-Selling Shareholders were prepared to meet on January 9, 2005, they wanted the "value ascribed to the

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Core Assts for the purposes of the transaction" agreed upon prior to any meeting. Mr. Jameson then conveyed, at length, the position of the Non-Selling Shareholders on the sale transaction:

> I can confirm that the non-selling shareholders are agreeable to the value of the Core Assets being that set out in the revised CIBC report i.e. $58.9 Million for College Square and $6 Million for Zena's Fisher Heights Plaza. The non-sellers have affirmed their confidence in the CIBC process and the results which have lead to the values established in the revised CIBC report. Please confirm that the selling shareholders are content and agree to transact at these values. These values in turn establish the amount which each selling shareholder will receive at the end of the restructuring which constitutes the Proposed Transaction set out in the CIBC report. There must be agreement on these values before any meeting can take place. To do so otherwise would I believe simply lead to a non-productive meeting.
>
> You had asked that the non-selling shareholders advise the selling shareholders of the form of financing transaction they intend to utilize to be able to finance the reorganization transaction. The non-selling shareholders have told me, and I am authorized to advise you and the selling shareholders, that no form of financing transaction has been structured and/or finalized, as the non selling shareholders will not commence discussions with any third parties, including the College Square senior debt holders, that they do not have the ability to complete. As such, financing proposals cannot be started or advanced until an executed and irrevocable LOI is delivered by the selling shareholders. The non selling shareholders are in agreement with the CIBC team's view that the Proposed Transaction will require a disproportionate share of equity financing, due to the severe restrictions that exist on placing subordinated debt on College Square. Moreover, there is the suggestion that the non-selling shareholders have arranged, in effect, a bought deal to enable them to complete this transaction immediately following the execution of the LOI, which seems to have given rise to the request for an adjustment of the value of College Square at closing if the value for financing purposes is greater than the valuation used for the Proposed Transaction.
>
> *This would suggest and necessitate that the non selling shareholder i) have sought and obtained the requisite approvals from the College Square senior debt holders; ii) dealt satisfactorily with the anchor tenants purchase rights; iii) negotiated a co-tenancy agreement and sale of an undivided interest with a third party equity investor; based on the successful completion of the third party's due diligence. I can confirm that none of the above noted events have been arranged. The non selling shareholders however have requested that I communicate their absolute intention to use their best efforts to finance the Proposed Transaction at the most favourable terms and conditions possible and will not allow financing terms and conditions to influence the price at which selling shareholders will be expected to sell.*
>
> They expect to require the full 120 day financing period to assemble the necessary due diligence information, find parties interested in the transaction, negotiate financing and

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> then arrange to close in conjunction with the closing of the Proposed Transaction. They have rejected an informal overture from CIBC to provide interim financing of the amount required to simply fund the Proposed Transaction as they do not have a pre-structured permanent financing arrangement in place to "takeout" such an interim financing arrangement. This provides further evidence to support the fact that there is no bought deal. (emphasis added)

Jameson requested Lewy to speak with the other parties on the "sell" side and give him their comments.

[305] This email, coupled with the previous positions of the Non-Selling Shareholders communicated by Jameson, clearly signaled to the Selling Shareholders that the Non-Selling Shareholders regarded the price for the share purchase transaction and the price on a financing as two different things.

[306] On December 31, 2004, Lewy, in a memorandum to Jameson, copied to the other lawyers for the plaintiffs, wrote, in response to Jameson's December 24 email:

> *Assuming that the governance issues can be dealt with satisfactorily, the Selling Shareholders reiterate that they are prepared to accept a fixed price even though this is different than their original understanding of how the reorganization was to be concluded.* (emphasis added)

Lewy advised that Rick Kessler and Jo Harris would be available for a meeting on January 9, 2005.

January

[307] Jameson sent the response of the Non-Selling Shareholders to Lewy on January 6, 2005. Most of his memorandum dealt with governance issues. Towards the end of it, however, Jameson returned to the issue of the redemption of shares transaction:

> Your memorandum to me of December 31, 2004 says that the Selling Shareholders are prepared to accept a fixed price for the Proposed Transaction but it does not confirm that the value is that set out in my memorandum to you of December 24, 2004, namely, $58.9MM for College Square. I would like to bring to your attention that the value identified for Zena's Fisher Heights Plaza of $6MM in my memo of December 24th was incorrectly stated and should have read $6.7MM. Confirmation of the fixed price based on the aforementioned values of $58.9 MM and $6.7 MM is essential to the completion of the proposed transaction.

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[308] Rick Kesler then contacted Grant Jameson directly, prompting the latter to circulate an email to Rick Kesler, Jules Lewy, Barbara Farber, Gerald Levitz and the CIBC, summarizing their conversation:

> *I have passed on your advice to me of this morning about the sell side acceptance of the governance proposal made by Barb and on the fixed price issue, with a fixed price being determined with reference to a valuation of College Square at $62MM.* In order for the non-sellers to fully assess their position given the oral discussions and memorandum exchanges which have taken place since receipt of the Memorandum from Jules Lewy of November 23, 2004 and to ensure that they know the definitive position of the selling shareholders, the non selling shareholders need to have a written summary of the selling shareholders position on all issues. (emphasis added)

Jameson suggested that this take the form of a memorandum from Jules Lewy.

[309] On January 12 Jameson sent Lewy an email expressing concern about the possible prejudice to the proposed transaction presented by the passage of time.

[310] On January 21 Lewy sent Jameson, and the other plaintiffs' counsel, a memorandum setting out the position of all of the Selling Shareholders which "should provide the basis for the LOI." The memorandum dealt with several issues, including governance, the special shares, transferability of shares, and LOI provisions. On the issue of price the memorandum stated:

> The price that would be used for the real estate in connections with the transactions would be $62 million for College Square, and $6.7 million for Zena's Fisher Heights Plaza.

Lewy also wrote that:

> The LOI should state that: transactions will only proceed once financing/purchase has been finalized. In this regard, the Selling Shareholders recognize that the Remaining Shareholders can retain such advisor, if any, as they desire. However, the Selling Shareholders do not wish to be responsible for the fees of such advisor. In addition, the LOI should clearly state that the Remaining Shareholders will use their best efforts to find financing/purchaser to consummate the transactions.

[311] Jameson regarded this communication from the Selling Shareholders as "a change in a fundamental principle of the Transaction, when the Selling Shareholders began to 'negotiate' the value to be attributed to College Square rather than basing the 'purchase price' on the assessed market value of College Square, which the revised Altus valuation had indicated to be $58.9 million."

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[312] David Spieler had been approached by an acquaintance in Barbados who had expressed an interest in purchasing an interest in College Square. In a January 17, 2005 email to Grant Jameson, Spieler queried whether he could "be part of the outside investor who buys the 52/56%".

[313] In January Sylvie Lachance contacted David Katz to find out what was happening on College Square. As she testified on the summary judgment motion:

> It is…very customary for me to follow up regularly on transactions that have died to check if they are for sale and to check if here is a possibility of concluding a transaction.

[314] At that point FCR was still interested in College Square. In response David Katz sent her an email dated January 27, 2005 attaching "relevant financial data" for College Square in which he, in a cash flow analysis, estimated the current market value of College Square at $76.589 million. When asked how he arrived at that number Katz testified:

> Well the $76.5 was the value that had to be ascribed in a third party transaction to generate sufficient proceeds to cover the cost of the share redemption transaction, and enable the non-selling shareholders to retain a 50% interest. And that calculation is confirmed by virtue of Pat Day's March the 6th analysis that we had reviewed just several minutes ago.

[315] Other than that exchange, Katz had no communications with FCR between mid-October, 2004 and May 4, 2005.

February

[316] The response of the Non-Selling Shareholders to Lewy's January 21 memo came through a memorandum from Jameson to Lewy dated February 2, 2005. The memorandum addressed several issues, spending much time on governance matters. On the issue of price Mr. Jameson responded:

> The value to be attributed to College Square in connection with the transactions is to be $58.9 Million and $6.7 Million for the overall value of Zena's Fisher Heights Plaza. It should be kept in mind so that there is no last minute misunderstanding that the Leikin Group is the owner of 90% of the equity of Zena's Fisher Heights Plaza therefore 90% of $6.7 Million would be the value of the Plaza attributable to the price paid per share to the Selling Shareholders in the proposed transaction.

[317] As to provisions of the LOI, Jameson wrote, in part:

> If the LOI is to contain an undertaking of the Remaining Shareholders to find financing, then that undertaking must be an undertaking to use reasonable efforts to find financing satisfactory to the Remaining Shareholders in their discretion. They must also be allowed to act in a manner which might be found by the Selling Shareholders or by an independent third party to be unreasonable in rejecting financing opportunities. Otherwise the Remaining Shareholders might be forced to agree to financing terms or to enter into arrangements which would not be in their own best interests going forward. This transaction will only work if it is a win/win situation for all shareholders. Neither group should be forced into a situation which is contrary to their best interests.
>
> …
>
> *The Selling Shareholders would not have the ability to review or to approve of the documentation or transactions relating to the financing of the proposed transaction or the structure of the arrangements with lenders or others which would take effect and relate to the Core Assets on or after closing. In short, whatever is implemented by all shareholders in order to achieve closing may be reviewed, whatever is entered into between Newco or the Remaining Shareholders and their lenders or others (such as co-tenants, if that form of structure is implemented) would not be reviewed or commented upon by the Selling Shareholders*. (emphasis added)

[318] On February 2 David Katz sent a memorandum to Barbara Farber, Andrew Katz and Grant Jameson outlining a methodology to obtain appropriate financing to fund the share redemption transaction. The first stage would involve identifying "the specific and required qualifications of the third party candidate." Katz then listed out seven factors to take into account in identifying such candidates, including: "Must be prepared to transact based on a valuation of College Square of not less than $67M (this seems to be Spieler's expectation)." Katz proposed that the other Non-Selling Shareholders give him a mandate to source pre-qualified investor candidates on the understanding that "he would carry out the mandate in a manner that would enable the shareholders to sell an undivided interest in College Square based on the highest achievable selling price, with due regard given to selecting an arms length 3rd party that would be considered highly compatible, so as to minimize the risks associated with co ownership arrangements". Jameson deposed:

> From this memo I understood that no such third party investor had been found and that David Katz was speaking about the process that he intended to follow once the LOI had been executed.

[319] I find that such an understanding by Jameson was a reasonable one. Katz's memorandum belied the existence of any "bought deal" and indicated that Katz, as a Non-Selling Shareholder, intended to work to achieve the highest possible selling price for an interest in College Square as part of the financing transaction.

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[320] Lewy spoke with Jameson on February 17 about the latter's February 2 memo. In his memo recording that conversation Lewy wrote:

> In respect of transaction costs, I stated that it did not make sense for the Selling Shareholders to pay any portion of the transaction costs. The Selling Shareholders have no say in the transaction. Grant stated that they would benefit from the transaction and, therefore, they should share in the transaction costs. I stated that, although they would benefit from the transaction, they could not direct who the purchaser would be or direct any other aspect of it. *They recognize that the Non-Selling Shareholders should be able to determine the type of transaction and the partner that is chosen and/or the financing that is chosen.* But on this basis, the Non-Selling Shareholders should not be responsible for the transaction costs. I also stated that it would not be acceptable for any of the transaction costs to be paid to David Katz if the Selling Shareholder were contributing. Grant stated that he would relay the message to the Non-Selling Shareholders. He added that it was his understanding the David Katz was not receiving any fees.
>
> *The final point was price. I stated that Selling Shareholders believe $62 million was reasonable. This was based on Rick's discussion with Desrosiers. I also repeated that the initial LOI was based on a selling price which would be determined in the transaction and that it was the Non-Selling Shareholders who now wanted a fixed price. Accordingly, the Selling Shareholders wanted a fixed price of $62 million based on the discussion with Desrosiers. I agreed with Grant that obviously price is negotiable but I stated that in the Selling Shareholders views, $62 million was reasonable.* (emphasis added)

[321] FCR maintained its interest in College Square, at least internally, for on February 9 an in-house analyst, Denise Cantin, sent Sylvie Lachance an email:

> Je vous transmets un document révisé et simplifié qui, je crois, illustre plus facilement ce qui a changé en terme de revenue en 2005 vs 2004. J'ai aussi révisé le tableau de comparaison pour utiliser le même taux de cap que l'an dernier. J'attends votre appel pour en discuter plus amplement.

Ms. Lachance doubted that the capitalization rate shown by Ms. Cantin – 8.5% - originated with FCR because it was not the normal cap rate used by FCR at that time.

March

[322] As can be seen, the Non-Selling Shareholders were prepared for the company to buy the shares of the others using a value attributed to College Square of $58.9 million, while the Selling Shareholders wanted the transaction to use a price for College Square of $62 million. CIBC was asked to provide a supplement to its September Report showing the valuation of the shares of the

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Leikin Group "based on a revised valuation of $60.0 million" for the College Square property. CIBC sent that revised calculation to David Katz on March 3, 2005.

[323] One of the plaintiffs, David Spieler, initially aligned his interests with the other Non-Selling Shareholders. By early 2005 he was unable to determine his position with respect to the proposed transaction and he retained his own counsel, Sandra Appel, to provide him with assistance on the shareholders' agreement to be entered into amongst the Non-Selling Shareholders, as well as with his rights on the redemption transaction. Ms. Appel's retainer ended in June, 2005, when Speiler decided to become a Selling Shareholder. Although at trial Ms. Appel recalled that she did not provide Speiler with advice on the letter of intent, her memory was refreshed when shown emails to which she was a party indicating that she was providing Speiler with some advice on aspects of the proposed transaction letter of intent.

[324] On March 3, 2005, Jameson sent a detailed memorandum to Lewy and Appel transmitting the position of the Katz Defendant Non-Selling Shareholders. Jameson advised that the memorandum set out "the full and final position of the Committed Non Selling Shareholders" on the acceptable terms of the proposed share sale transaction. The memorandum then dealt with issues concerning the proposed transaction, governance and shareholder matters. As to the price for the transaction, the Non-Selling Shareholders would consider:

> the value of College Square and the Plaza to be used in calculating the transaction price will be $60,000,000 and $6,700,00 respectively. As a result, the gross pre tax transaction price to be paid to each selling shareholder upon closing will be $3,410,000.00.

[325] The memorandum attached the form of LOI to be executed by the Selling Shareholders and set an outside date of March 11, 2005 for its execution by all seven Selling Shareholders. The memorandum stated that David Spieler could participate either as a Selling or Non-Selling Shareholder, as he chose.

[326] The LOI, which was signed by Barbara Farber in her capacity as CEO for the Leikin Group, stipulated that consummation of the proposed share transaction would be conditional upon several events, including:

> Newco and Newco 2 (as defined in Schedule B) shall have arranged financing satisfactory to Newco and Newco 2 in their sole discretion in order to complete the Pre-closing Transactions and the Transaction contemplated by this letter.

The LOI contemplated that the share sale transaction would close 120 days after its execution.

[327] Lewy responded on March 14, sending Mr. Jameson a memo which focused largely on governance issues. Paragraph 5 dealt with the transaction price:

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> As we have discussed, Schedule "B" deals with the redemption of shares in the amount of $2,964,000 and $446,000. These amounts are reflected on the CIBC schedule which you provided to me, as the fair market value per Selling Shareholder and this should be made clear in Schedule "B".

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[328] The $2,964,000 came from the CIBC's March 4, 2005 Supplement (initially sent to David Katz) which calculated the pay-out per shareholder using a revised valuation of $60 million for College Square. The governance issues had assumed a significant role in the discussions by this time, with Lewy stating that although "we are very close to agreeing on the terms of the transaction", the Selling Shareholders wanted to enter into a formal shareholders' agreement as soon as possible. From Lewy's memorandum sent on March 14, it was apparent that all shareholders were prepared to proceed with the share sale transaction based on a value attributed to College Square of $60 million.

[329] Jameson conveyed the Non-Selling Shareholders' response on March 16, 2005:

> Having received no executed LOI from the Selling Shareholders by the date and time set out in the LOI dated March 3, 2005, the LOI is now null and void and is fully withdrawn in accordance with its terms…
>
> The Committed Non-Selling Shareholders have no plans to conduct further discussions with the Selling Shareholders on matters relating to the Proposed Transaction. The committed Non-Selling Shareholders have withdrawn from the Proposed Transaction and as a consequence the Proposed Transaction should now be considered terminated.

[330] Notwithstanding this formal statement by the Non-Selling Shareholders, discussions continued between Rick Kesler and Barbara Farber, as well as between the lawyers, Grant Jameson and Jules Lewy.

[331] During February and March some discussions were held between David Katz and Eric Desrosiers about the possible involvement of CIBC to assist the Non-Selling Shareholders in locating a joint venture equity partner. A March 7, 2005 CIBC draft engagement letter stated that qualified offers by potential partners would have to be based on a minimum gross value of $77 million for College Square, with lesser values for smaller equity interests, and the draft recited that the non-selling shareholders had "had preliminary discussions with two potential JV Partners". No engagement with CBIC was concluded.

April

[332] On April 7, 2005, Lewy sent Jameson a revised LOI signed by all the Selling Shareholders. The purchase price of $3,416,564 per vendor reflected a fixed value for College

Square of $60 million. Lewy proposed a meeting of all shareholders to discuss the terms, instead of exchanging memoranda.

[333] Jameson responded by email to Lewy, and the other counsel for the Selling Shareholders, on April 12 with amendments sought by the Non-Selling Shareholders and confirmed counsel would talk the following day, which they did. Jameson's memo of that conference call indicated that price was not an issue by this stage of the negotiations.

[334] By April 13 Rick Kesler was becoming concerned about the positions being taken by Mainzer on behalf of the Harris Family plaintiffs. He emailed Lewy stating: "Jim [Mainzer] is not committed to closing, and I am beginning to feel that he is treating this as a forever file." Mr. Kesler commented: "I think that everyone is running out [of] steam and I fear that while some issues remain outstanding, particularly obtaining an asset list, there is a significant risk that either side may either walk from the deal or simply give in and withdraw, feeling that this is really a never ending negotiation." He concluded:

> I know you don't share all of my concerns but I have spoken with Barbara who is preparing an asset list and can tell you that the other side is very fragile and does not believe we can say yes. I think we could lose the deal and feel that we need to be able to say "yes" knowing that the essentials are there, otherwise I fear we are going to lose.

Kesler was concerned that the Non-Selling Shareholders would walk away from the deal and there would be no deal.

[335] Lewy sent Jameson a memo on April 14 with further comments about the proposed deal – his memo did not touch on the issue of the deal price.

B. The conclusion of an agreement

[336] A deal was finally reached on April 18, by which date all shareholders had signed a Letter of Intent. At this point of time the plaintiff, David Spieler, signed as a Non-Selling Shareholder. As agreed, the transaction would have two stages. First, an amalgamation reorganization would take place in which the ownership of the "principal assets" of the Leikin Group – i.e. College Square and Fisher Heights Plaza – would be separated from the ownership of the non-principal, or remaining assets. The LOI called this step the Pre-Closing Transactions. Second, the Newco owned by the Non-Selling Shareholders would acquire an interest in College Square proportionate to the Selling Shareholders`s interest, and then the sale proceeds would be used by the re-organized Amalcos to purchase, redeem or cancel the shares owned by the Selling Shareholders in Amalco – what the LOI termed the Transaction. The Selling Shareholders were

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to receive approximately $3.398 million for their shares in Newco, subject to certain final adjustments. There were certain conditions of closing, including paragraph 7(d) which stated:

> Newco and Newco 2 (as defined in Schedule B) shall have arranged financing satisfactory to Newco and Newco 2 in their sole discretion in order to complete the Pre-Closing Transactions and the Transaction contemplated by this letter…

This was a key condition. As noted above, Rick Kesler attempted to paint the CIBC Report as setting the parameters for the financing phase of the transaction. It did not. As the LOI's financing condition provided, satisfactory financing lay within the sole discretion of the Non-Selling Shareholders.

[337] On cross-examination Josephine Harris acknowledged that the plaintiffs agreed to the LOI "with the benefit of independent legal and valuation advice", including Mainzer and Lewy. She agreed that her children had entered into the LOI voluntarily and freely. Ms. Harris also characterized the negotiations which led to the signing of the LOI as highly adversarial, difficult, fractious, infused with self-interest where each side sought to maximize the value of the transaction to themselves, and ones in which the Selling Shareholders mistrusted the Non-Selling Shareholders. The following extract from her cross-examination on the summary judgment motion captured the essence of the position of herself and, presumably, her plaintiff children:

> Q. And, really, that because of this mistrust of the non-selling shareholders, you really weren't relying upon the non-selling shareholders, were you?
>
> A. Impossible.
>
> Q. Impossible for what?
>
> A. Yes.
>
> Q. Impossible to rely on them?
>
> A. Yes.

[338] Ms. Harris agreed that the $60 million value attributed to College Square for the purpose of setting the share purchase price in the LOI was a price reached through negotiations, not one based on any appraisal of College Square or on its fair market value. Mr. Kesler's evidence was to the same effect, as was Mr. Lewy's. Ms. Day, of GGFL, testified that at the end of the day the value of the share redemption was based on the negotiated value attributed to College Square and Fisher Heights Plaza.

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[339] According to Ms. Harris, at the time the plaintiffs entered into the LOI they knew that College Square might have a value greater than $60 million and that the value of College Square associated with any subsequent financing with a third party could be greater than $60 million. Having dropped their request during the negotiations to share in any upside of a subsequent transaction for College Square, Ms. Harris agreed that when they entered into the LOI the Selling Shareholders did not expect to receive anything more than the purchase price based on the negotiated $60 million.

[340] Josephine Harris acknowledged that financing of the proposed transaction was an essential ingredient of the share redemption transaction, and equity financing from a third party could reduce the Non-Selling Shareholders' interest in College Square to below 50%. She acknowledged that under the LOI it was the responsibility of the Non-Selling Shareholders to arrange the funding of the share redemption, and that the Selling Shareholders agreed that they would not be entitled to receive any information about the equity financing to be arranged by the Non-Selling Shareholders.

[341] Mr. Kesler also agreed that securing financing was an integral part of the share redemption transaction and that the Selling Shareholders were not entitled to receive information about any equity financing. Mr. Kesler stated that at the time he signed the LOI he was aware that College Square might have a value greater than $60 million "by a small percentage perhaps".

[342] Mr. Lewy testified that the Selling Shareholders understood that by agreeing to a fixed price for the LOI, there was always the risk that the property actually could be subject to a transaction at a later date which was at a different value. He testified: "Correct. And that was discussed with Mr. Kesler and the others and there are notes to that effect."

[343] Mr. Kesler agreed on cross-examination on the summary judgment motion that he believed it was the intention of the Non-Selling Shareholders only to sell a 50% interest in College Square in order to avoid losing control. Lewy stated that although there would be a 50% person coming in, the Selling Shareholders were not aware what financing arrangements would be put in place or whether all of the money needed to pay off the selling shareholders would come from the new person.

[344] Mr. Kesler had concerns right up to the time of signing the LOI that the Non-Selling Shareholders had already negotiated a deal with a third party to purchase an interest in College Square at a value in excess of $58.9 million. Lewy deposed that throughout the negotiations for the LOI "the selling shareholders were concerned that the non-selling shareholders were

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withholding information from them and/or had already arranged to sell a partial interest in College Square to a third party at a price that was higher than the value in the Letter of Intent."

[345] Andrew Katz deposed that during the negotiations he was unaware that FCR or anyone else might have been interested in purchasing an interest in College Square based upon a vlue of $70 million, or any other value. Further, in his dealings during that period of time with his two siblings "the notion of First Capital or anyone else purchasing an interest in College Square based upon a value of $70 million was not discussed between us".

C. GGFL's activities during the negotiations

[346] GGFL was not involved in the negotiations between the Selling and Non-Selling Shareholders; that fact is not in dispute. However, during the course of the negotiations GGFL did, at the request of David Katz, run numbers with respect to various "hypothetical buy-out scenarios", as deposed by Ms. Day. Those calculations used estimates as high as $76.5 million (in the first quarter of 2005) for the sale of a 100% interest in College Square. Day deposed that she understood David Katz had full authority to ask her to provide such calculations to the Leikin Group. Some of the calculations involved cash flow analysis, others dealt with the amount of potential payouts to redeeming shareholders under various scenarios, transaction costs, and the sale of an interest in the properties to third parties. Day testified that when she performed those calculations she had not been aware of any actual sale agreement to a third party regarding an interest in College Square.

[347] Andrew Katz was asked at trial about an April 6, 2005 email he, David Katz and Farber had received from Ms. Day which included a number of spreadsheets. One spreadsheet performed calculations using a buyout of shareholders at a price of $60 million for College Square and a sale price to a third party at $76.5 million. Andrew Katz testified:

> You'll see that the objective of this exercise at plugging numbers in is to determine what number a third party would have to pay in order to fund the share redemption, and it turns out this time we had – the selling shareholders had agreed to a fixed price of $60 million, so when you run $76.5 million at that point and time there was a shortfall in the funding was about $1.2 million…

[348] GGFL was not involved in the sale transaction and Day did not become aware of the transaction with FCR until she read about it in a local newspaper.

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XX. Securing financing for the share redemption transaction[26]

[349] The LOI contemplated that the transactions would close within 120 days from the date of execution of LOI. David Katz initially had some discussions with CIBC in March, 2005, about CIBC World Markets acting as advisors to secure a joint equity partner. At that point of time CIBC learned that the Leikin Group had held some "preliminary discussions" with FCR. The negotiations with the CIBC broke down in a somewhat acrimonious way and, as matters transpired, CIBC was "taken out of the deal bunker", as put by Mr. Desrosiers, and ultimately had to resort to litigation to recover its fees for the work it had performed in 2004.

[350] The Non-Selling Shareholders, through Newco (6384099 Canada Inc.), retained RBC Capital Markets Realty Inc. on April 29, 2005 to advise Newco, which the Non-Selling Shareholders controlled, "to secure a joint venture equity partner" for College Square. RBC's mandate was to "identify and communicate with a pre-authorized and highly qualified short list of institutional investors, for the purposes of securing a Qualified JV Partner". The mandate letter of RBC contained several conditions precedent:

> It is agreed and understood that an offer presented to the Vendor by the Advisor will only be considered to be qualified, if it is executed by a Purchaser and based on the following terms and conditions:
>
> The 100% equivalent gross sale value of College Square must be calculated at no less than $78,778, 423…
>
> The maximum equity interest that the Purchaser may acquire in College Square is 47%.
>
> …
>
> The Advisor acknowledges that the Vendor has had *comprehensive discussions with First Capital Realty concerning the Proposed Transaction*. In consideration of such discussions with First Capital Realty they are to be considered as an excluded party for purposes of calculating the Sales Fee (the "Excluded Party").
>
> Any sale of an interest in College Square to First Capital would result in a reduced fee to RBC. (emphasis added)

[26] The evidence before the court on the summary judgment motion can be found at paragraphs 241 to 249 of the SJ Reasons.

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[351] On April 19, 2005, prior to signing the agreement with RBC Capital, David Katz had sent Grant Jameson a draft of the agreement for review and comment. Jameson did not respond immediately, which led David Katz to ask him only to comment on the proposed indemnification provision. Mr. Jameson did so. He deposed: "I do not believe that I reviewed the rest of the draft engagement, given the time pressures I was under, and I do not recall focusing on any of the other provisions contained in it."

[352] David Katz emailed Lachance on May 4, 2005 to update her on the intentions regarding College Square. He informed her about the execution of the April 18 LOI, advised that tax advisors had suggested a limited partnership structure for a partial interest in College Square "which I recognize may not be suitable to FCR and may be better suited to certain institutional investors", and informed Lachance of the retainer of RBC Capital for a proposed bid call process. He concluded: "The RBC engagement letter recognizes First Capital Realty as an excluded party to their mandate on the basis that I have had advanced discussions with FCR." At trial Katz explained his reference to "advanced discussions":

> Advanced discussions simply meant that First Capital was the only company that I had ever had discussions with pertaining to the partial sale of College Square in order to fund a share redemption transaction, and because of the fact that First Capital was the only third party that was aware of the particular situation the discussions I had with them obviously were advanced relative to any other third party that were privy to those discussions.

Lachance described the prior discussions as "long discussions": "we were discussing things in detail regarding the various points…"

[353] Katz explained why he had contacted Lachance at that point in time:

> Because I felt that it was appropriate for me to inform Ms. LaChance that we had in fact completed our internal arrangements that we had an executed LOI amongst all shareholders, and that it enabled us to proceed with pursuing funding opportunities, and given the fact that I had had previous discussions with Ms. LaChance dating back to August I felt that it was fair to inform her that we were going to move forward with a formalized process that would provide us the opportunity to expose College Square to the market to generate the most favourable financing that we could obtain.

[354] This email was put to Rick Kesler on his cross-examination on the summary judgment motion and he was asked to agree that as of May 4, 2005 no agreement had been concluded between the Leikin Group and FCR. Mr. Kesler, on the advice of counsel, refused to answer the question.

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[355] After conducting due diligence on the property RBC Capital modeled an 11-year pro forma for College Square and created a Confidential Information Memorandum about the property for prospective purchasers. RBC Capital identified 12 prospective purchasers and secured the approval of the Non-Selling Shareholders to approach them. RBC commenced its marketing process on May 6, 2005 and requested interested purchasers to submit bids on May 20. Katz testified that the CIM contained an outline of the co-ownership principles important to the Leikin Group, and those principles largely had been created through Katz's discussions with FCR in August, 2004.

[356] Lachance testified that when she received David Katz's email she asked for a copy of the Confidential Information Memorandum. She deposed that there was no information in the CIM about a preliminary transaction amongst the Leikin Group shareholders or any valuations which might have been conducted on College Square. FCR remained interested in College Square. Around May 17 Ms. Lachance received approval from her superior, Mr. Segal, to pursue the property, and FCR's counsel requested further information from RBC Capital. In response Graham Hoey, a chartered accountant advising the Leikin Group, sent a May 25, 2005 letter to FCR's counsel describing the creation of a new amalgamated company to hold College Square, the transfer of part of the interest in College Square to a Newco, and a further transfer to a partnership. Mr. Hoey also described the resulting adjusted cost base for interests in College Square. In the result, FCR submitted a proposal to RBC Capital to purchase a 47% interest in College Square.

[357] By the end of May, 2005, RBC had received four offers: from Sun Life, Hydro Quebec, Canadian Real Estate Investment Trust and First Capital. Two offers were for a 50% interest in College Square; two were for 47%. The offered prices (on a 100% basis) ranged from a low of $68.5 million (Sun Life) to $78.8 million submitted by First Capital.

[358] RBC Capital sent the Non-Selling Shareholders (Newco) a memorandum dated June 8, 2005 summarizing its efforts to market College Square. In its memo RBC Capital made the following recommendation:

> It is RBC's recommendation that based on price, comments on the co-ownership and management agreements, familiarity with the asset, financial capacity to close and willingness to consider an alternative partnership structure, First Capital's offer of $37.036 million (based on 47% interest) is the superior offer and should be countered on terms to be determined appropriate by the Vendor.

[359] Although Ms. Harris in her pre-trial cross-examination had described the RBC process as a sham, at trial she clarified that what she meant to say was that the decision made to select FCR was based on a long standing relationship.

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XXI. David Spieler becomes a Selling Shareholder[27]

[360] David Spieler had started as a Non-Selling Shareholder in the process. It was his position that the Non-Selling Shareholders should retain at least a 50% interest in College Square; he did not want the remaining shareholders to give up control of that property.

[361] In his affidavit Spieler stated that the Katz Siblings treated him as an outsider during the negotiations of the LOI and they met with Ogilvy Renault, GGFL, and the CIBC to make decisions about the transaction without Spieler's knowledge. Spieler deposed that Jameson "delivered ultimatums and positions to the selling shareholders representing them as being on behalf of all of the non-selling shareholders without any consultation with me." However, on cross-examination on the summary judgment motion Spieler acknowledged that his criticism of Jameson might have been too broad, and he agreed that he had received numerous communications from Jameson. Spieler ultimately decided to retain Ms. Sandra Appel, a corporate lawyer at Davis LLP, to represent his interests.

[362] On March 11, 2005, David Spieler emailed Barbara Farber advising that he wanted to obtain information about the proposed refinancing of College Square. He had asked Mr. Jameson, who told him that he did not have such information. Jameson had sought such information from David Katz, who replied that "as a non selling shareholder of the Leikin Group, I believe that I am fully entitled to conduct my own analysis financial and otherwise, without being obligated to share such analysis with others." Mr. Spieler told Ms. Farber that David Katz had said he saw no need to share any financial analysis he had done, so Mr. Spieler turned to Ms. Farber for the information. Mr. Spieler did not receive any information in response to his request. David Katz testified that at that point of time the other Non-Selling Shareholders had good reason to mistrust David Spieler.

[363] Spieler passed on to Rick Kesler the email from David Katz refusing to share the financial analysis he had conducted, and Kesler transmitted the email to Lewy.[28] So, one month before signing the LOI, Kesler and Spieler clearly were aware that David Katz would not disclose to them his own financial analysis.

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[27] The evidence before the court on the summary judgment motion can be found at paragraphs 250 to 255 of the SJ Reasons.

[28] Ex. 2, Vol. 8, Tab 418.

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[364] The day before, on March 10, Jameson had replied by email to Sandra Appel, in part on the issue of available financial calculations for the refinancing of College Square. Mr. Jameson wrote:

> I have not seen nor am I aware of any financial analysis of such a proposed refinancing transaction. The only information that I have seen as counsel to the Leikin Group of Companies with respect to the transaction at all is the CIBC report which I have sent to you. I have not seen nor am I aware of any figures that may have been run showing the costs of financing, the cash flow projections from College Square etc.

On cross-examination before trial Mr. Jameson was asked the following questions about this email:

> Q. When you wrote this, did you turn your mind back to the e-mail with the analysis you had received on July 26 from Pat Day.
>
> A: No.
>
> Q. And if you were to turn your mind back now, would you be able to make that statement if you looked at that memo again?
>
> A. I think it depends. I'd have to go back and really look at the Pat Day memo. I mean, when I wrote this statement, I was talking about the state of the world on March of 2005 when the Letter of Intent was about to be signed.

[365] On March 10 Jameson also sent Appel an email from Katz in which he cautioned that the "non selling shareholders refrain from making any overtures to the market" until the letter of intent was signed.

[366] Jameson evidently discussed Appel's request for information about the financing because on March 11 he emailed Appel to advise that he had spoken to David Katz "about your inquiry about numbers" and he told Appel to contact Katz directly. Appel testified that she believed she had at least one conversation with Katz.

[367] Then, in the middle of May, Jeremy Farr, a lawyer at Borden Ladner Gervais LLP who was representing the Katz Siblings on the financing of the share redemption, contacted Ms. Appel to propose a form of unanimous shareholders' agreement amongst the four Non-Selling Shareholders. There then followed correspondence on the terms of the USA, as well as the demand of the Katz Siblings that Spieler sign a confidentiality agreement before information about the financing was revealed to him. Those negotiations did not bear fruit. At the end of June David Spieler elected to become a Selling Shareholder, and he signed a comprehensive release of claims as against the remaining Non-Selling Shareholders.

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[368] Spieler deposed that he had no knowledge that the value of College Square was more than $70 million and had he been aware of such information, he would not have agreed to the terms of the LOI. He also would have shared that information with his other cousins, including Rick Kesler.

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XXII. Agreement with First Capital[29]

[369] By letter dated July 8, 2005, First City offered to purchase, in effect, a 50% interest in College Square for a price of $39.4 million, subject to certain adjustments, which would reflect a 100% gross sale value for College Square of $78.8 million. The offer specifically contemplated the negotiation of a formal purchase agreement, followed by a 30 day due diligence period. Closing would occur 30 days following the expiration of the due diligence period. Any agreement resulting from an acceptance of the offer would be conditional on the successful completion of the preliminary transactions with the other shareholders of the Leikin Group. FCR's offer did not specify the terms of those preliminary transactions or the purchase price or valuation underlying them.

[370] FCR's management committee discussed the College Square opportunity at its July 15, 2005 meeting.

[371] According to David Katz, it was necessary to obtain a purchase price of $39.4 million for a 50% interest in College Square in order for the Non-Selling Shareholders to fund the approximately $25 million required to redeem the shares of the Selling Shareholders and, at the same time, not relinquish control of the College Square property.

[372] Grant Jameson was informed by an email from David Katz on July 8 that a LOI had been signed with FCR. A few days earlier Farber inadvertently had told him about the agreement, but Jameson deposed that "I had no information about the particulars of the transaction at that time, including the valuation of College Square for the purpose of this equity investment."

[373] A conversation took place on July 19, 2005 amongst David Katz, Grant Jameson, Rick Kesler and Jules Lewy. David Katz explained that the Non-Selling Shareholders were asking the corporation to defease the mortgage on College Square in order to facilitate a possible loan from Merrill Lynch to fund the share redemption transaction. Rick Kesler deposed that during the call

[29] The evidence before the court on the summary judgment motion can be found at paragraphs 256 to 267 of the SJ Reasons.

David Katz did not reveal that the Non-Selling Shareholders had already entered into a LOI with FCR.

[374] The Leikin Group wished to retain Ogilvy Renault to deal with several issues on the proposed sale to FCR: an environmental matter, the negotiation of a waiver of the rights of first refusal enjoyed by two anchor tenants in College Square, and certain deliverable and title issues. The Leikin Group asked Ogilvy Renault to accept this retainer on the basis that the firm would not disclose the terms of the proposed sale to FCR to the Selling Shareholders. Jameson deposed:

> I told David Katz that I did not feel comfortable being provided with specific information about the Transaction that Ogilvy Renault would have to undertake (in advance of seeing it, without even knowing what it was) not to disclose to the Selling Shareholders, without their knowledge and consent.

[375] Around July 14 Ogilvy Renault received the consent of the Selling Shareholders, and their counsel, to accept the retainer and to have access to the third party information without disclosing it to the Selling Shareholders. Jameson deposed that he was not otherwise involved in the process by which third party financing was obtained.

[376] David Katz sent Jameson the executed letter of intent signed by FCR on July 18, 2005 which revealed that FCR would pay $39.4 million for its interest in College Square. Jameson deposed:

> I had the document printed, but to the best of my recollection I did not read it at the time...

[377] Later in July David Katz, by way of a July 25 email to Grant Jameson, and others, expressed concern about the release of information about the pending FCR transaction to the other directors of the re-organized board of the Leikin Group:

> If the above noted concerns are correct, it is quite conceivable that Spieler, Rick Kesler and/or Jo Harris as Amalco directors could insist on at least being informed as to the non selling shareholders' activities pertaining to the financing of the shareholder transaction. I am of the view, that the FCR transaction could be jeopardized if the terms and conditions of the sale of a partial interest in College Square to FCR are made available to the selling shareholder!

[378] Day deposed that she did not become aware that FCR was purchasing an interest in College Square until sometime after it had entered into the agreement of purchase and sale. She did not learn that the FCR transaction was based on a purchase price for College Square of $78.6

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million until she read a newspaper article in early October reporting on First Capital's acquisition.

[379] Merrill Lynch Capital Canada Inc., evidently on behalf of FCR, secured an appraisal report for College Square dated July 26, 2005, which estimated the fair market of value of College Square at $73.9 million as at July 20, 2005.[30] Not much turns on that, however, because David Katz testified that he never saw the appraisal until long after the transaction had closed. Lachance was not concerned that the appraised value obtained by the lender was lower than the value underlying FCR's bid for an interest in College Square:

> I can tell you that, traditionally, the appraisal reports that we receive in support of financing are always a little bit inferior to what we end up buying the property for. It is very common.
>
> …we prepared the bid aggressively because we wanted to have the property…
>
> [W]e were acting in a market constantly changing and on the rise, and the cap rates for the properties at the time, in my humble opinion, and in the opinion of First Capital, was in the 6, 6%, 6.3. 6.5, 6.7, around that…

[380] Although neither the Selling Shareholders nor the Non-Selling Shareholders saw the July, 2005 appraisal for College Square, that appraisal put in very concrete terms the qualitative information known to both sides since October, 2004, that the value of big box shopping centres in the Ottawa area was increasing in an aggressive manner: from the $55 million Altus Group appraised value as of August 1, 2004 to the $73.9 million appraised value as of July 20, 2005.

[381] On August 11 a purchase and sale agreement with First Capital for an interest in College Square was executed. In her affidavit Lachance described several efforts by FCR to obtain more information during the due diligence process about the preliminary reorganization transaction taking place amongst the shareholders of the Leikin Group. Although FCR eventually received some information regarding the transfer of interests in College Square into new entities, it did not receive information about the valuation used in the preliminary transaction amongst the shareholders or other details of that transaction. Lachance deposed:

> First Capital was never made aware, before the commencement of this action, that the Preliminary Transaction was being conducted at a value of $60,000,000.00 for College Square. It was never provided with the details or the documents concerning the

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[30] Ex. 2, Vol. 10, Tab 512.

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Preliminary Transaction. I have seen no documents in the productions of any party to suggest otherwise.

XXIII. Closing of the Share Redemption and First Capital transactions[31]

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[382] The shareholder redemption transaction closed in escrow on August 4, 2005, pending completion of the FCR transaction. Final closings of both transactions were deferred to late September and early October.

[383] At a meeting on September 16, 2005, FCR's Board approved the acquisition of an interest in College Square, and the FCR transaction closed on September 29, 2005, with First Capital delivering its required payment of about $25 million.

[384] On October 3, 2005, FCR released a press announcement reporting that it had acquired a 50% interest in College Square for $39.3 million.

[385] On October 4, 2005, Ogilvy Renault sent the share redemption proceeds to the Selling Shareholders, each of whom received $3.395 million.

[386] Josephine Harris deposed that her family first learned about the FCR transaction in the fall of 2005 when the plaintiff, Sheira Harris, came across a FCR press release about its acquisition of a 50% interest in College Square for $39.3 million. In her affidavit Josephine Harris deposed that she was advised by her children, the Harris Family plaintiffs, that had they been told that FCR was interested in purchasing an interest in College Square at a value in excess of $70 million, they would not have signed the letter of intent.

[387] As will become apparent from the analysis below, I need not make any finding on this point. I would observe, however, that the evidence was far from clear as to what consequences would have flowed from the disclosure to the plaintiffs of information that the financing of the share redemption transaction would use a higher value for College Square than that negotiated in the LOI. Would the plaintiffs have not signed the LOI? Perhaps. But what next? The Non-Selling Shareholders did not want to be left with a stake in College Square of less than 50%? Further negotiations? Perhaps. A stand-off? Perhaps; no party was operating under financial pressures necessitating a sale of the assets, so both sides could have backed off. A compelled sale of assets under a winding-up? At the end of the day it is not possible to discern what would

[31] The evidence before the court on the summary judgment motion can be found at paragraphs 268 to 273 of the SJ Reasons.

have happened had, as Ms. Harris testified, she known the details of the financing. Perhaps today the cousins would still be where they were in early 2004. It is not possible to tell.

[388] Kesler stated, on cross-examination, that a few weeks after the transaction had closed he phoned Barbara Farber and complained that she and her brothers had not been truthful with the other shareholders. David Spieler also found out a few weeks after the transaction closed.

[389] Barbara Farber deposed that following the close of the transaction she did not receive any complaints about it from the plaintiffs until she was served with the Statement of Claim in November, 2007.

[390] Andrew Katz deposed that at a Board meeting in July, 2006, Kesler told Levitz and himself that he and the other Selling Shareholders were quite satisfied with the outcome of the share redemption transaction, and Kesler identified how the share redemption proceeds had facilitated certain of the Selling Shareholders retiring from their employment or purchasing homes.

XXIV. Breach of fiduciary duty claims against the Leikin Group and the Leikin Family Defendants: The governing legal principles

A. When a fiduciary relationship arises

[391] A fiduciary relationship is one which requires a party, the fiduciary, to act with absolute loyalty toward the other party, the beneficiary or *cestui que trust*, in managing the latter's affairs.[32] Fiduciary duties do not exist at large, but arise from, and relate to, the specific legal interests at stake. Consequently, the nature and scope of the fiduciary duty must be assessed in the legal framework governing the relationship out of which the fiduciary duty arises.[33]

[392] Canadian law distinguishes between *per se* fiduciary relationships and *ad hoc* ones. *Per se* fiduciary relationships attach to certain categories of relationships because of the inherent purpose or the presumed factual or legal incidents of those relationships. Relationships which the law historically has recognized as giving rise to fiduciary obligations include those between director/corporation, trustee/beneficiary, solicitor/client, partners, and principal/agent.[34] However, not every legal claim arising out of a *per se* fiduciary relationship will give rise to a claim for a breach of fiduciary duty. A claim for breach of fiduciary duty may only be founded

[32] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, para. 22.
[33] *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, paras. 184 and 185.
[34] *Lac Minerals Ltd. v. International Corona Resources Ltd*., [1989] 2 S.C.R. 574, para. 30.

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on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary.[35] As the Court of Appeal put it in the recent case of *Simkeslak Investments Ltd. v. Kolter Yonge LP Ltd.*:

> Not all actions taken by a person in a *per se* fiduciary relationship - that is, in a category of relationship in which a fiduciary relationship has been traditionally recognized - attract a fiduciary obligation. The presumption that in a *per se* fiduciary relationship one party has a duty to act in the best interests of the other is rebuttable.[36]

[393] By contrast, *ad hoc* fiduciary obligations may arise as a matter of fact out of the specific circumstances of a particular relationship.[37] In such a situation, fiduciary duties are imposed on a person because his relationship with another presumes the existence of fiduciary obligations.[38] In *Alberta v. Elder Advocates of Alberta Society* the Supreme Court summarized the current approach to identifying *ad hoc* fiduciary relationships in the following way:

> As useful as the three "hallmarks" referred to in *Frame* are in explaining the source fiduciary duties, they are not a complete code for identifying fiduciary duties. It is now clear from the foundational principles outlined in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, and *Galambos* that the elements outlined in the paragraphs that follow are those which identify the existence of a fiduciary duty in cases not covered by an existing category in which fiduciary duties have been recognized.
>
> First, the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary: *Galambos*, at paras. 66, 71 and 77-78; and *Hodgkinson*, *per* La Forest J., at pp. 409-10. As Cromwell J. wrote in *Galambos*, at para. 75: "what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her."
>
> The existence and character of the undertaking is informed by the norms relating to the particular relationship: *Galambos*, at para. 77. The party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake.

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[35] *Galambos v. Perez*, 2009 SCC 48, paras. 36 and 37.
[36] 2013 ONCA 116, para. 16.
[37] *Galambos,* para. 48.
[38] *Lac Minerals*, p. 648.

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The undertaking may be found in the relationship between the parties, in an imposition of responsibility by statute, or under an express agreement to act as trustee of the beneficiary's interests. As stated in *Galambos*, at para. 77:

> The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and ad hoc fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty. [Emphasis added.]

Second, the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them. Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties. *Per se*, historically recognized, fiduciary relationships exist as a matter of course within the traditional categories of trustee-*cestui qui trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation and guardian-ward or parent-child. By contrast, *ad hoc* fiduciary relationships must be established on a case-by-case basis.

Finally, to establish a fiduciary duty, the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary: *Frame*, *per* Wilson J., at p. 142.

In the traditional categories of fiduciary relationship, the nature of the relationship itself defines the interest at stake. However, a party seeking to establish an *ad hoc* duty must be able to point to an identifiable legal or vital practical interest that is at stake. The most obvious example is an interest in property, although other interests recognized by law may also be protected.

In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame:* (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[39]

[39] *Galambos*, paras. 29 to 36.

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[394] The existence of the fiduciary obligation is thus primarily a question of fact to be determined by examining the specific circumstances.[40] Whether an *ad hoc* fiduciary relationship exists therefore "demands a meticulous examination of the facts surrounding the legal and practical incidents of any particular relationship".[41]

[395] As Cromwell J. noted in *Galambos,* commentators have described the requirement that a fiduciary give an undertaking of responsibility to act in the best interests of a beneficiary in various fashions: a person had "bound himself in some way to protect and/or to advance the interest of another"; or a person had relinquished self-interest; or a person had undertaken "to act in the interest of another person."[42] He continued:

> This does not mean, however, that an express undertaking is required. Rather, the fiduciary's undertaking may be implied in the particular circumstances of the parties' relationship. Relevant to the enquiry of whether there is such an implied undertaking are considerations such as professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty.[43]

[396] It is often said as a general rule fiduciary relationships do not arise from a commercial contract or between arm's length independent parties in commercial transactions because such transactions usually derive their utility from the pursuit of self-interest.[44] Sopinka J., in his judgment in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, adopted the following passage from an academic article explaining why fiduciary duties rarely arise in arm's length commercial transactions:

> It would seem that part of the reluctance to find a fiduciary duty within an arm's length commercial transaction is due to the fact that the parties in that situation have an adequate opportunity to prescribe their own mutual obligations, and that the contractual remedies available to them to obtain compensation for any breach of those obligations should be sufficient. Although the relief granted in the case of a breach of a fiduciary duty will be moulded by the equity of the particular transaction, an offending fiduciary will still be exposed to a variety of available remedies, many of which go beyond mere compensation for the loss suffered by the person to whom the duty was owed, equity, unlike the

[40] *Galambos*, para. 48.
[41] *Waxman v. Waxman*, (2004), 44 B.L.R. (3d) 165 (Ont. C.A.), para. 505.
[42] *Galambos*, para. 78.
[43] *Galambos*, para. 79.
[44] *Waxman v. Waxman* (2002), 25 B.L.R. (3d) 1 (Ont. S.C.J.), para. 1210; affirmed (2004), 44 B.L.R. (3d) 165 (Ont. C.A.).

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> ordinary law of contract, having [sic] regard to the gain obtained by the wrongdoer, and not simply to the need to compensate the injured party.[45]

[397] Certainly some cases have demonstrated such a judicial reluctance. For example, in *Aronowicz v. Emtwo Properties* the Court of Appeal commented that it was hard to conceive of a corporate/commercial mechanism less likely to attract the operation of fiduciary obligations than a shotgun buy/sell provision in a unanimous shareholders agreement.[46]

[398] That said, there is no absolute rule precluding the finding of a fiduciary relationship in the context of a commercial transaction. By way of example, the Supreme Court of Canada, in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.,* upheld the trial judge's finding of the existence of fiduciary duties where a commercial contract was in place between the parties. The Court noted that the "fiduciary relationship in this case must therefore be circumscribed by the contractual bargain".[47] One must also recall the following comments by the Court of Appeal in *Waxman*:

> The appellants' second argument is that the fiduciary duty does not arise on the sale of shares by one shareholder to another, particularly where there has been no express undertaking by the selling shareholder to act in the other's interest.
>
> Again, we do not agree. There is no reason to preclude the existence of a fiduciary duty when one shareholder sells his or her interest to another. It all depends on the relationship between them: see, for example, *Tongue v. Vencap Equities Alberta Ltd.* (1994), 148 A.R. 321 (Q.B.), aff'd (1996), 184 A.R. 368 (C.A.); *Dusik v. Newton* (1985), 62 B.C.L.R. 1 (C.A.).
>
> …
>
> Nor is it necessary that there be an express undertaking concerning the specific transaction. The focus must be on the relationship and the mutual understanding of trust and loyalty that goes with it. As the trial judge found, the lifelong relationship between the brothers led Morris to the reasonable expectation that he could completely trust Chester to look after his interest in IWS. In effect, Chester represented this to Morris by the course of his conduct throughout their relationship. He did not need to make any

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[45] [1989] 2 S.C.R. 574, para. 27.
[46] 2010 ONCA 96, para. 50; see also *Simkeslak, supra.*
[47] 2011 SCC 23, para. 143.

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express representation to Morris about this transaction in order for a fiduciary duty to be found in connection with it.[48]

B. Nature of the fiduciary duties of directors and officers

[399] The nature and scope of the fiduciary duties of directors of corporations were canvassed at length by the Supreme Court of Canada in the *BCE* case where the Court stated:

> The fiduciary duty of the directors to the corporation originated in the common law. It is a duty to act in the best interests of the corporation. Often the interests of shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors' duty is clear -- it is to the corporation: *Peoples Department Stores*.
>
> The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation. The content of this duty varies with the situation at hand. At a minimum, it requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there may also be other requirements. In any event, the fiduciary duty owed by directors is mandatory; directors must look to what is in the best interests of the corporation.
>
> …
>
> In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives: see *Maple Leaf Foods Inc. v. Schneider Corp*. (1998), 42 O.R. (3d) 177 (C.A.); *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331, 2007 SCC 44. It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.[49]

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[48] *Waxman, OCA, supra*., paras. 510 to 512.
[49] *BCE*, paras. 37, 38 and 40.

[400] As a fiduciary of a corporation, a director owes the company duties of disclosure, honesty, loyalty, candour, and the duty to favour the company's interest over his own.[50] A director must disclose to the corporation facts which impact upon the business of the company.[51] The principles concerning the fiduciary duties of directors apply generally to any senior officer of a corporation who is authorized to act on its behalf in a managerial capacity.[52]

C. Duties of directors to shareholders

[401] Directors of a company do not owe a *general* fiduciary duty to shareholders.[53] As the Supreme Court of Canada stated in *BCE*:

> [T]he directors owe a fiduciary duty to the corporation, and only to the corporation. *People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincide with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.*[54] (emphasis added)

[402] Nontheless, it is well-recognized that directors may owe a fiduciary duty to specific shareholders in particular circumstances. The law on this point was summarized by Kevin McGuinness in his text, *Canadian Business Corporations Law, Second Edition,* at §11.194:

> Although the directors owe no general duty to individual shareholders of a corporation, such a duty may exist in the circumstances of a particular case. Stated another way, the mere status of corporate director imposes no fiduciary duty upon the directors with respect to the individual shareholder of the corporation, but such duties may arise with respect to a specific individual shareholder independently of the director-corporate relationship, because of circumstances of the dealing between the director and the shareholder concerned…These exceptions to the general rule seem to be limited to situations involving a family or other close special relationships of trust and dependency between the claimant and the defendant director, in which the director was seeking to

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[50] *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J.), para. 123; affirmed (2004), 250 D.L.R. (4th) 526 (Ont. C.A.).
[51] *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 101 D.L.R. (4th) 15 (Ont. Gen. Div.), at 59; aff'd (1994), 15 O.R. (3d) 370 (C.A.); leave to appeal refused [1993] 3 S.C.R. vi.
[52] Kevin McGuiness, *Canadian Business Corporations Law, Second Edition* (Toronto: LexisNexis, 2007), §11.118.
[53] McGuiness, *supra.*, §11.192 and 11.193.
[54] *BCE*, para. 66.

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> take advantage of that relationship for personal gain or profit. The standard of conduct required from a director in relation to dealings with a shareholder will differ depending upon all the surrounding circumstances and the nature of the responsibility which in a real and practical sense the director has assumed towards the shareholder. In the one case there may be a need to provide an explicit warning and a great deal of information concerning the proposed transaction. In another there may be no need to speak at all. There may be intermediate situations. For instance, the director will owe a fiduciary duty to a shareholder where the director acts as the agent of the shareholder, where the director buys shares from the shareholder, and where the director has been dishonest with or misled a minority shareholder…

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D. Duty to disclose material information

[403] One issue in the Supreme Court of Canada decision in *Sharbern Holding* concerned whether a fiduciary had failed to disclose material information to beneficiaries in a circumstance where the fiduciary was acting for two parties whose interests differed. A fiduciary is obligated to disclose any material facts or information if there is a substantial risk that its fiduciary relationship with a party would be materially and adversely affected by its own interests or its duties to another.[55] In *Sharbern* the Court commented:

> A breach of fiduciary duty would occur if the undisclosed Compensation Differences were material or placed VAC into a conflict of interest to which Sharbern had not consented. This is because equity "forbids trustees and other fiduciaries from allowing themselves to be placed in ambiguous situations ... that is, in a situation where a conflict of interest and duty might occur" (D. W. M. Waters, M. Gillen and L. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 914). As M. Ng writes, in *Fiduciary Duties: Obligations of Loyalty and Faithfulness* (loose-leaf), at p. 2-10:
>
> > Where fiduciaries put themselves in a position where their own interests or those of others may conflict with their duty to their principal, they will be required to disclose all material information regarding the transaction in order to obtain their principal's informed consent as to their acting despite the conflict.[56]

[404] The party seeking to establish the materiality of undisclosed facts or information must provide evidence upon which a finding of materiality can reasonably be made.[57] If it does, the onus then falls on the fiduciary to prove that it had received the informed consent of the

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[55] *Sharbern Holding Inv. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23.
[56] *Sharbern*, para. 148.
[57] *Sharbern*, para. 158.

beneficiary to act on or use the material information for its own interests or the interest of others.[58]

[405] In *Waxman v. Waxman* the trial judge cited the legal principle which requires partners who are negotiating a transaction to buy out the interest of the other to make full disclosure of information relevant to the value of the partnership shares unknown or not available to the other partner, as well as information regarding the nature and effect of the transaction.[59] Or, as put by the Alberta Court of Appeal in *Radford v. Stannard*, a fiduciary is bound to communicate to his beneficiary all the information he acquires in respect of a property which is the subject-matter of a transaction concerning the beneficiary.[60]

[406] In *DiFlorio v. Con Structural Steel Ltd.*,[61] J. Wilson J. considered the jurisprudence concerning whether the non-disclosure of material information by a fiduciary would have affected the beneficiary's decision to proceed with the transaction:

> The defence suggests that even if the facts had been known, Joseph's family would have purchased Roland's family interest in the businesses. This does not accord with Ida's evidence, and is speculative. The defence acknowledges that Roland was a fiduciary to Rocca. In *Brickenden v. London Loan & Savings Co. et al.,* [1934] 3 D.L.R. 465 (J.C.P.C.), Lord Thankerton, at p. 469, articulates a statement of principle relating to a fiduciary's duty to disclose material facts and the issue of speculation:
>
>> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction ... Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.
>
> This passage has been re-affirmed and elaborated upon in *Commerce Capital Trust Co. v. Berk* (1989), 68 O.R. (2d) 257 at 262-2 (C.A.) in obiter comments by McKinlay J.A.:
>
>> I interpret Lord Thankerton's statement to place the onus on the [defendants] to prove that, despite the non-disclosure of material facts, the [plaintiff] would have proceeded with the transaction. However, proof in such a situation would undoubtedly be difficult, and "speculation" would not suffice ... Lord

[58] *Sharbern*, para. 149.
[59] *Waxman v. Waxman*, SCJ, paras. 1268 to 1272.
[60] *Radford v. Stannard* (1914), 19 D.L.R. 768 (Alta. Sup. Ct., App. Div.), para. 17.
[61] [2000] O.J. No. 340 (S.C.J.).

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> Thankerton's statement indicates that the test of materiality is not whether or not the transaction would have been proceeded with if all facts had been known. Applying such a test to determine materiality, would make Lord Thankerton's statement meaningless ... [T]he question of materiality must be determined on some objective basis. [Emphasis added.]

> In *Raso v. Dionigi* (1993), 12 O.R. (3d) 580 (C.A.), Dubin C.J.O. confirmed that the passage from Lord Thankerton does not require "an inquiry into what would have transpired if full disclosure had been made". This recurring principle is confirmed by La Forest J. in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at para. 76:

>> where the plaintiff has made out a case of non-disclosure and the loss occasioned thereby is established, the onus is on the defendant to prove that the innocent victim would have suffered the same loss regardless of the breach. Mere 'speculation' on the part of the defendant will not suffice.

> The test of materiality therefore must not give way to speculation. It must be objectively based upon what extent of disclosure a reasonable person contemplating a particular transaction would require before completing it.[62]

As noted earlier in these Reasons, the Supreme Court of Canada, in its decision in *Sharbern Holding*, canvassed at some length the inquiry a court should make to determine the materiality of undisclosed information.

E. Agent – Principal relationship

[407] At law a rebuttable presumption exists that in an agent-principal relationship the agent has a duty to act in the best interests of its principal.[63] Every agent labours under a duty to do the best he can for his principal.[64]

XXV. Analysis of the breach of fiduciary duty claims against the Leikin Group and the Katz Defendants

A. The plaintiffs' claims of breach of fiduciary duty by the Non-Selling Shareholders

[408] The plaintiffs submitted that the Non-Selling Shareholders possessed material information which they failed to disclose to the plaintiffs, specifically that (a) FCR had expressed a strong desire to purchase an interest in College Square, (b) FCR had the wherewithal

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[62] *Ibid.*, paras. 106 to 109.
[63] *Hodgkinson v. Simms,* [1994] 3 S.C.R. 377, para. 31.
[64] *Johnson v. Birkett* (1910), 21 O.L.R. 319 (H.C.J.), para. 25.

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to purchase such an interest, and (c) FCR had been involved in negotiations with David Katz which had assigned a value to College Square in excess of $70 million.

[409] The plaintiffs argued that such information about the dealings with FCR was material (i) when David Katz was President of the companies in early 2004, (ii) when he was employed as a consultant, (iii) when he communicated this information to the other Defendants to this action, and (iv) when the Non-Selling Shareholders pressed the Plaintiffs in negotiations to accept a significantly lower value for College Square in the share redemption transaction.

[410] It was the plaintiff's position that the obligation of the Katz Defendants to disclose that material information to the plaintiffs arose both because David Katz owed them a fiduciary duty as an officer of, and then as consultant to, the companies and, as well, the Non-Selling Shareholders owed the plaintiffs an *ad hoc* fiduciary duty because:

(i) they had undertaken to act in the plaintiffs' best interests by representing that the share redemption would be based on fair market value, the process would be open and transparent, and the process would be in the interests of all shareholders;

(ii) they possessed information which by its very nature caused the plaintiffs to be vulnerable; and,

(iii) this vulnerability could only be addressed properly through the disclosure of the FCR negotiations.

[411] The plaintiffs contended that their reliance on their own independent legal advisors or the give-and-take of the negotiations between the two sides did not relieve the Non-Selling Shareholders of their fiduciary duty to the Selling Shareholders. The plaintiffs alleged that by failing to disclose that material information and by concealing the FCR negotiations, the Non-Selling Shareholders manufactured a significant personal benefit – in effect they increased their interest in College Square from 27% to 50% without any financial contribution from them, all at the expense of the Selling Shareholders. The Non-Selling Shareholders intended to use the spread between the values assigned to College Square in the share redemption transaction and the price fetched on the subsequent sale of an interest in that property to a third party to increase their equity share in College Square. (In their Closing Submissions the plaintiffs stated that they were not advancing a claim based on misrepresentation.)

[412] These allegations raise two important issues. First, there can be no doubt on the evidence that the April 15, 2005 Letter of Intent resulted from a process of self-interested dealing by both the Selling Shareholders and Non-Selling Shareholders during which the Selling Shareholders had access to, sought and received independent legal advice and real estate appraisal advice, and

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I so find. At trial Lewy acknowledged the essential self-interestedness of both parties' dealing when he gave the following testimony:

> Q. And in that negotiation about the fixed price, and what the fixed price should be there was the normal what might be called deal tension, one side wanting a higher price, the sellers, and the non-selling side wanting a lower price, correct?
>
> A. I can speak at least for my side.
>
> Q. Sure, sure.
>
> A. Yes, they wanted as high a price as they could.
>
> Q. Sure, and it was coupled with some of the normal events of negotiation including negotiations being called off at certain points, that's it the deal is off, and then coming back on stream, correct?
>
> A. Correct.
>
> *Q. So I take it that from your perspective sir there was nothing in this negotiation that looked like one side negotiating in the other sides interest, both sides were negotiating in their own interest?*
>
> *A. Correct*. (emphasis added)

Notwithstanding the self-interest of both sides to the negotiations, one side now wishes to set aside part (but not all) of an agreement which was the product of hard, self-interested bargaining.

[413] Second, it was clear from the evidence that during those negotiations the Selling Shareholders did not trust the Non-Selling Shareholders – that was a constant theme of the evidence given by Josephine Harris and Rick Kesler. When the negotiations opened in earnest in November, 2004, the Selling Shareholders asked for two things from the Non-Selling Shareholders: (i) a tag-along which would allow them to share in any "upside" related to the financing transaction the Non-Selling Shareholders would put in place to finance the buy-out, and (ii) a representation regarding the information possessed by the Non-Selling Shareholders about the opportunities to finance the transaction. Notwithstanding repeated demands by the Selling Shareholders for those two items, the Non-Selling Shareholders refused to include them in the final LOI. The scope of informational disclosure and the sharing of an "upside" on the financing were not issues swept under the rug or never addressed. On the contrary, the parties specifically adverted to both issues in their negotiations, they were refused by the Non-Selling Shareholders, and the Selling Shareholders accepted that refusal and agreed to sell their shares in any event. The plaintiffs now ask this Court to ignore the fact of the negotiations on those two

points. That is a lot to ask after a deal has closed. Accordingly, the plaintiffs' claim must undergo careful scrutiny.

[414] In considering any claim for an alleged breach of a fiduciary duty, a court must examine the evidence to see whether it supports the finding of (i) the existence of a fiduciary duty, (ii) the breach of a duty, and (iii) the causation of an injury by reason of the breach, so let me turn to that analysis.

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B. The allegation regarding the existence and breach of a fiduciary duty by David Katz when he was President of the Leikin Group

[415] As an officer of the Leikin Group until his resignation in May, 2004, David Katz owed the companies a duty to act honestly and in good faith with a view to the best interests of the corporations. Part of that obligation consisted of a duty to disclose to the corporations facts which impacted upon their business.[65] In the context of the business of the Leikin Group part of what Katz did was to identify and explore opportunities to develop the Group's business. As an officer he labored under an obligation to report periodically to the Board of Directors on the activities he was undertaking on behalf of the corporations and, when opportunities had reached a certain degree of ripeness, to seek direction from the Board on whether to pursue the opportunity and, if so, subject to what general parameters.

[416] The Leikin Group was a family-run corporation. Its governance possessed a degree of informality. No formal policies concerning the scope of the President's authority or his obligations to report to the Board were placed in evidence. In practice, therefore, the President enjoyed a degree of discretion about what opportunities to pursue and when to engage the Board in discussing those opportunities. Obviously Katz could not commit the Leikin Group to a significant business obligation without approval from the Board, and there is no suggestion made by the plaintiffs in this case that Katz attempted to do so in his early 2004 discussions with FCR.

[417] As Katz testified, his strategic vision for the future of the Leikin Group saw the companies using their core assets, and in particular the "crown jewel", the College Square property, to grow into a significant player in the development of large retail properties in the Ottawa market. Katz understood that the Leikin Group could not move up to the next level without linking-up with a more senior player in that market. Thus arose his overture to FCR in the latter part of 2003.

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[65] *PWA Corp. v. Gemini Group, supra.,* Ont. Gen. Div., p. 59a.

[418] Over the course of a little over a month, from early February until mid-March, 2004, Katz initiated talks with FCR about a possible strategic alliance which would involve jointly pursuing the acquisition of new properties, as well as securing FCR's participation in the College Square property. Recognizing that he would be sharing with FCR some confidential information of the Leikin Group, Katz secured a confidentiality agreement from FCR. The ensuing talks included the exchange by the parties of memoranda setting out their views on key governance principles concerning property investments they might take together, the so-called co-tenancy principles.

[419] David Katz reported on those discussions at the next meeting of the Leikin Group Boards on April 15, 2004. In so doing, he did what one would expect of a senior officer of a corporation. Katz hoped that he could persuade the Board to adopt the concept of the Leikin Group embarking on a strategic alliance, in particular one with FCR, but in that Katz was mistaken. A majority of the directors – Harris, Kesler and Spieler – had no interest in having the Leikin Group pursue such an alliance. At that point of time a majority of the shareholders had given notice of their wish to sell their shares in the companies, so they had no interest in using the core corporate assets as a springboard from which to grow the companies' business. Katz was unable to secure Board approval to pursue his discussions with FCR, and within the space of a few weeks he had been forced to resign as President of the Leikin Group.

[420] In terms of the scope of the information which David Katz presented to the Board at the April 15 meeting, I found above in paragraph 111 that at the April 15 meeting Katz (i) made a PowerPoint presentation which included slides about a possible strategic alliance between the Leikin Group and FCR, (ii) told the Board that he was proposing a strategic alliance with FCR to acquire commercial redevelopment opportunities and acquire property in the Ottawa area to become the dominant non-enclosed retail centre developer/asset manager within the market, (iii) explained that he had exchanged some memos with FCR and had brought FCR personnel through the College Square property, and (iv) also suggested that a strategic alliance with FCR would involve FCR acquiring an interest in College Square. What Katz did not tell the Board during that presentation was that as part of his exploratory discussions with FCR he had floated an estimated value of $72 million for College Square. As an officer of the Leikin Group, did David Katz breach his duty to the corporations to act in good faith by failing to place that information before the Boards?

[421] Counsel placed before me some cases which considered the issue of materiality in the context of the disclosure of information to investors. Care must be taken in transferring notions of materiality which apply in third party investor circumstances to cases where a corporate officer is presenting information to his Board. I say that because the context in which the officer makes that disclosure is all important and will affect the level of detail which the officer legally must make as part of his fiduciary duty to disclose material information. In the case at bar Katz

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was broaching to the Board a new business approach – a strategic alliance with a third party – uncertain as to whether the Board would even be receptive to the new approach. Officers of a corporation sometimes must engage in a kind of advocacy with their Boards to persuade them to move in a new direction. Such advocacy may require persuasion to a course of action over a period of time, and the amount of information provided to the Board may change depending upon whether the Board is receptive to the new direction. If a board displays interest in a possible approach, more detailed investigation and reporting of the opportunity may be required.

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[422] In the present case Katz pitched his Board on the new concept of a strategic alliance. A majority rejected it out of hand, based on the information he provided, in large part because by that point of time the "selling directors" were more focused on their families' interests as shareholders in the value locked up in the core assets than they were in the corporate development of those assets. I find that Katz did not breach his duty as an officer to disclose information to the Board by not mentioning the $72 million trial balloon he had floated with FCR. By the time of the April 15 Board meeting Katz did not know FCR's reaction to that number; FCR had not responded to it. All he could usefully tell the Board about FCR's response to his overture was that FCR had been prepared to engage in some discussions about co-tenancy principles.

[423] The plaintiff/directors' complaint about Katz not telling them that he had floated a trial balloon of $72 million for the value of College Square to FCR related not to information they would require to perform their duties as directors of the Leikin Group – they had no interest in a corporate strategic alliance with FCR or continuing their involvement in College Square as a going concern – but in their personal interests as shareholders of the Leikin Group looking to sell their shares. However, the purpose of Katz's presentation at the April 15 Board meeting, and the purpose of his discussions to that point with FCR, had not been to scout out a buyer for some of the shareholders' interests in the companies, but to develop a business opportunity for the corporations using their core asset of College Square. Accordingly, the legal adequacy of Katz's presentation to the Board on April 15 must be assessed in the context of his duties as an officer to the corporation, not to individual shareholders. No allegation was made by the plaintiffs that by that point of time Katz had made any undertaking to protect their interests *qua* shareholders. The plaintiffs relied on subsequent events to found that claim of an *ad hoc* fiduciary duty.

[424] Finally, on this issue of the required scope of Katz's disclosure of information to the Board on April 15, I re-iterate that by the time of that meeting FCR had not made any offer to purchase an interest in College Square. To the contrary, FCR had not responded to Katz's trial balloon concerning value.

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C. Allegations of breach of other *per se* fiduciary duties

[425] At all materials times Barbara Farber and Andrew Katz were directors of the Leikin Group. Although David Katz had ceased to serve as an officer in May, 2004, he did enter into a subsequent consultancy contract with one of the Leikin Group companies and throughout the negotiation process remained a paid consultant. The plaintiffs contended that David Katz's role as a paid consultant imposed a fiduciary obligation on him. It did not on a *per se* basis – the law has not extended *per se* fiduciary obligations to paid consultants of corporations; whether it did on an *ad hoc* basis I will consider later in these reasons.

[426] As I understand their submissions, the plaintiffs contended that Farber and Andrew Katz, as directors of the Leikin Group, breached their *per se* duties in two respects. First, they failed to disclose to the other directors information concerning the financing of the share redemption transaction thereby, in effect, failing to disclose that they planned to "flip" an interest in College Square upon the redemption of the plaintiffs' shares. Second, the plaintiffs argued that since all members of the Board were in a conflict of interest position in respect of the share redemption transaction, the transaction needed shareholder approval. Since the transaction needed shareholder approval, the plaintiffs argued, the duties which the directors would otherwise owe to the corporation in respect of the transaction became owed directly to each shareholder. From that the plaintiffs argued that Farber and Andrew Katz breached that duty to the shareholders by failing to disclose the financing-related information and by securing a personal profit from the transaction. Let me deal with each allegation in turn.

C.1 The failure to disclose financing information to the other directors

[427] What became known as the share redemption transaction commenced with Farber's June 9, 2004, response to the sale notices delivered by a majority of the shareholders. In that memo to the Board, Farber proposed re-constituting the Board to include outside, professional directors. That elicited Prehogan's threat to sue a week later. Farber also stated that at the June 16 Board meeting one agenda item would deal with the "review of net proceeds analysis on sale of core assets". The GGFL calculations circulated for that agenda item "estimated" a FMV for College Square of $62 million.

[428] Prehogan, in his letter of June 15, wrote in respect of the offers to sell by the shareholders: "Unfortunately, any sale of their shares has been frustrated by the fact that according to the companies' constating documents, there is no market for them other than the issue of Harry Leikin." On behalf of his clients Prehogan proposed a winding-up of the companies.

[429] By about mid-June, Farber had contacted CIBC Mid-Market Investment Banking for assistance, and in its engagement letter of June 23, 2004, CIBC proposed to provide services to explore "liquidity options" that "would allow the [7] Selling Shareholder(s) to realize full or partial liquidity for their shares". CIBC proposed that it would conduct a valuation estimate of the fair market value of the shares owned by the Selling Shareholders, "as well as the feasibility of financing the Proposed Transaction". That latter matter would include reviewing "suitable financing structures for the Proposed Transaction".

[430] On July 6 Farber wrote Prehogan asking him to clarify whether his clients sought the disposition of College Square and Fisher Heights Plaza, or whether they wished to dispose entirely of their shareholdings in the Leikin Group. Farber proposed postponing the AGM to "permit The Leikin Group to fully examine the possibility and feasibility of shareholder divestiture scenarios". Prehogan responded on July 16 that his clients wished to "sell core assets, not shares" and repeated his clients' opposition to any change in the existing Board of Directors.

[431] On July 19 Farber wrote to the Board stating that "a definitive approach must be developed to enable the Leikin Group to act in a highly responsive, diligent and equitable manner in examining the feasibility of a transaction that addresses such liquidity needs." Farber reported on finalizing an engagement letter with CIBC, which she attached, and noted that the retainer required Board approval. Farber asked for dates for a Board meeting to approve the CIBC retainer "to permit the financial evaluation and analysis to commence as soon as possible".

[432] The Board met on July 21, 2004, at which time it approved the engagement of CIBC. Jameson's notes of that meeting recorded that four shareholders were not interested in selling their shares and wanted to continue to operate the core assets as a going concern. Jameson's notes also disclosed that the first phase of the analysis process would involve CIBC reporting on the feasibility of financing and a proposed transaction structure, which would be followed by the conclusion of a term sheet, then a further 90 days for the financing of the transaction.

[433] As reviewed above, the September 23 CIBC Phase I Report proposed a transaction structure under which Leikin Group core assets would be placed in re-organized corporations, an Amalco would redeem the shares of the Selling Shareholders, and the financing of the redemption would see a third party acquiring an interest in College Square.

[434] So, faced with demands by shareholders to sell their shares or liquidate the companies, Farber, as CEO and the controlling shareholder, engaged CIBC to explore liquidity and structure options, secured Board approval for that engagement, and CIBC reported its recommendations to the Board on a transaction structure and the feasibility of financing the transaction. That process of developing a method by which shareholders who wished to monetize their value in the core

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assets could do so, while those who wished to remain could carry on the business of the core assets, took about three months.

[435] The evidence disclosed that the objective of that whole process was not corporate-oriented, but shareholder-oriented: i.e. by what means could a majority of the shareholders sell their shares in light of their grandfather's restriction on the sale of shares to non-family members? The form of solution found was to re-organize the ownership of the core assets of the corporations and then allow the Selling Shareholders to "sell" their shares by having the re-organized corporation redeem those shares. The money needed to redeem those shares would have to come from either placing debt on the core assets or bringing in third party equity financing, or both.

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[436] I have reviewed that background to the share redemption transaction in some detail because it informs the consideration of the scope of directors' duties during that process. In its substance the share redemption transaction was a transaction between two sets of shareholders – those who wished to liquidate their interest in the companies' core assets and those who wished to retain their interests. The form of the transaction – a corporate redemption of shares – was required because of the restrictions placed by the company's founder on the transfer of shares. That restriction meant that only two sources of financing for the share buy-out existed – the personal resources of the remaining shareholders, which everyone acknowledged was a non-starter, or using the value of the core corporate assets to finance the share buy-out, either by saddling the assets with debt or by finding a third party equity investor.

[437] In those circumstances I have great difficulty in conceptualizing what duties the directors would owe *to the corporations* in respect of a transaction which, in its essence, involved one set of shareholders purchasing the shares of the other set. As Jameson wrote in his September 23, 2004, memo to the Board of Directors:

> Given the structure of the Proposed transactions and the fact that each member of the Board will have an interest in and derive a benefit from the Proposed Transactions (either as a "buyer", "seller" or "preservation of a continuing benefit") all of the Board members are in a conflict of interest position with respect to the Proposed transactions.

The Selling Shareholders initially wished to liquidate the companies' core assets; the Non-Selling Shareholders wished to preserve those assets. The compromise they reached was to agree that the remaining shareholders could use the corporate assets to secure debt or equity financing in order to fund the buy-out of the Selling Shareholders' shares.

[438] The plaintiffs seemed to argue that the "remaining" directors owed a duty to provide the "selling" directors with information about the financing of the share redemption transaction as

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part of their duty to disclose information relevant to the business of the corporation. I do not follow that argument. To the extent that the corporations which owned the core assets had a business interest in the financial effects of the share buy-out transaction, that interest would be identical to the interest of the Non-Selling Shareholders in the continuation of the business. The Selling Shareholders would have no interest; they would have exited the business related to the core asset. Accordingly, where, from a practical matter, the post-redemption viability of the corporations would be a matter of interest only to the remaining shareholders (and the directors they might elect), I do not see the share redemption transaction as giving rise to a fiduciary duty of Farber and Andrew Katz – or any other of the directors – to the corporations which owned the core assets.

C.2 The failure to disclose financing information to the shareholders

[439] Which brings me to the second argument advanced by the plaintiffs – i.e. because all the directors were in a conflict of interest position in respect of the share redemption transaction, the directors owed their duties to the shareholders in whose hands approval of the transaction rested. As noted above, directors of a company do not owe a general fiduciary duty to shareholders. That said, the particular circumstances of a case might give rise to such a fiduciary duty. Since the existence of any such duty would be fact-specific, I think it more appropriate to examine this claim by the plaintiffs under the rubric of *ad hoc* fiduciary duties.

D. Plaintiffs' allegations against the Katz Defendants for breaches of *ad hoc* fiduciary duties

[440] The plaintiffs alleged that the Non-Selling Shareholders undertook to act in the best interests of all shareholders through express promises, admissions in their pleading, and by their conduct:

(i) The plaintiffs pointed to two memoranda as containing the express promises: (i) the July 19, 2004 memo which Farber sent to the directors; (ii) the September 1, 2004 memo which Farber sent to all shareolders;

(ii) The plaintiffs argued that in paragraphs 9 and 59 of their Statement of Defence the Non-Selling Shareholders had admitted that they undertook to act in the best interests of all shareholders; and,

(iii) As to conduct, the Non-Selling Shareholders were all officers or former officers of the Leikin Group and therefore owed a duty to the Leikin Group to act in its best interests and not divert a corporate opportunity for their own benefit.

[441] Before turning to examine the facts, I should note that in their Closing Submissions the plaintiffs did not argue that the nature of the *ad hoc* fiduciary relationship owed by the Non-Selling Shareholders to them was such that it required those defendants to subjugate entirely their interests to the plaintiffs. Instead, they argued, the *ad hoc* fiduciary duty was one under which the Non-Selling Shareholders undertook to act in the *joint* interests of the parties.

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[442] In support of that submission the plaintiffs relied on the decision of the Nova Scotia Court of Appeal in *2475813 Nova Scotia Ltd. v. Rodgers*,[66] a case involving whether the owner of 80% of the units in a condominium owed a fiduciary duty to the remaining unit owners to act in the best interests of all unit owners. In the course of his decision holding that the majority owner did owe such a duty, Cromwell J.A. (as he then was) stated:

> Where, as here, it is alleged that the fiduciary obligation arises out of the specific circumstances of a particular relationship, the key consideration is whether, in all of the circumstances, one party could reasonably have expected that the other would act in the former's best interest with respect to the subject matter at issue…This does not preclude the fiduciary from acting in the joint interests of him or herself and those to whom the duty is owed. LaForest, J in Hodgkinson at 407 specifically approved the statement of Professor P. D. Finn in "Contract and the Fiduciary Principle" (1989), 12 U.N.S.W.L.J. 76 at 88 that the key consideration is whether "... the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests."[67]

Under this duty to act in the joint interests of all shareholders, the plaintiffs argued, the Non-Selling Shareholders were not precluded from making a personal profit from their decisions, but they could not profit at the expense of the Selling Shareholders.[68]

[443] As I understand the plaintiffs' argument regarding the existence of an *ad hoc* duty by the Non-Selling Shareholders, the key question boils down to whether, in all the circumstances, the Selling Shareholders could reasonably have expected that the Non-Selling Shareholders would act on the share redemption transaction both in the best interests of the Selling Shareholders, as well as in their own best interests? Based on my review of the evidence, for the following reasons I conclude that the Selling Shareholders could not reasonably have expected the Non-Selling Shareholders to act in their joint best interests.

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[66] 2001 NSCA 12
[67] *Ibid.*, para. 61.
[68] *Ibid.*, para. 87.

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D.1 The relationship of distrust between the two sides of the family

[444] The arguments of the plaintiffs about the existence of an *ad hoc* fiduciary duty on the part of the Non-Selling Shareholders in large part relied on selected sentences in a few documents, while at the same time ignoring the larger context in which the relationship between the two sides was carried on. Simply put, as the evidence I reviewed above disclosed, from the start of 2004 until the conclusion of the share redemption transaction in 2005, the Selling Shareholders never trusted the Non-Selling Shareholders. I accept the plaintiffs' submission, based on their reference to some case law, that a fiduciary relationship may arise even where the parties do not trust each other. But each case is fact specific, and based on my review of the evidence as a whole I conclude that no relationship of confidence existed between the two groups of cousins in respect of the share redemption transaction, and the Selling Shareholders did not place their interests in the hands of their cousins; they relied on their own advisors throughout the process.

[445] Josephine Harris described the relationships amongst the Leikin sisters and the grandchildren in early 2004 as ones characterized by conflict and lack of trust; they were "fractious". Rick Kesler thought that Farber's style of management was causing tension within the family and the Board was emotional and polarized. The Harris Family and Kesler wanted to sell their shares in the Leikin Group because they were concerned that the management of the company by Farber and David Katz might jeopardize the value of their investments.

[446] This lack of trust resulted in Harris, Kesler and Spieler forcing Katz's resignation as President in May, 2004. Then, in mid-June, Prehogan advised Farber that the majority of the shareholders wanted to liquidate their interests in the companies and threatened litigation to wind-up the companies. Prehogan's June 29 letter stated that if Farber exercised the control she possessed through her special shares, "legal action against you will be swiftly instituted and aggressively prosecuted".

[447] The plaintiffs pointed to memoranda from Farber dated July 19 and September 1, 2004 as containing express undertakings to protect their interests. I will consider those two memoranda shortly. But, Josephine Harris, Sheira Harris, Zena Harris and Rick Kesler testified that even after those memoranda were sent and the share negotiation process had begun, they did not trust the Non-Selling Shareholders. On the contrary, they were convinced that the Non-Selling Shareholders had arranged a bought deal with a third party and were hiding that information from them. Josephine Harris testified that it was "impossible" for the Selling Shareholders to

rely on the Non-Selling Shareholders.[69] I cannot reconcile that evidence from the plaintiffs with their submissions at trial that they expected the Non-Selling Shareholders to protect and look after their interests in the share redemption transaction.

[448] In *Waxman v. Waxman* the Court of Appeal stated that although a fiduciary relationship between parties may not always extend to a share sale between them, in that case one did because of the overwhelming evidence concerning the nature of the relationship between the two brothers. The Court of Appeal specifically referred to the following findings of fact of the trial judge in support of the existence of a fiduciary relationship:

> They had a special and close personal relationship as brothers. They had a special and close business relationship as 50/50 partners, who had built IWS together. In the financial and legal sphere, Morris was dependent on Chester both in relation to IWS and personally. By his conduct, Chester represented to Morris that their personal and business interests were common, identical and without conflict. Morris relied absolutely and completely on Chester in legal and financial matters. Chester was fully aware of the trust and confidence that Morris reposed in him and of Morris' vulnerability.[70]

The dependent, special and close personal relationship which existed between the Waxman brothers was a far cry from the fractious, conflicted, self-interested and untrusting relationship amongst the two sets of cousins in the present case.

[449] Although I have not set out much of the evidence on this point, it is important to note that a large amount of time during the negotiation of the LOI was spent by the parties on thrashing out a new governance structure for the Leikin Group companies which would continue to own the non-core assets. Schedule "C" to the LOI contained the new governance principles all parties had agreed upon. That a new governance structure was vigorously negotiated by both sides during the LOI process reflected the discord which had grown up between both sides of the family and the need to re-calibrate the governance arrangement for the non-core assets business which they would carry on together, notwithstanding their parting of the ways on the core asset business.

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[69] *Supra.*, para. 337.
[70] *Waxman v. Waxman*, OCA, para. 511.

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D.2 The nature of the negotiations in share redemption transaction

[450] I set out above in great detail the evidence concerning the negotiations between the two sides which culminated in the April 15, 2005 Letter of Intent. From that evidence the following findings of fact flow:

(i) The Selling Shareholders retained and relied upon their own legal and accounting advisors to protect their interests during the negotiation of the LOI;

(ii) The Selling Shareholders retained and sought some advice from their own real estate appraiser, David Atlin, during the course of the negotiations. It was always open to the Selling Shareholders to obtain from Atlin a more formal expression of views about the value of College Square. For their own reasons, the Selling Shareholders elected not to secure a formal, independent valuation opinion;

(iii) The negotiations were conducted over the course of almost half a year, with both sides strongly advancing their respective self-interests as shareholders in the Leikin Group companies. As the plaintiffs' own lawyer, Mr. Lewy, admitted at trial:

> Q. So I take it that from your perspective, sir, there was nothing in this negotiation that looked like one side negotiating in the other side's interest, both sides were negotiating in their own interest?
>
> A. Correct.

Negotiations containing those characteristics usually do not attract the imposition of a fiduciary duty on one of the negotiating sides, and the admission by Lewy that there was nothing in the negotiation that looked like one side was negotiating in the other side's interest severely undermines the plaintiffs' legal submission that the Non-Selling Shareholders owed a duty to protect the joint interests of the shareholders in that transaction.

D.3 The nature of the share redemption transaction

[451] As I have found, in its substance the share redemption transaction was a transaction between two sets of shareholders – those who wished to liquidate their interests in the companies' core assets and those who wished to retain their interests. The form of the transaction – a corporate redemption of shares – was required because of the restrictions placed by the company's founder on the transfer of shares out of the family. The Selling Shareholders agreed that the remaining shareholders could use the corporate assets to secure debt or equity financing in order to fund the buy-out of their shares.

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[452] The plaintiffs' legal advisors certainly recognized that the conflicting self-interests of the opposing parties and the nature of the transaction meant that each side was pursuing its own self-interest. Lewy conceded that Kesler was at liberty to attempt to maximize the benefits he could get from the transaction[71] and Mainzer acknowledged that after his clients had sold their shares, the remaining shareholders would have been free to do whatever they wanted with their properties.[72]

[453] A key characteristic of the transaction in this case was that the Selling Shareholders knew that the remaining shareholders would be using the core assets of the Leikin Group to finance the share buy-out. The Selling Shareholders also knew from the Edwardh Report and the Updated Altus Report that as the parties embarked upon their negotiations in November, 2004, a hot market existed for shopping centres like College Square – the Updated Altus Report went so far as to state that "this frenzy has not been witnessed since the late 1980's". I have found that the plaintiffs' own real estate appraiser, David Atlin, told Kesler in the fall of 2004 that market values for such assets were going up and that in March/April, 2005, he estimated the value of College Square as ranging from $64.59 to $66.76 million. It therefore follows, and I find, that during the course of the negotiations of the LOI the plaintiffs knew that the value of the asset which the Non-Selling Shareholders would be using to secure financing for the share buy-out was going up.

[454] The Selling Shareholders also knew, before they embarked in November, 2004, on the negotiations for a LOI, that the Non-Selling Shareholders did not intend to seek an equity investor who would end up with majority control of the College Square asset. Farber, in her September 1, 2004, memo to shareholders wrote:

> In fact the non-selling shareholders' *desire to retain ownership and management of the core assets* will most likely result in the maximization of the value of the non-core assets of the Leikin Group, which will be retained by all current shareholders. (emphasis added)

Appendix "F" to the September 23, 2004, CIBC Report clearly stated that the percentage participation by a third party investor would depend on the financing scenario selected. CIBC's November 5, 2004 revised financing analysis reported that the Non-Selling Shareholders had rejected a scenario under which a third party investor could acquire a 64% equity interest in College Square because "Newco would be left with no ability to influence major decisions pertaining to the ownership and management of the assets".

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[71] *Supra.*, para. 275.
[72] *Supra.*, para. 60.

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[455] The figure of 64% was an important one because at that point of time 7 out of 11 of the shareholders, or 64% of the shareholders, wanted to sell their shares. So, before negotiations started, it was evident that the Non-Selling Shareholders were not prepared to "flow-through" to the Selling Shareholders a percentage of the equity financing equivalent to their shareholdings in the companies because the remaining shareholders wanted to be able to influence major decisions regarding College Square post-financing. The Selling Shareholders therefore were on notice that the Non-Selling Shareholders intended to retain something more than a 36% interest in College Square post-closing; indeed they intended to retain a sufficient interest to be able to influence major decisions. The signal to the Selling Shareholders at that point was clear: a spread most likely would exist between the appraised value of College Square and the price of the financing in order that the Non-Selling Shareholders could continue to influence decisions about that asset after the Selling Shareholders had left. More colloquially, the writing was on the wall for all to see, even before the negotiations on the LOI had started, that the Non-Selling Shareholders were not prepared to relinquish control over the core assets to a third party equity investor.

[456] That, no doubt, prompted Lewy's opening requests on November 23 in respect of the proposed LOI that the Non-Selling Shareholders (i) represent that they did not have any information about the financing transaction which, if known to the other shareholders, might deter them from entering into the share redemption transaction, (ii) represent that they had no present intention of selling their interest in College Square, and (iii) agree that the selling shareholders would share in the benefit of any difference in price between the share redemption transaction and the sale of the property to a new owner. The Non-Selling Shareholders refused each of those three requests, the Selling Shareholders accepted that refusal (all the while being advised by their own, independent legal advisors), and the share redemption transaction was concluded on that basis. The executed LOI contained a condition of closing that "Newco and Newco 2…shall have arranged financing satisfactory to Newco and Newco 2 *in their sole discretion* in order to complete the Pre-Closing Transactions and the Transaction…"; the Non-Selling Shareholders owned Newco and Newco 2.

[457] Where, during the course of negotiations issues are specifically raised – the disclosure of financing information and the sharing in the up-side of the financing transaction – discussed, and agreement is reached on the issues – i.e. no disclosure of financing information and no sharing in the up-side – I do not see how one party to the transaction can, following closing, take the position that it reasonably expected that the other side was looking out for their interests on those issues when, prior to closing, the other side specifically stated it would not, and the deal closed on that basis.

D.4 Allegations of express undertakings to protect the plaintiffs' interests

[458] The nature of the relationship between the two groups of cousins, when combined with the nature of the share redemption transaction and the nature of the negotiations between the parties, offer no support for the existence of an *ad hoc* fiduciary owed by the Non-Selling Shareholders to the Selling Shareholders in the specific circumstances of this case. The plaintiffs submitted that, in any event, the Non-Selling Shareholders expressly undertook to protect their interests, and they pointed to July 19, 2004 memo from Farber to the Board of Directors and a September 1, 2004, memo from her to all shareholders in support of their assertion.

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[459] I referred to the July 19 memo in paragraph 131 above. In that memo Farber also wrote to the directors:

> It is clear to me that to move such a process forward the board and selling shareholders will require a highly credible independent financial advisor, with specific skills and experience that are relevant to the Leikin Group environment, to provide comprehensive insight, analysis and recommendations with the view of facilitating a mutually beneficial transaction between selling shareholders and the Leikin Group.

[460] The plaintiffs argued that Farber's reference to a "mutually beneficial transaction" constituted an undertaking by the Non-Selling Shareholders to protect the interests of the Selling Shareholders. I disagree. I consider that phrase, when taken in the overall context of the memo, to constitute nothing more than an expression by Farber of her hope that the parties could work together through a process involving the CIBC to reach an agreement which would result in the Selling Shareholders achieving their liquidity needs.

[461] As to the September 1, 2004, memo Farber wrote to all shareholders, the plaintiffs submitted that the following portions of the memo amounted to assurances and undertakings by Farber:

> [This note] will bring you up to date on the process being followed to arrive at a fair market value based offer to the seven shareholders who have formally advised the Leikin Group, through their lawyer, that they want to sell the interests in the core assets…
>
> As we move toward the goal of satisfying the desires of the seven shareholders to liquidate their interests in the core assets, I would like all shareholders to be assured and satisfied that we are engaged in a business exercise, which is open and transparent, in an effort to satisfy all shareholders.
>
> …

> I believe that the process we have embarked upon is the best course of action for all shareholders and for the companies themselves.
>
> I am extremely confident that all shareholders will approach the CIBC shareholder liquidity process with the knowledge that a successful outcome can only be achieved if it is beneficial to all shareholders. I look forward to working together with all directors and shareholders that will ensure a favourable conclusion.

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[462] As I mentioned above in paragraph 198, I do not read those passages, let alone the memo as a whole, as constituting an undertaking by the Non-Selling Shareholders to protect the interests of the Selling Shareholders. Farber indicated that the point of the exercise was to develop an offer for the Selling Shareholders to consider. Whether they accepted the offer was up to them. Farber simply stated the obvious that unless the process resulted in an outcome which both sides considered beneficial, no deal would be made, and she expressed the hope that the parties would work together to get a deal done. But Farber made it crystal clear, in the second paragraph of her memo, that the two sides of the family were opposite in their interests:

> Those wishing to sell and those not wishing to sell must acknowledge that they have perspectives and interests that are now totally opposite, and which will preclude them from enjoying a satisfying and productive business relationship with respect to the ownership and management of the core assets, on a going forward basis. As such, it will be necessary for both sellers and non-sellers to make every effort possible to enable an appropriate liquidity opportunity to be completed.

Hardly the language of undertaking to protect the interests of the opposite party. In my view, Farber's memo sent a simple message: "We cannot get along anymore. Our interests are opposed. We need to go our separate ways on the core assets. We'll work to make the sellers an offer. I hope we can get a deal done." I find that neither Farber's July 19 or September 1, 2004 memos contained express or implied undertakings that the Non-Selling Shareholders would protect the interests of the Selling Shareholders in the share redemption transaction.

[463] For the same reasons I find that Farber's September 1, 2004, memorandum did not constitute an undertaking by the Non-Selling Shareholders to act as the agents of the Selling Shareholders in the share redemption transaction.

[464] The plaintiffs also submitted that statements pleaded by the Katz Defendants in paragraphs 9 and 59 of their Statement of Defence acknowledged their obligation to act in the best interests of all shareholders. With respect, that submission distorted what was actually pleaded. In their Statement of Defence the Katz Defendants denied that they had owed any fiduciary duty to the Selling Shareholders. The statements made in paragraph 59 were a plea in

the alternative, and the statement made in paragraph 9 must be read in light of those defendants' denial of the existence of a fiduciary duty.

D.5 A consideration of the jurisprudence

[465] Earlier in these Reasons I referred to a passage from Kevin McGuinness, *Canadian Business Corporations Law, Second Edition,* regarding fiduciary duties owed by directors to shareholders. For the principles contained in this passage Mr. McGuinness drew heavily on the judgment of Woodhouse J. of the New Zealand Court of Appeal in *Coleman v. Myers*. In considering what factors a court should take into account when examining whether a fiduciary duty existed between a director and the shareholders of a company, Woodhouse J. stated:

> [The factors] include, I think, dependence upon information and advice, the existence of a relationship of confidence, the significance of some particular transaction for the parties and, of course, the extent of any positive action taken by or on behalf of the director or directors to promote it.[73]

In a concurring judgment Cooke J. pointed to the following factors as leading him to conclude in that case that the directors owed fiduciary duties to the selling shareholders: "the family character of this company; the positions of [the father and son directors] in the company and the family; their high degree of inside knowledge; and the way in which they went about the take-over and the persuasion of shareholders."[74]

[466] The facts in *Coleman v. Myers* were quite different than those in the present case. Myers made a successful take-over bid for the shares of a company, C&E. Following the closing of the take-over bid, Myers sold the main asset of C&E at a significant gain. The selling shareholders sued, claiming that Myers had undervalued the worth of the company in the representations which he made during the bid. In reversing the trial judge, the New Zealand Court of Appeal found that during the take-over bid process Myers had represented to the target shareholders that he did not intend to use the assets of C&E – a piece of real estate and cash reserves – to fund his take-over bid, when, in fact, that is exactly what he had intended to do all along. The appellate court found that Myers had made fraudulent misrepresentations which were material and induced the shareholders to sell their shares. On the issue of fiduciary duty, the appellate court found that on the facts of that case the selling shareholders had reposed their confidence in Myers, due to his inside knowledge of the company, to provide them with a fair recommendation of the value

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[73] [1977] 2 NZLR 225, at 325.
[74] *Ibid*, at 330.

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of their shares. By contrast, in the present case, I have found that great distrust existed between the Selling Shareholders and their cousins and, significantly, it was understood and agreed to by all, through the ultimate execution of the LOI, that the Non-Selling Shareholders enjoyed complete discretion to secure the financing of the share redemption transaction, including using the core assets to secure debt or equity financing.

[467] The plaintiffs also pointed to several Canadian decisions as illustrating the principle that a fiduciary duty may arise between a director and shareholder in specific circumstances. The decisions in *Tongue v. Vencap Equities Alberta Ltd.* [75] and *Gadsden v. Bennetto*[76] both involved one director, or a small committee of directors, acting *on behalf of* all shareholders to arrange for the sale of their shares, or the main asset of the company, and not disclosing to the shareholders that they had arranged a deal at a higher price with a third party. As McBain J. stated in his trial decision in *Tongue v. Vencap Equities Alberta Ltd.*, "the mere presence of the director-shareholder relationship does not prevent a fiduciary duty from arising", but for one to arise "something more must be present" than the mere director-shareholder relationship. *In Tongue* the trial judge found that a director owed a fiduciary relationship to shareholders, "outside of the scope of the duties of ordinary directors", when he acted to solicit and arrange for the disposition of the shareholders' shares in the company – in that case without disclosing that a major corporation had expressed interest in acquiring the company.[77] The trial judge also found that a fiduciary relationship arose between the directors who owned shares in the company, and those shareholders whose shares they bought pursuant to which the directors owed a duty to the selling shareholders to disclose the existence of an expression of interest to purchase the company by a major corporation and the price per share that purchaser was willing to pay[78].

[468] In the decision of the Manitoba Court of Appeal in *Gadsden v. Bennetto* a corporation's sole asset was a tract of land. A special committee of the Board was tasked with finding a purchaser of the lands or shares of the company. The committee did, but they failed to disclose to the shareholders that one director would receive a secret commission from the sale and that the price at which the shareholders transferred their shares did not reflect the real value of the sale to the third party. The Manitoba Court of Appeal held that any information received by the committee about the price of the land, or the shares, was received in a fiduciary capacity both for

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[75] [1994] A.J. No. 115 (Q.B.), para. 103. Although the judgment of McBain J. was affirmed on appeal, the Alberta Court of Appeal did not find it necessary to consider the findings about the existence of a fiduciary relationship: *Tongue v. Vencap Equities Alberta Ltd.,* [1996] A.J. No. 435 (C.A.), para. 31.
[76] (1913), 9 D.L.R. 719 (Man. C.A.).
[77] *Tongue*, Q.B., para. 108.
[78] *Tongue, Q.B., supra*., para. 113.

the company and for its shareholders, and the committee was obliged to disclose to the shareholders how much per share the purchaser was willing to give.[79] One member of the court described the members of the committee as the "confidential agents of the company and the shareholders" and, as such, bound to make full disclosure of the sales terms to the shareholders.[80]

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[469] In *Hyatt v. Allen*[81] the directors of a company entered into an agreement with a party who wished to acquire all the company's shares and undertaking in order to merge the company into another one. The directors represented to the majority of the shareholders that their consent was necessary to the transaction and the directors, without disclosing the real price of the deal, induced the shareholders to give them options to purchase their shares at a value far below that which would be realized in the transaction. In upholding the judgment against the directors requiring them to disgorge their secret profits, the Privy Council stated that although the duty of directors was primarily one to the company itself, in the circumstances of the case the directors had "held themselves out to the individual shareholders as acting for them on the same footing as they were acting for the company itself, that is as agents".[82]

[470] Finally, the plaintiffs referred to the Alberta Court of Appeal decision in *Verma v. Zinner*[83] in which that court imposed a fiduciary duty on a real estate agent who had bought a shopping centre for himself and two other investors. His co-investors thought that their money was being used to acquire the property at a certain price, when in fact the real estate agent bought it at a lower price through a company he controlled and then flipped it to co-investors' company, earning a secret profit on the transaction.

[471] The facts I mentioned which distinguish the present case from the circumstances in *Coleman v. Myers* also distinguish it from the decisions in the *Tongue, Gadsden, Hyatt* and *Verma* cases. By way of further distinction, in the present case the Non-Selling Shareholders did not act as agents on behalf of the other shareholders to secure the sale of their shares. The directors accepted a transaction structure under which the parties would negotiate a price for the redeemed shares and the remaining shareholders would use the core assets to finance the purchase. The Non-Selling Shareholders rebuffed pre-LOI efforts by the Selling Shareholders to negotiate a share in any up-side in the financing transaction, and in the LOI the Non-Selling Shareholders were given the sole discretion to arrange the financing.

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[79] *Gadsden, supra*., para. 13.
[80] *Gadsden*, para. 14.
[81] (1914), 17 D.L.R. 7 (J.C.P.C.).
[82] *Hyatt, supra*., para. 7.
[83] (1994), 157 A.R. 279 (C.A.), paras. 25 to 31.

[472] It must also be recalled that the Altus Group's updated October 29, 2004 estimated market value of $58.9 million was circulated almost 6 months before the parties executed the LOI. Notwithstanding the passage of almost half a year and the knowledge that the market for big box shopping centres in Ottawa was hot, the Selling Shareholders did not seek or require an updated formal appraisal for College Square. The risk in not so doing can be seen from the opinion expressed in the appraisal obtained by Merrill Lynch Capital about a year later which valued College Square at $73.9 million as of July 20, 2005.

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D.6 Conclusion

[473] By way of summary, for the reasons set out above, I find that the Non-Selling Shareholders did not owe a fiduciary duty to the Selling Shareholders to protect their financial interests in the share redemption transaction, nor did the Non-Selling Shareholders act as the sellers' agents in the share purchase transaction. It follows that I find that the Non-Selling Shareholders were not under any obligation to provide to the Selling Shareholders they information which they generated related to the financing they might or did secure in order to fund the share redemption transaction.

[474] Since I have found that the Non-Selling Shareholders did not owe an *ad hoc* fiduciary duty to the Selling Shareholders in the particular circumstances, the issue of the materiality of the information in the possession of the Non-Selling Shareholders does not arise. But, several points bear repeating on the nature of the information possessed by some or all of the Katz Defendants. First, as I found in my Summary Judgment Reasons, and as was upheld by the Court of Appeal, FCR made its first, and only, offer to purchase an interest in College Square by its LOI dated July 8, 2005. Put another way, during the negotiations between the two sets of cousins over their LOI, the Non-Selling Shareholders did not have a "bought deal" in their back pocket; there was no "secret flip". Second, the evidence which I set out above, when read in its context, showed that the various calculations performed by GGFL and David Katz which the plaintiffs pointed to as evidence of some bought deal with FCR in fact were efforts by those who wished to continue the business of College Square and Fisher Heights Plaza to get a handle on how much they would have to raise in any financing to buy-out their selling cousins, yet at the same time not relinquish control of the assets in whose management they wished to continue. Such calculations and information were reasonable and necessary in order for those who were going to assume responsibility for financing the buy-out of the selling shareholders to figure out whether the transaction was even feasible. Further, in the final deal cut between the two sides, the financing of the whole transaction remained solely in the discretion of Newco and Newco 2, companies owned by the Non-Selling Shareholders. Third, when Jameson in his December 24, 2004 email to Lewy wrote that the "non-selling shareholders have told me, and I am authorized to advise you and the selling shareholders, that no form of financing has been structured and/or finalized",

that was an accurate statement. The Non-Selling Shareholders did not begin their financing efforts until after the LOI had been executed, and then they employed a very formal bid process using RBC to solicit expressions of interest for the financing through an equity investment in College Square. In the result, they selected the highest bid, that of FCR.

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XXVI. Misuse of confidential information/unjust enrichment claims

[475] Although the plaintiffs pleaded claims sounding in misuse of confidential information and unjust enrichment, they were not pressed at trial, so I shall not deal with them to any extent save to state that (i) David Katz did secure a confidentiality agreement from FCR when he disclosed Leikin Group information to it in February, 2004, (ii) the LOI enabled the Non-Selling Shareholders to seek financing in their "sole discretion", which would include making use of confidential corporate information to secure that financing, and (iii) the only enrichment of the defendants resulted from the terms of the LOI negotiated and agreed to by the parties. I see no basis for either claim.

XXVII. Oppression claims

A. Elements of a claim for oppression under the *Business Corporations Act*

[476] The oppression remedy contained in section 248 of the *OBCA* is an equitable remedy which seeks to ensure fairness and which gives courts a broad, equitable jurisdiction to enforce not just what is legal, but what is fair. In considering oppression claims courts must look at business realities, not merely narrow legalities. At the same time the remedy is very fact-specific – what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play.[84]

[477] In *BCE Inc. v. 1976 Debentureholders* the Supreme Court identified the two inquiries which a court must make in considering an oppression claim: (i) Does the evidence support the reasonable expectation asserted by the claimant? and (ii) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?[85]

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[84] *BCE Inc. v. 1976 Debentureholders*, *supra.*, paras. 58 and 59.
[85] *Ibid.*, para. 68.

[478] The reasonable expectations of specified stakeholders is the cornerstone of the oppression remedy.[86] Fair treatment - the central theme running through the oppression jurisprudence - is most fundamentally what stakeholders are entitled to "reasonably expect".[87] The concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive - the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.[88]

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[479] The onus lies on the claimant to identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held.[89] Factors which a court may consider in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.[90]

[480] For the purposes of this motion it is worth recalling several of the comments made by the Supreme Court in the *BCE* case about these factors. First, reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation.[91] Second, in determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered. Thus, it may be relevant to inquire whether a secured creditor claiming oppressive conduct could have negotiated protections against the prejudice suffered.[92] Finally, the cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all

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[86] *Ibid*. para. 61.
[87] *Ibid*., para. 64.
[88] *Ibid*., para. 62.
[89] *Ibid*., para. 70.
[90] *Ibid*., para. 72.
[91] *Ibid*., para. 75.
[92] *Ibid*., para. 78.

relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.[93]

[481] As the Supreme Court pointed out in *BCE*, not every unmet expectation gives rise to an oppression claim. Something more is required: the conduct complained of must amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. Finally, although the conduct most often complained of in an oppression action is that by a company's directors, "the conduct of other actors, such as shareholders, may also support a claim for oppression".[94]

[482] With that by way of summary of the legal principles placed before me by the parties, let me turn to consider the plaintiffs' oppression claim.

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B. Analysis

[483] In their Statement of Claim the plaintiffs did not expressly identify the expectations that they claimed were violated by the conduct of the Katz Defendants. The plaintiffs pleaded, in paragraph 32 of their Statement of Claim, that the conduct of the Non-Selling Shareholders which they alleged amounted to breaches of their fiduciary duties to the plaintiffs also was oppressive. Those breaches of fiduciary duties, as particularized in paragraphs 29 and 31 of the Statement of Claim and paragraph 4 of the Reply, can be grouped as follows:

(i) The Non-Selling Shareholders withheld pertinent information about the value of College Square and potential purchasers for the property, including failing to disclose that the fair value of College Square was at least 30% higher than the price set out in the LOI;

(ii) The Non-Selling Shareholders utilized information about the College Square property to obtain offers for the property without authorization from the Board or other shareholders;

(iii) The Selling Shareholders reasonably expected that the share redemption transaction was to be based on the fair market value of the core assets;

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[93] *Ibid*., paras. 81 and 82.
[94] *Ibid*., para. 65.

(iv) The Non-Selling Shareholders made decisions likely to affect the Selling Shareholders' welfare without obtaining the informed consent of the Selling Shareholders; and,

(v) The Non-Selling Shareholders directed the accountants and lawyers for the company to withhold information from, or to distort information being provided to, the Selling Shareholders.

[484] In paragraph 65 of their written Closing Submissions the plaintiffs fleshed out these allegations, referring to specific events or documents, but the essence of the allegations remained unchanged from their pleading.

[485] Let me deal first with items (i) through (iv). In oppression claims context is all-important. The reasonableness of a party's expectations is framed by that context. At the risk of repeating myself, in early 2004 seven shareholders signaled that they wanted out. That position ultimately changed into wanting to monetize their interests in the companies' core assets. The Board of Directors was controlled by those who ultimately sold their shares, although one director, Farber, owned special shares which entitled her to control any vote, but she did not exercise that right. By June the sellers had threatened litigation against those who wished to continue to own and manage the core assets. A process run by CIBC unfolded to ascertain the feasibility of a buy-out and a transaction structure. A report opining on fair market value as of August 1, 2004 was obtained; it was updated in October. By early October a proposed LOI was put in the hands of all shareholders. Matters languished until late November when both sides started to negotiate the LOI, including the share redemption price. The Selling Shareholders were represented by their own legal advisors and they had access to their own real estate appraiser. Those negotiations started and stopped. Typical negotiating posturing characterized the process. The negotiations proceeded on the basis that the Non-Selling Shareholders would have to find the financing to buy-out the Selling Shareholders. During the negotiations the Selling Shareholders asked for certain reps and warranties concerning the financing transaction and sought to share in the "up-side" of the financing transaction. The Non-Selling Shareholders refused. The negotiations continued. It was not until over 6 months following the circulation of the initial draft LOI that the parties struck a deal for the share redemption.

[486] As I have already found, this was not a context in which the Non-Selling Shareholders undertook to look after or to protect the interests of the Selling Shareholders in the share redemption transaction. Accordingly, the Selling Shareholders could have no reasonable expectation that the Non-Selling Shareholders would do so.

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[487] It was a context in which it became clear, through arm's-length negotiations, that the Non-Selling Shareholders were not prepared to share any "up-side" on the financing with the Selling Shareholders. The parties ultimately agreed that securing financing would be left to the "sole discretion" of the Non-Selling Shareholders. Under those circumstances the Selling Shareholders could have no reasonable expectation that they would receive information about the ultimate financing or that they would share in any "up-side" of that financing. They bargained those interests away, and the expectations which the Selling Shareholders reasonably could hold were shaped by that bargain.

[488] When David Katz first talked with FCR, he was President of the Leikin Group. I have set out above my findings as to what he disclosed about those initial discussions to the Board at the April 15, 2004 and the adequacy of that disclosure. His next talks with FCR took place in late August, 2004. By that time the context had changed, with two sets of opposing shareholders pursuing their own interests. David Katz did not disclose those discussions to either Farber or Andrew Katz; he was investigating whether equity investor financing was feasible. Given the division in shareholder interests at that time, and given that the parties ultimately agreed that the Non-Selling Shareholders would find the financing in their sole discretion, it was not reasonable for the plaintiffs to expect David Katz to disclose to them what he was doing to further his legitimate interest of finding financing to enable the transaction proceed. As was pointed out at trial during several of the cross-examinations of the plaintiffs, they did not disclose to the Non-Selling Shareholders that they had retained Atlin as their own real estate appraiser. Put another way, both buyers and sellers legitimately were entitled to secure information to assist them in their negotiations with the other side.

[489] One must also take into account the steps which the claimant plaintiffs could have taken to protect themselves against the prejudice they claim to have suffered. Much of the plaintiffs' complaint rested on their assertion that they had a reasonable expectation of receiving fair market value for their shares on the redemption. Let me make two points. First, in support of their argument that they possessed a reasonable expectation that their shares would be redeemed at fair market value, the plaintiffs pointed to an October 31, 2004 email from David Katz to the CIBC that "there must be a presumption that the sale of an undivided interest to a third party will also be based on such revised FMV". Reasonable expectations must be based, in part, on a party's understanding. That presumes some communication of a matter from one party to the other. Katz's email was not sent to the plaintiffs. I have difficulty understanding how a communication to which the plaintiffs were not privy could shape their reasonable expectations. Second, and more to the point, the deal which the plaintiffs struck in the April, 2005 LOI was not one in which the price equalled the fair market value of any asset. As described, part-way

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through the negotiations the share redemption price was unlinked from appraised value and the parties concluded by negotiating a price.

[490] Further, following the estimate of value given by Altus as of August 1, 2004, the Selling Shareholders were put on notice by several sources that the value of power, or big box, shopping centres was rising: the Edwardh Report; the updated Altus Report; Atlin's comments to Kesler in the fall of 2004; Ivan Kesler's email of December 9, 2004; and, Atlin's sensitivity analysis comments to Kesler in March or April, 2004. All that information was put in the hands of the Selling Shareholders before they executed the LOI. Moreover, the Selling Shareholders had asked the Non-Selling Shareholders to share in any "up-side" on the financing, and they were refused. Notwithstanding all these *indicia* of a rising market for properties like College Square, and notwithstanding the somewhat stale nature of the Altus August 1, 2004 valuation by the time of the April 15, 2005 LOI, the Selling Shareholders took no steps to obtain a more current valuation of the core asset before they inked their deal even though ways were open to them to do so: at the time they had access to their own appraiser – Atlin – and at the time they still sat on the Boards of the Leikin Group.

[491] It also should be noted that the evidence did not disclose that the Selling Shareholders were subject to any economic compulsion to sell. Their choice to monetize their interests in the core assets was freely made, and they selected the time when they wanted to sell. This was not a situation where those who wanted to remain owners of the assets took advantage of some financial distress which prompted the other side to offer to sell their shares. The transaction was not a squeeze-out of the majority by the minority. Simply put, the Selling Shareholders could have held on to their shares if they were not satisfied with the way the negotiations were proceeding.

[492] Our law of commercial contracts has not reached the point where it is unlawful for one side in negotiations to drive a hard or better bargain than the other. Some people are better negotiators than others and can negotiate deals to their advantage. Often advantage flows from one side being prepared to accept greater future risks than the other. The law of commercial dealings permits such a result, and the law of oppression and fiduciary relationships does not stand in the way. However, the law of commercial dealings, including the law of oppression and fiduciary relationships, does lay down certain minimum standards for the conduct of commercial dealings, especially where one side to the negotiations reasonably looked to the other to protect some or all of its commercial interests in the negotiations. Where, however, each side, independently advised, acts only to protect its own interests in the negotiations, the law tends not to interfere with the resulting bargain even if, in retrospect, one side proved the more astute negotiator.

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[493] For these reasons, I conclude that the expectations as generally articulated by the plaintiffs in Items (i) through (iv) in paragraph 483 above, were not reasonable when regard is had to the specific circumstances of this transaction.

[494] As to Item (v), I find that the Non-Selling Shareholders did not direct the accountants and lawyers for the company to withhold relevant information from, or to distort information being provided to, the Selling Shareholders. I repeat what I wrote earlier that it was reasonable for the remaining shareholders to use GGFL to run calculations on various financing scenarios. Simply put, if the financing was not feasible, the Selling Shareholders would not have been able to sell their shares. It is within that overall context that the issue of scenario calculations must be understood.

[495] Finally, the one request which David Katz made of the Lawyer Defendants – his October 19, 2004 email to Geoff Gilbert – not to circulate certain information to the Selling Shareholders concerned calculations which mentioned a potential capital gain on the transaction with a potential equity investor. I can only repeat the analysis I set out in paragraphs 453 to 457 above about the information available to the Selling Shareholders in the fall of 2004 which could only reasonably lead them to understand that a refinancing transaction with an equity investor would involve a capital gain.

[496] For these reasons, I conclude that the plaintiffs have not made out an oppression claim against the Katz Defendants. I therefore dismiss their action against the Katz Defendants and Leikin Group Inc.

XXVIII. The knowing assistance claim against the Lawyer Defendants

[497] The plaintiffs advanced two claims against the Lawyer Defendants: (i) the Lawyer Defendants breached fiduciary duties which they owed to the plaintiffs; and (ii) they knowingly assisted the Katz Defendants in breaching their fiduciary duties to the plaintiffs. Let me consider the second claim first.

A. The law of knowing assistance

[498] The grounds upon which a stranger to a trust, or a fiduciary relationship, may be held liable in the event of the breach of the trust or fiduciary duty were explained by the Supreme Court of Canada in *Gold v. Rosenberg*:

> A person who has not been appointed as a trustee may, under certain circumstances, attract the liabilities of trusteeship. In *Barnes v. Addy* (1874), L.R. 9 Ch. App. 244, Lord Selborne L.C. explained that there are three situations in which a breach of trust may give

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> rise to liability in a person who is a stranger to the trust. First, a person may be liable as a trustee de son tort. The facts of this case do not require consideration of this category of liability. Second, a person will be liable if he or she knowingly assisted in a fraudulent and dishonest breach of trust. This type of liability is referred to as "knowing assistance". And third, depending upon considerations of notice, equity may impose liability if the defendant received, in his or her own right, property obtained through breach of trust. This last category of liability is referred to as "knowing receipt".[95]

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[499] The requirements for establishing a claim of knowing assistance were canvassed by the Supreme Court in *Air Canada v. M & L Travel Ltd.*,[96] and repeated in *Gold v. Rosenberg*:

> This Court reviewed the law of knowing assistance in *Air Canada*. In that case, we adopted the definition of "knowing assistance" given in *Barnes v. Addy*, where Lord Selborne L.C. stated that a stranger to the trust will be liable if he or she "assist[s] with knowledge in a dishonest and fraudulent design on the part of the trustees" (p. 252).
>
> A "dishonest and fraudulent design" includes "the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary". As was said in Air Canada (at p. 826):
>
> > I would therefore "take as a relevant description of fraud 'the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take'."
>
> As the name "knowing assistance" implies, the plaintiff must prove not only that the breach of trust was fraudulent and dishonest, but also that the defendant participated knowingly in that breach of trust. As stated in Air Canada (at p. 811):
>
> > The knowledge requirement for this type of liability is actual knowledge; recklessness or wilful blindness will also suffice.[97]

[500] In *Air Canada* the Supreme Court dealt at greater length with the knowledge requirement:

> The knowledge requirement for this type of liability is actual knowledge; recklessness or wilful blindness will also suffice…In [*Carl-Zeiss-Stiftung v. Herbert Smith & Co.* (No. 2), [1969] 2 All E.R. 367 (C.A.)] Sachs L.J. stated that to be held liable the stranger must have had "both actual knowledge of the trust's existence and actual knowledge that what is being done is improperly in breach of that trust -- though, of

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[95] [1997] 3 S.C.R. 767, para. 26.
[96] [1993] 3 S.C.R. 787.
[97] *Gold v. Rosenberg, supra*., paras. 30 to 32.

course, in both cases a person wilfully shutting his eyes to the obvious is in no different position than if he had kept them open." Whether the trust is created by statute or by contract may have an impact on the question of the stranger's knowledge of the trust. If the trust was imposed by statute, then he or she will be deemed to have known of it. If the trust was contractually created, then whether the stranger knew of the trust will depend on his or her familiarity or involvement with the contract.

If the stranger received a benefit as a result of the breach of trust, this may ground an inference that the stranger knew of the breach… The receipt of a benefit will be neither a sufficient nor a necessary condition for the drawing of such an inference.[98]

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[501] Finally, as stated by the Court of Appeal in *Keeton v. Bank of Nova Scotia*:

With respect to knowing assistance in a breach of fiduciary duty, to found liability, the stranger to the trust must have actual (as opposed to constructive) knowledge of the misconduct, or be wilfully blind to the breach or reckless in his failure to realize that there was a breach.[99]

[502] In sum, to recover damages for knowingly assisting in a breach of a fiduciary duty, a claimant must demonstrate that:

(i) A fiduciary relationship existed;

(ii) the fiduciary perpetrated a dishonest and fraudulent breach of trust; and

(iii) the defendant stranger participated in and had actual knowledge of the trustee's dishonest and fraudulent breach of fiduciary duty.[100]

B. Analysis

[503] As I have found above, David Katz did not breach his fiduciary duty to the corporation when he was President of the Leikin Group, nor did Barber Farber or Andrew Katz breach their duties as directors. I also found that the Katz Defendants and the Leikin Group Inc. did not owe an *ad hoc* fiduciary duty to the plaintiffs. In light of those findings, the plaintiffs' knowing assistance claim against the Lawyer Defendants fails.

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[98] *Air Canada, supra*., paras. 38 and 39. See also: *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, para. 22.
[99] 2009 ONCA 662, para. 82.
[100] *Gold, supra*., para. 34.

XXIX. The breach of fiduciary duty claims against the Lawyer Defendants

A. Some further legal principles

A.1 The duties of a corporation's solicitors

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[504] The Lawyer Defendants argued that the Leikin Group corporations were their clients and, as a result, their duty was to act solely in the best interests of those companies. The defendants pointed to Rule 2.01(1.1) of the *Rules of Professional Conduct* issued by the Law Society of Upper Canada, and the accompanying Commentary, which read:

> **Rule 2.01 (1.1)** Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organization.
>
> **Commentary**
>
> A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors, and employees. While the organization or corporation will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organization that are to be served and protected. Further, given that an organization depends upon persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority. In addition to acting for the organization, the lawyer may also accept a joint retainer and act for a person associated with the organization. An example might be a lawyer advising about liability insurance for an officer of an organization. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interest and should comply with the rules about the avoidance of conflicts of interest (rule 2.04).

[505] In considering the nature of the duties flowing from a professional relationship, courts may consider the scope of the duties imposed by rules of professional conduct. As noted by the Supreme Court in *Galambos v. Perez*:

> Codes of professional conduct, while they are important statements of public policy with respect to the conduct of lawyers, are designed to serve as a guide to lawyers and are typically enforced in disciplinary proceedings. They are of importance in determining the nature and extent of duties flowing from a professional relationship…They are not,

> however, binding on the courts and do not necessarily describe the applicable duty or standard of care in negligence…[101]

[506] To the same effect the Court of Appeal, in *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc*, stated:

> No doubt, the *Rules* are not binding on the courts: *MacDonald Estate* at p. 1245. The *Rules* are, however, a clear expression of the profession's concept of the duties owed to former clients. That expression must be given considerable weight by the courts.[102]

A.2 The relationship between a corporation's solicitor and the company's directors and shareholders

[507] At the heart of the fiduciary duty lies the duty of loyalty, which includes the duty to avoid conflicting interests.[103] The duty of a corporate solicitor is to the company. Since the best interests of the company are not necessarily those of the majority shareholders or directors, a corporate solicitor who seeks to represent both the company and the majority of its shareholders or directors stands in a conflict position.[104]

[508] A solicitor/client relationship does not arise between a corporate solicitor and a corporate officer merely because the officer had consulted or given instructions to the corporate solicitor. However:

> In certain circumstances a solicitor and client relationship with the individual shareholders or directors of a corporation may exist even where the solicitor purports to act on behalf of the corporation only and bills all his services to it. An example is a husband and wife who instruct their personal solicitor to incorporate their farm or business and to subsequently act for this new closely-held corporation of which they are the sole shareholders and directors. In such a case multiple solicitor and client relationships would exist. The one between the corporation and the solicitor would simply be an additional one to that which previously existed between the solicitor and the husband and wife.[105]

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[101] *Galambos, supra*., para. 29.
[102] 2010 ONCA 788, para. 24.
[103] *Waxman, OCA*, para. 646.
[104] *Mottershead v. Burdwood Bay Settlement Co.*, [1991] B.C.J. No. 2554 (S.C.), p. 2.
[105] *International Capital Corp. v. Schafer*, [1996] S.J. No. 799 (Q.B.), para. 32.

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[509] Whether a solicitor-client relationship exists in any particular set of circumstances is a question of fact. A formal letter of retainer is not required to find a solicitor/client relationship, nor is it necessary that there be an account rendered by the lawyer to or paid by the complaining party.[106] Courts look to a number of factors to ascertain whether a solicitor/client relationship has arisen in particular circumstances:

> These indicia include: a contract or retainer; a file opened by the lawyer; meetings between the lawyer and the party; correspondence between the lawyer and the party; a bill rendered by the lawyer to the party; a bill paid by the party; instructions given by the party to the lawyer; the lawyer acting on the instructions given; statements made by the lawyer that the lawyer is acting for the party; a reasonable expectation by the party about the lawyer's role; legal advice given; and legal documents created for the party. Not all indicia need to be present. As Madam Justice Romaine stated in *Guardian Insurance, supra*, the question appears to be whether a reasonable person in the position of a party with knowledge of all the facts would reasonably form the belief that the lawyer was acting for a particular party.[107]

[510] Where a solicitor/client relationship arises between a law firm and two clients on a transaction, courts have imposed a high duty of disclosure on the solicitors. As put by the Court of Appeal in *Commerce Capital Trust Co. v. Berk*:

> There can be no doubt that the solicitors owed a fiduciary duty to their client, Commerce Capital, and, on the issues as raised in this case, the relevant duty of the solicitors as fiduciaries was to disclose to their client all "material" facts. The true question in this case is whether or not the undisclosed facts were material. Lord Thankerton's statement indicates that the test of materiality is not whether or not the transaction would have been proceeded with if all facts had been known. Applying such a test to determine materiality, would make Lord Thankerton's statement meaningless. In cases such as this, the question of materiality must be determined on some objective basis...[108]

[511] If a solicitor-client relationship does not exist, courts proceed carefully before imposing fiduciary duties on solicitors in respect of non-clients. As the Court of Appeal cautioned in *Filipovic v. Upshall*:

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[106] *Jeffers v. Calico Compression Systems*, [2002] A.J. No. 79 (Q.B.), para. 8.
[107] *Ibid.*
[108] (1989), 68 O.R. (2d) 257 (C.A.), para. 18.

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> The courts should be careful in imposing fiduciary obligations on a solicitor outside the solicitor-client relationship if the solicitor is engaged in the delivery of legal services. The imposition of a fiduciary duty on a solicitor in relation to a non-client involved in a transaction with a client whom the solicitor is representing could give rise to a serious conflict of interest.[109]

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[512] In the *Filipovic* case the trial judge had explained why no fiduciary obligation arose by the lawyers to those outside of their retainer:

> Snowdon was retained by the principals of the company with authority to act on its behalf. He took their specific instructions. It has not been shown that he had any scope for the unilateral exercise of discretion; nor if he had were the plaintiffs vulnerable to the exercise of any such discretion or power. None of the plaintiffs asked him for advice, gave him instructions, or conveyed their expectations to him. None was acting under a disability of any kind. No relationship was established displaying trust, reliance or confidence. This aspect of the plaintiffs' claim has not been proven.[110]

B. Review of additional evidence

B.1 Mr. Jameson's description of the role played by Ogilvy Renault in the transactions

[513] Mr. Jameson started acting for the Leikin Group of Companies in early 2003. As corporate counsel he attended all Board meetings where he served as recording secretary. Directors would call him periodically with questions. He deposed that Ogilvy Renault acted as corporate counsel throughout the transactions and their mandate was to put together the corporate documentation which would permit the redemption of the Selling Shareholders' shares. Since the LOI was the principal operating agreement governing the transaction and he had carriage of drafting the initial LOI, Mr. Jameson deposed that "I was often the conduit through which the Non-Selling Shareholders communicated their position to the selling Shareholders about various changes the Non-Selling Shareholders were proposing to the document…I was careful to make it clear that I did not represent the Non-Selling Shareholders and was not advocating for their position…" Mr. Jameson testified that he would have withdrawn "at any moment had there been a challenge to our role", but "no party raised that as an objection during the transaction."

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[109] [2000] O.J. No. 2291 (C.A.), para. 7.
[110] [1998] O.J. No. 2256 (Gen. Div.), para. 57.

[514] Jules Lewy, Kesler's lawyer, testified that it was not unusual in corporate transactions for one lawyer to gather the position of several persons and communicate them to the other side:

> Q. And I take it that in a corporate context where there is many people involved that's not an unusual situation where one lawyer will gather positions of both their own clients, and others and be the communicator, so to speak?
>
> A. That isn't unusual, correct.
>
> Q. And you understood that Ogilvy Renault were the lawyers for the Leikin Group Corporations, correct?
>
> A. Correct.
>
> Q. And I take it you also understood that they were conveying positions of the non-selling shareholders even though they were not acting for them?
>
> A. Correct.
>
> Q. And in fact you specifically raised with Mr. Jameson at one point, and sought his clarification as to whether he was acting for the non-selling shareholders or merely conveying their positions, and he clarified that it was the latter, correct?
>
> A. That's correct. I was concerned and confused exactly what – who Grant was acting for.
>
> Q. All right, and he clarified it for you, and you then continued to deal with him on that basis?
>
> A. Correct.

[515] Mr. Jameson testified that with respect to the buyout, or reorganization, transaction, his instructions came from Barbara Farber. Her instructions to him were to deal with David Katz for the basic structuring of the transaction. So, as corporate counsel, Ogilvy Renault put together the reorganization documentation based on input from the client, the Leikin Group, through Barbara Farber, its CEO, and David Katz, a consultant to the companies.

[516] Jameson also testified that Ogilvy Renault acted as a conduit between the Selling Shareholders and the Non-Selling Shareholders:

> Q. You are saying that your role was as conduit. Was that different from your role as counsel to the company?

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A. The role as conduit was – the fact that there ended up being – well, there clearly are two groups. There is the selling shareholders and the remaining shareholders.

The transaction is a transaction – when we began to draft the documentation, we didn't know if it was a purchase and sale, so would there be an Agreement of Purchase and Sale, was there a buyer and a seller, and the answer to that was no, this is not a transaction of purchase and sale, this is a corporate reorganization transaction.

Therefore, as company counsel, we were involved in putting together the corporate documentation which would result in the redemption of the shares that were held by the so-called selling – by the selling shareholders, which redemption proceeds represented their personal interest in the core assets of the company. So the original transaction – the concept of the transaction was quite simple.

Q. On the reorganization.

A. Yes, as counsel to the company, we were preparing a reorganization document.

[517] Jameson emphasized that the Non-Selling Shareholders were not his clients:

What we are doing is putting together a draft [LOI], based on their input.

And I am not providing them with any – I am not providing them with the legal advice that I might provide for my own client, in terms of, you know – if I was acting for a specific client on a purchase, I think I would be more involved with the actual analysis and things like that.

He thought that the interests of the Non-Selling Shareholders were separate from the company.

[518] At one point in April, 2005, David and Andy Katz asked Grant Jameson to relay a certain position to David Spieler, still at that point one of the Non-Selling Shareholders. Jameson demurred in an email to David Katz dated April 12, 2005:

David, I am thinking that the position you and Andy want to take with Spieler puts me in a definite conflict of interest. I can coordinate responses to Lewy and look after the documentation of the transaction but in thinking about it the message you have asked me to take to Spieler today is definitely adversarial. I don't think that I can pass on the message to him as effectively as if you were separately represented on this issue. He is certainly still looking to me as representing him in the overall transaction. Even though he has Sandra Appel to represent him in his dealing with you and the others in Newco, he clearly still looks to me as being on the same side.

[519] Jameson deposed that all of the common shareholders were advised that since Ogilvy Renault was corporate counsel to the Leikin Group, it could not represent their personal interests

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and they should secure independent counsel in respect of their own interests. As of March 10, 2005 he was not aware of any of the Katz Defendants having retained counsel. He testified that he believed Rick Kesler felt free to call him up during the transaction, just as he felt free to call him up. His dealings with Rick Kesler were not acrimonious.

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[520] Jameson testified that throughout the negotiations David Katz sent him, most often unsolicited, memos detailing the strategy of the Non-Selling Shareholders. He read them, but did not act on them unless there was a specific action item or position to be communicated to the other side. Patricia Day gave evidence similar in effect about GGFL's treatment of communications it received from David Katz.

[521] In a March 3, 2005 email to David Spieler, following a telephone call with Sandra Appel, his lawyer, Jameson described his role as follows:

> As counsel for the companies I have worked under the direction of Barbara Farber, the CEO of the companies, in preparing a joint position for all the non-selling shareholders. I have also always recommended to you just as I have on several occasions with the other non-selling shareholders that they obtain independent legal advice for their own interests within the Proposed Transaction as well as in respect of the shareholder arrangements among the non-selling shareholders in "Newco".

[522] In a July 27, 2004 email to one of his partners, John Naccarato, Mr. Jameson described the nature of his mandate with respect to the Leikin Group:

> My mandate is to represent the corporations with a view to the interests of all shareholders but I cannot ignore the fact that Barb is the controlling shareholder.

[523] The defendant Geoffrey Gilbert, an associate with Ogilvy Renault at the time of the transactions, testified that the firm received instructions from the companies, either from Barbara Farber or David Katz, the consultant. Although they received lots of direction from Mr. Katz, Mr. Gilbert stated that "we were mindful of our obligation to the companies and…we would not necessarily follow all of this direction." He continued:

> You know, the ones that I was involved with, there were challenges. At times, there were personal comments that you didn't believe as counsel should necessarily be communicated. You knew at all times who your client was and your client was the companies.
>
> So we, Grant and I together, when I was involved with the communications would figure out what the appropriate thing for the company was, unless of course it was something to do with the conduit role we were having where we were this go between, this communicator of messages.

> We would have to make a distinction between those two and determine which instruction to proceed with.

B.2 The plaintiffs' understanding of the nature of the retainer of the Ogilvy Renault Defendants

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[524] On his pre-trial cross-examination Mr. Kesler acknowledged that he understood Jameson was communicating the positions of the Non-Selling Shareholders to the Selling Shareholders throughout the negotiations, acting as a conduit, and he knew that Jameson did not consider himself to be acting as counsel for the Non-Selling Shareholders. Kesler stated that he never retained Jameson to represent his personal interests in the transaction and he did not look to Jameson to provide him with an opinion as to the proper value of College Square. On cross-examination Jameson testified that he did not recall ever commenting on the appropriateness of the valuation to anybody, including Mr. Kesler.

[525] Spieler testified on the summary judgment motion that in his view Jameson knew at an early stage that FCR was buying College Square for $78 million. David Spieler regarded Grant Jameson as his own lawyer to whom he looked for advice; he did not view him only as the corporate lawyer whom he consulted from time to time as a director of the companies.

[526] Sheira Harris testified that she relied on her mother and Mainzer to protect her interests throughout the transaction. To the extent she received any information from the Lawyer Defendants or GGFL, she did so through her mother or Mainzer, not directly from the lawyers or accountants. Sheira had not direct contact with the Lawyer or Accountant Defendants before signing the LOI.

B.3 The state of knowledge of the Mr. Gilbert

[527] Mr. Geoffrey Gilbert testified that he was not aware of any potential sale to an unrelated third party in October, 2004. Mr. Gilbert did receive an email from David Katz on October 19, 2004 in which Mr. Katz asked him not to circulate "the re-org files" previously sent "as two of the files make reference to a capital gain resulting from the potential sale from Newco to a third party based on the value that exceeds FMV." Mr. Gilbert transmitted this request to Mr. Jameson for his consideration and decision.

C. Analysis

[528] The plaintiffs submitted that the fiduciary duty owed to them by the Lawyer Defendants arose both from a direct lawyer-client relationship with the shareholders, as well as by way of a context-specific fiduciary duty.

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C.1 A direct lawyer-client relationship

[529] The plaintiffs argued that as counsel to the Leikin Group of Companies, with knowledge of the family nature of the corporations, Ogilvy Renault not only owed a fiduciary duty to the boards of directors which managed those companies, but also to the shareholders of the families whom each director represented. I do not accept this argument.

[530] No party disputed that Ogilvy Renault had been retained by the Leikin Group a few years before the transaction in question ever arose to act as counsel for the corporations. As corporate counsel, Ogilvy Renault owed its duty of loyalty to the companies, and it was obliged to advise all directors of the companies so that the Boards could make informed decisions in the best interests of the companies.

[531] No plaintiff adduced evidence that he or she had retained Ogilvy Renault to represent his or her interests on the share redemption transaction. None of the typical *indicia* of the existence of a solicitor-client relationship between Ogilvy Renault and the plaintiffs could be found in the evidence: there were no retainer letters; no bills paid by the plaintiffs; no separate meetings attended only by a plaintiff and Jameson to discuss the plaintiff's personal interest in the share redemption transaction; no reporting letters or emails from Ogilvy Renault to the plaintiffs. In fact, the evidence overwhelmingly indicated the contrary: the Harris family plaintiffs had retained Mainzer; Rick Kesler retained Jules Lewy; and, David Spieler retained Sandra Appel. As set out in great detail above, the negotiations over the terms of the LOI saw Lewy communicate the position of the Selling Shareholders as a group, and Jameson communicate that of the Non-Selling Shareholders. During the course of those negotiations the Selling Shareholders did not seek advice from Jameson. True, Spieler, while still a Non-Selling Shareholder, approached Jameson for advice, but Jameson counseled him to secure independent legal representation, and Spieler ended up retaining Appel.

[532] Although none of those facts support finding the existence of a solicitor-client relationship between Ogilvy Renault and the plaintiffs, as I understand their argument the plaintiffs contend, in effect, that the nature of the share redemption transaction meant that by operation of law such a solicitor-client relationship existed. Thus, the plaintiffs argued that with all directors of the corporations in a conflict of interest position regarding the transaction, the duties owed by corporate counsel to the corporation, acting through its board of directors, became transferred to the shareholders.

[533] I do not accept that line of argument. The duty of corporate counsel remained a duty to the corporation. I suppose, as a matter of theory, where all directors are conflicted, the directors and shareholders could agree that corporate counsel act for all parties, but as a matter of fact that

did not happen in the present case. The plaintiffs retained their own independent counsel to represent their personal interests in the share redemption transaction. Accordingly, there was no "devolution" of duty by corporate counsel down to the shareholder level because of the conflicts of interest in respect of this transaction which existed at the Board level and, significantly, the plaintiffs did not act as one had – they retained their own separate counsel.

[534] As I pointed out during my analysis of the claims against the Katz Defendants, although the form of the share purchase transaction involved a corporate redemption of issued shares, in essence the transaction involved the majority group of shareholders selling their shares to the minority group, with an agreement that the minority could use the core assets to secure financing for the share buy-out or redemption. In such a circumstance, what was left for "corporate" counsel to do? Jameson testified that he played two roles. First, since the transaction involved corporate re-organizations followed by a share redemption, Ogilvy Renault needed to paper those transactions. That was standard fare for corporate counsel.

[535] Second, Jameson testified that he acted as a "conduit" between the Non-Selling Shareholders and the Selling Shareholders, passing information back and forth between one side and the other. In their closing submissions the plaintiffs took issue with that characterization, submitting that no legal authority had been provided to support the legality of a "conduit" role, and it was a "novel concept without any defined legal test". While counsel did not refer me to any cases dealing with a lawyer acting as a conduit, as the evidence of Lewy reproduced above in paragraph 514 indicated, the concept certainly is known to those who practice in the area of corporate transactions. Lewy testified that he had played the role of conduit for all of the Selling Shareholders, even though he had not been retained by all of them.

[536] Of course, care must be taken by any corporate counsel acting as a conduit so that counsel's role is clearly understood and counsel does not transgress the proper boundaries of that role and begin to act as counsel to a party other than the corporation. When looked at as a whole, I conclude that the evidence disclosed that Jameson was alive to both issues and took care to limit his role to that of a conduit. In the early stages of the negotiations Lewy specifically queried Jameson about the role he was playing; Jameson explained; Lewy accepted that explanation. Jameson provided a similar explanation to Appel when Spieler retained her.[111] Rick Kesler acknowledged that Jameson was acting as a conduit. Jameson testified that he would have withdrawn at any moment had a party challenged his role. I accept his evidence on that point.

[111] See Ex. 2, Vol. 8, Tabs 378, 379 and 382.

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[537] Based upon my review of the evidence as a whole, I also conclude that Jameson did not stray from acting as a conduit to acting as counsel for the personal interests of the Non-Selling Shareholders. I should observe that in light of a transaction in which the Non-Selling Shareholders would end up as the owners of the core corporate assets it becomes difficult, at street level, to separate their financial interests from the financial interests of the corporations which owned the assets. Nevertheless, I am satisfied that Jameson sought, at all material times, to confine his role to that of conduit, not as advisor to the personal financial interests of the Non-Selling Shareholders. First, when read as a whole, Jameson's emails to Lewy, and the other counsel, during the negotiations reflected that he was transmitting the position of the Non-Selling Shareholders. Second, Jameson's April 12, 2005 email to David Katz refusing to transmit information to Spieler while he was still on the non-selling side demonstrated that Jameson was alive to, and sought to work within, the proper boundaries of a conduit. Third, Jameson's conduct must be assessed by what he did, not, as the plaintiffs sought to argue, by reference to the content of emails he received from David Katz. As Jameson testified, he had no control over what David Katz wrote to him:

> A. … Mr. Katz would, as I've said in previous evidence, would send me emails saying things often that I didn't agree to or agree with characterizing, this is one characterization.
>
> Q. All right.
>
> A. I mean I would not characterize myself as part of the buy side team ever.
>
> Q. But those are the emails that got sent to you?
>
> A. I can't control or could not control the emails that Mr. Katz would send to me.
>
> Q. I never saw any that went back from you saying David please don't refer to me as the buy side team.
>
> A. That's true, I don't know how often or when he did that, but I could not control - and could not control the emails that Mr. Katz sent to me.
>
> Q. All right.
>
> A. Some of which were rather embarrassing.

I accept Jameson's evidence that he ignored a number of the emails which David Katz had sent to him and, instead, tried to act in accordance with his retainer as corporate counsel and his *de facto* role as a conduit in the share redemption transaction.

[538] For these reasons, I conclude that no direct solicitor-client relationship existed between the Lawyer Defendants and the plaintiffs. A reasonable person in the position of a party with knowledge of all the facts would not reasonably form the belief that Ogilvy Renault was acting for the Selling Shareholders.

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C.2 An *ad hoc* fiduciary relationship

[539] The plaintiffs submitted that *an hoc*, context-specific, fiduciary relationship existed between the Lawyer Defendants and the plaintiffs. In support of that position the plaintiffs argued that "such a context-specific fiduciary duty is most easily considered through the analysis applied to a "near client" relationship".[112] I disagree that the "near client" cases provide much, if any, assistance in the inquiry into the existence of an *ad hoc* fiduciary relationship between a lawyer and non-clients.

[540] As I read those cases, the issue of "near client" has arisen in the context of motions to remove a lawyer or law firm as the solicitor of record. As Sopinka J. noted in *Martin v. Gray*, the Canadian Bar Association's *Code of Professional Conduct*, in its commentary on Impartiality and Conflict of Interest, provided:

> A lawyer who has acted for a client in a matter should not thereafter act against him (or against persons who were involved in or associated with him in that matter) in the same or any related matter, or place himself in a position where he might be tempted or appear to be tempted to breach the Rule relating to Confidential Information. (my emphasis)[113]

[541] In *UCB Sidac International Ltd. v. Lancaster Packaging Inc.*, Blair J. (as he then was) considered, on a motion to remove the plaintiff's solicitors of record, the "overriding question: 'Is there a disqualifying conflict of interest?'". In addressing that question Blair J. stated:

> In addressing this question one should look to see whether there is "a previous relationship" not only between the lawyer and the client but also between the lawyer and the "person involved in or associated with" the client in connection with the original matter, "which is sufficiently related to the retainer from which it is sought to remove the solicitor" to justify the removal sought.[114]

He concluded:

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[112] Plaintiffs' Summary Judgment Factum, para. 228.
[113] *Martin v. Gray* (1990), 77 D.L.R. (4th) 249 (S.C.C.).
[114] [1993] O.J. No. 2775 (Gen. Div.), para. 13.

> I am satisfied that "there existed a previous relationship" between the law firm and the Defendants Lancaster and Mulholland "which is sufficiently related to the retainer from which it is sought to remove the solicitor[s]" that the inference regarding the imparting of confidential information arises. On the conflicting evidence before me the law firm has not discharged the "difficult burden" of displacing that inference. In the interests of ensuring, in the eyes of the reasonably informed member of the public who is possessed of all the facts, "that even an appearance of impropriety should be avoided" the law firm should cease to act in the action.[115]

[542] As can be seen from these extracts, in *UCB Sidac International* the court did not conclude that the law firm owed fiduciary duties to those who were not its clients. What the court did was to conclude that the relationship between the law firm and the non-clients was sufficiently related to the retainer at issue so that the inference regarding the transmission of confidential information arose, thereby placing on the law firm the burden of displacing the inference. Although some cases have used the term "near client" to describe a situation where "an individual has a commonality of interest or a close association with a client of a solicitor", they do so in the context of identifying a relationship with a law firm characterized by confidentiality which would invoke the protection afforded by the conflict of interest rules regarding legal representation.[116]

[543] The proper inquiry into the existence of an *ad hoc* fiduciary relationship is that articulated by the Supreme Court of Canada in the *Elder Advocates of Alberta Society* case, set out earlier in these Reasons. Applying that analysis, I conclude that no *ad hoc* fiduciary relationship existed between the plaintiffs and the Lawyer Defendants. From the time the Harris family gave notice in February, 2004, of their intention to sell their shares, they were represented by their own counsel, Mainzer. Rick Kesler retained Jules Lewy; other sellers retained other counsel, as noted above. In sum, Jameson was faced with a transaction in which all the sellers were separately represented. Even Spieler retained his own counsel before signing the LOI as a Non-Selling Shareholder. Hardly a situation of vulnerable sellers to whom an undertaking to protect their interests was given.

[544] Josephine Harris ultimately admitted that she was relying on her own counsel to protect his interests, as did Sheira and Zena who obtained their information through their mother. Rick

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[115] *Ibid*., para. 15.
[116] *Milverton Capital Corp. v. Thermo Tech Technologies Inc.*, 2002 BCSC 773 (S.C.), paras. 50 and 68; *Stanley v. Advertising Directory Solutions Inc*., 2007 BCSC 1125, para. 35.

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Kesler admitted he did not retain Jameson to represent his personal interests. Spieler did seek personal advice from Jameson in early 2005, but Jameson told him to retain his own counsel.

[545] The evidence adduced by Harris and Kesler to support the plaintiffs' contention of the existence of an *ad hoc* relationship boiled down to the following. Ms. Harris testified on the summary judgment motion that she thought Mr. Jameson was representing all the interests of all the shareholders, all eleven shareholders. However, Ms. Harris conceded that she did not discuss points of negotiation with Mr. Jameson. She also acknowledged that Mr. Jameson did not act for her children as selling shareholders; he had advised them to retain their own counsel, which they did. In her affidavit Josephine Harris also deposed as follows:

> I recall asking both Gerry Levitz and Grant Jameson, separately, their opinions as to whether the transaction was a fair one which would result in my children receiving the contemplated fair market value for their shares in the company. Each of them assured me that this was indeed the case. Neither of them told me of the meetings they were having with David Katz or his siblings. Similarly neither advised me about the additional information they had learned from those meetings indicating that the asset value, and consequently the share value, was significantly higher.

On the summary judgment motion Ms. Harris was cross-examined at length on this portion of her affidavit. At one point she testified that she took from a shake of Jameson's head at a meeting that he was approving of the Selling Shareholders going ahead with the transaction at a value of $55 million, although when pressed she could not identify the particular meeting. However, upon further cross-examination she explained that what she meant was that Mr. Jameson never dissuaded the Harris Family from entering a share redemption transaction at that price. Yet, she also acknowledged that none of her children who were the shareholder-parties to the LOI had ever met Mr. Jameson. Mr. Jameson testified that he did not recall "ever being contacted by any of the so-called 'Harris parties'".

[546] In his affidavit Rick Kesler also asserted that he had received assurances from Grant Jameson about the soundness and fairness of the LOI transaction:

> 61. [O]n many occasions I had the opportunity to discuss the Proposed Transaction with Grant. On each occasion he assured me that this was the right transaction for the companies and both "good" and "fair" for the shareholders. He understood at all times that the purpose of the transaction was to give each shareholder their "fair market value" of the core assets, and achieve what our grandfather had always endorsed and advocated – a "fair and even" allocation of the assets of the family business. At no time did he ever advise me of the information that he had received on July 14, 2004 from David Katz regarding First Capital Realty purchasing an interest at a value in excess of $70 million.

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> If I had known of this information I would not have agreed to the Proposed Transaction or executed the Letter of Intent.
>
> …
>
> 68. Throughout the negotiation process I was always concerned that the non-selling shareholders had an arrangement to sell College Square at a value higher than the purported fair market value that was set out in the Letter of Intent. If I had known that First Capital Realty was prepared to purchase a 50% interest in College Square at a value in excess of $70,000,000 I would not have agreed to sign the Letter of Intent.

However, when on cross-examination on the summary judgment motion he was asked to identify the particular instances of such conversations with Mr. Jameson, Mr. Kesler was unable to do so. Kesler acknowledged that he never had a separate retainer agreement with Mr. Jameson regarding the advice he contended he had received.

[547] On his cross-examination on the summary judgment motion Mr. Jameson stated that he did not recall ever commenting on the valuation to anybody:

> A: I don't know anything about valuations, I never pretended to know anything about valuations. My view of valuations was that there was a professional company engaged to value the property and it did that and that was peer reviewed and I was not going to impose my view; I had none on the appropriate value.
>
> Q. Do you recall Mr. Kesler asking you about the deal and whether you thought it was a good deal?
>
> A. I don't recall him asking that.
>
> Q. Is that something that you would have felt comfortable discussing with Mr. Kesler?
>
> A. If I discussed that with Mr. Kesler, it would not have been on the basis that the price which had been agreed upon for the valuation of the core assets was a good deal…

[548] The evidence given on this point by Harris and Kesler was vague and lacked particularity. As plaintiffs they bore the onus of demonstrating the existence of an *ad hoc* fiduciary relationship, and their evidence came nowhere near so doing. In the negotiations over the terms of the LOI they were represented by their own counsel who dealt with Jameson, not on the basis that he was a lawyer jointly representing the interests of the sellers, but on the basis that Jameson, as corporate counsel, was communicating the responses of the non-sellers to the positions of the sellers. In a circumstance where self-interested parties were represented by their own counsel, I do not see how an *ad hoc* fiduciary relationship can arise on the part of another

counsel in the absence of a clear undertaking by that counsel to protect those already-represented interests. Ogilvy Renault gave no such undertaking in the present case.

[549] I also reject the plaintiffs' argument that Jameson induced them to enter into the share redemption transaction. As I stated in paragraphs 221 and 222 above, in his September 23 and October 1, 2004 communications with the directors and shareholders, Jameson made it clear that the decision whether to accept or reject the proposed transaction rested with the shareholders and he made no recommendation on the proposal.

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C.3 Conclusion on the existence of a fiduciary relationship between the Lawyer Defendants and the plaintiffs

[550] For these reasons, I find that no fiduciary relationship existed between the Lawyer Defendants and the plaintiffs.

C.4 The information in the possession of the Lawyer Defendants

[551] Although that conclusion is sufficient to dispose of the plaintiffs' claim against the Lawyer Defendants, I wish to make two comments on the plaintiffs' allegations that the Lawyer Defendants hid material information to which the plaintiffs were entitled.

[552] First, in their closing submissions the plaintiffs argued that Jameson was not credible when he asserted that had understood the references to FCR made by David Katz at the July 14, 2004 meeting as examples or hypotheticals. I disagree, for the reasons given in paragraph 162 above.

[553] Second, I also accepted, in paragraph 169 above, Jameson's evidence that when he received certain buy-out calculations from GGFL in late July, 2004, he would not have paid attention to the numerical analysis. His job was to focus on the deal structure, not the financial analysis.

D. Summary

[554] For these reasons, I dismiss the plaintiffs' claim against Ogilvy Renault LLP, Grant Jameson and Geoffrey Gilbert.

XXX. The knowing assistance claims against the Accountant Defendants

[555] As I have found above, David Katz did not breach his fiduciary duty to the corporation when he was President of the Leikin Group, nor did Barber Farber or Andrew Katz breach their duties as directors. I also found that the Katz Defendants and the Leikin Group Inc. did not owe

an *ad hoc* fiduciary duty to the plaintiffs. In light of those findings, the plaintiffs' knowing assistance claim against the Accountant Defendants fails.

XXXI. The breach of fiduciary duty claim against the Accountant Defendants

A. Some further legal principles concerning the duties of corporate accountants

[556] In *Waxman v. Waxman*, Sanderson J. summarized the law surrounding the existence of a fiduciary duty by a company's accountants – in that case its auditors – to the company's shareholders:

> As with the ordinary duty of care, it is a matter of law that any fiduciary duties owed by auditors are generally owed to the corporation and not to the individual shareholders.
>
> Farley J. said in *Roman Corp. Ltd. v. Peat Marwick Thorne* (1992), 11 O.R. (3d) 248 (Gen. Div.)"
>
>> It seems clear that the auditors have a relationship with their client. That client is the corporation ... it would be the corporation which would be able to complain about any breach of fiduciary duty ...
>
> In order for a fiduciary duty to be owed to an individual shareholder, there must be a clear expansion of the auditors' mandate to specifically protect the individual shareholder's personal interests in addition to those of the corporate client.[117]

In that case the Court of Appeal stated:

> [W]e see no basis for an independent fiduciary duty. Simply because Taylor Leibow is a firm of professional accountants and gave advice to Morris personally from time to time does not automatically give rise to a fiduciary relationship between them: see Brant Investments Ltd. v. Keep Rite Inc., (1991) 80 D.L.R. (4th) 161 at 172 (Ont. C.A.); Roman Corp. v. Peat Marwick Thorne, (1994) 12 B.L.R. (2d) 10 at 28 (Ont. G.D.). Nor do Morris' assertions, largely self-serving, that he "trusted" and "relied on" Taylor Leibow create a fiduciary duty. We must consider whether their relationship is characterized by the accepted badges of a fiduciary relationship: whether Taylor Leibow had scope to exercise some discretion or power; if so, whether it could exercise that discretion or power unilaterally to affect Morris' legal or practical interests; and whether Morris was vulnerable to the exercise of that discretion or power.[118]

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[117] *Waxman, SCJ, supra*., paras. 2461 to 2463.
[118] *Waxman, OCA, supra*., para. 720.

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[557] In *Roman Corp. v. Peat Marwick Thorne*, Farley J. stated, albeit in the context of a motion to strike out a statement of claim as disclosing no reasonable cause of action, that no contractual relationship arises between specific shareholders of a corporation and its auditors by virtue of the shareholders' resolution appoint the auditors. Turning to the issue of the existence of a fiduciary duty to specific shareholders, he stated:

> The statement of claim does not suggest vis-à-vis these specific shareholders that the defendants had scope for the exercise of some discretion of power nor that the defendants could unilaterally exercise that power or discretion so as to their specific practical or legal interest. Then it may be questioned as to how the plaintiffs could show that they are peculiarly vulnerable to or at the mercy of the defendants. See *McGauley v. British Columbia (No. 1), supra*, at pp. 238-43 and particularly at p. 242 where Cumming J.A. said:
>
>> But the focus must be on the facts and deeds which are relied upon to give rise to these special relationships and, in order to maintain an action based upon alleged breach of breaches of the duties said to flow from the special relationship asserted to exist, it seems elemental to say that it is necessary they be pleaded. It is in this respect that, in my view, the statement of claim before us is deficient.
>>
>> I have read and reread the statement of claim and nowhere in it can I find any pleading of facts, of anything done or said by the defendants to the plaintiffs, of any inquiries directed by the plaintiffs to the defendants or any of them, of any representations, oral or written, made by any of the defendants to any of the plaintiffs affecting the individual plaintiffs in their personal capacity, nor the provision of any particulars which could lend substance to any of the foregoing, which could be said to carry the defendants' obligations and duties to the plaintiffs individually beyond the scope of those they already owed to the T.I.H.C. or to establish any direct nexus or relationship between them and the plaintiffs independent of the cooperative.
>
> It seems clear that the auditors have a relationship with their client. That client is the corporation. And as presently pleaded it would be the corporation which would be able to complain about any breach of fiduciary duty (or, as pointed out, a shareholder in a derivative action since it appears that there is a flow through from the corporation per se to the body of shareholders generally). In my view even in argument the plaintiffs were not able to explain how a fiduciary duty was owed by the auditors to them as control shareholders.[119]

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[119] (1992), 11 O.R. (3d) 248 (Gen. Div.), at 262-263.

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[558] The plaintiffs referred to the decision of this Court in *DiFlorio v. Con Structural Steel Ltd.*,[120] a case involving a very closely-held family company where one brother, having sold his half interest in the business to the other side of the family, proceeded to set up immediately a competing business and hire a key employee away from the family company. J. Wilson J. was very troubled by the conduct of the accountant who had acted for the two sides of the family and the company for years and yet had failed to disclose to the buying side of the family that the selling brother intended to run a competing business once the purchase and sale agreement had closed. Since the accountant was not a party to that action, the judge was not required to make any finding of liability about the accountant.

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B. Review of additional evidence

[559] Over the years GGFL had provided regular accounting services to the Leikin Group, including the preparation of financial statements and the completion of income tax returns. In terms of the share redemption transaction, Ms. Day deposed that GGFL was retained by the Leikin Group of Companies to provide accounting and tax advice, including advice on a tax-efficient structure for the redemption, preparing calculations on possible cash flows and distributions which might result from the transaction, tax related services, and net asset listings. GGFL also completed the personal income tax returns for all of the non-resident shareholders, including some of the plaintiffs, which work was paid for by the Leikin Group. GGFL did not provide accounting or audit services to the plaintiffs or to the Katz Defendants.

[560] Ms. Harris testified that GGFL did not act as her family's personal accountants with respect to the share redemption transaction.

[561] Ms. Day deposed, and her evidence was uncontradicted on these points, that:

i/ GGFL did not perform any appraisal of College Square for the purposes of the share redemption transaction;

ii/ neither Mr. Levitz nor herself were involved in the negotiation of the LOI or its purchase price; and,

iii/ GGFL was not retained to provide, and did not provide, any services with respect to the Leikin Group's search for third party financing or the First Capital transaction.

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[120] [2000] O.J. No. 340 (S.C.J.).

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[562] During the share redemption transaction GGFL took its instructions from Barbara Farber, as CEO of the Leikin Group, who, in turn, told GGFL that they also could act on instructions from David Katz and provide him with information, including calculations. According to Ms. Day, GGFL did not provide calculations to other shareholders, unless directed to do so by Ms. Farber, "because we were engaged by the company". As to requests from members of the Board of Directors, Day testified that "we're engaged by the company, so we would have to get the permission of Barbara Farber as the CEO to provide any information."

[563] The plaintiffs' belief regarding the information Ms. Day learned at the July 14, 2004 meeting came solely from their interpretation of the contents of Mr. Jameson's notes of that meeting.

C. Analysis

[564] GGFL were the accountants for the Leikin Group of companies, and the firm was retained by the corporations to provide accounting and tax services in connection with the share redemption transaction. Was there an expansion of those accountants' mandate to specifically protect the individual shareholders' personal interests, in addition to those of the corporate client? The evidence showed that there was none.

[565] Quite apart from the expansion of a mandate, did an *ad hoc* fiduciary duty arise between GGFL and the Selling Shareholders? For several reasons, I conclude that one did not.

[566] First, GGFL did not give an express undertaking to the Selling Shareholders, either through Levitz or Day, that they would protect the personal financial interests of those shareholders.

[567] Second, no such undertaking can be implied from the evidence. The evidence the plaintiffs relied on was as follows. Josephine Harris deposed that she recalled asking Gerry Levitz his opinion as to whether the transaction was a fair one which would result in her children receiving the contemplated fair market value for their shares in the company and he assured her that this was indeed the case. When asked when she had these discussions with Mr. Levitz, Ms. Harris stated that she spoke with him "numerous times for reassurance about whether…the shareholders were being fairly dealt with", during breaks at board meetings and sometimes by telephone at his home. However, she had no notes of such discussions, never confirmed to Mr. Levitz her understanding of the advice she had given him, and could not be any more specific about times or occasions.

[568] As well, Rick Kesler deposed that he had received assurances from Gerry Levitz about the soundness and fairness of the LOI transaction:

62. Similarly, I had a number of opportunities to privately discuss with Gerry Levitz the nature of the Proposed Transaction, both after reviewing the CIBC Report and during the preparation of the Letter of Intent. I also specifically recall expressing to Gerry my concern that the property would be sold immediately by the non-selling shareholders at a higher value. On each occasion Gerry Levitz assured me that we were receiving the fair market value of College Square and highest and best price for our shares. He advised me that I should proceed with the Proposed Transaction. At no time during these discussion with Gerry Levitz did he advise me of the information that he had obtained on July 14, 2004 regarding First Capital Realty purchasing an interest in College Square at a value in excess of $70 million.

[569] During his cross-examination at trial Mr. Kesler expanded on this evidence:

Q. And I think you've told us in your previous evidence that you don't have a written record of these discussions, correct?

A. Correct.

Q. And you weren't able to tell us exactly the dates, correct?

A. Well in fact let me retrace that for a moment. Mr. Levitz, of course, came to all of our board meetings, and Mr. Levitz was a cigar smoker, and we'd often take breaks in our board meetings, and as a smoker I would step out of our offices with Mr. Levitz on all of those occasions, and the dates that I would've had these discussions with him were, what I would characterize, as close intimate discussions with Mr. Levitz in the course of our board meetings, and that happened on many occasions.

Q. Right, now –

A. He and I would step outside, and we had the kind of relationship where I could turn to him and say Gerry –

Q. Mr. Kesler I haven't asked you about any of this, I just asked you –

A. I'm trying to answer your question.

Q. I simply asked, and I'm not sure where you're going, but I simply asked that your previous evidence was that you weren't able to tell us the dates in which these discussions took place, and that's still the case, you can't tell us the exact dates, right?

A. I told you that the answer to that question was they would've been the dates of our board meetings, which is when I would have been together with Mr. Levitz.

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[570] Day testified that she was aware Rick Kesler and David Spieler had called Mr. Levitz during the transaction, but she did not know the result of the conversations.

[571] During his cross-examination at trial Mr. Kesler was pressed on his allegation that Mr. Levitz had not advised him about information he had obtained at the July 14 meeting regarding FCR purchasing an interest in College Square. When it was pointed out to Kesler that Levitz did not attend the July 14 meeting, this exchange occurred:

> Q. …and what you said at paragraph 62, and what you said at paragraph 62, we've agreed, is that you said Mr. Levitz was at this meeting, that he got information about First Capital, and he misled you, correct?
>
> A. I think that Mr. Levitz did get information about First Capital, and if he wasn't at the meeting it would've come from Ms. Day. And he would've had that information…
>
> Mr. Levitz would've known the information that flowed from any of these meetings…

[572] On his cross-examination on the summary judgment motion Mr. Kesler undertook to advise whether he recalled a specific incident where he had asked Ms. Day or Mr. Levitz for specific information and they had refused to give him the information. Mr. Kesler responded as follows:

> Mr. Kesler recalls many discussions with Mr. Levitz both in the period of time prior to the CIBC report being released and during the negotiation of the LOI when he asked Mr. Levitz for his opinion on whether it was a fair transaction and whether he had all of the information he needed. These discussions generally took place during or after board meetings that Mr. Kesler and Mr. Levitz attended together in Ottawa.
>
> Mr. Kesler also recalls speaking with Mr. Levitz over the telephone to ask Mr. Levitz his opinion regarding the CIBC process, the negotiations and whether Mr. Kesler had the information he needed to make a decision on whether to enter into the transaction. In each instance, Mr. Levitz advised Mr. Kesler that he had all of the information and that the transaction was a fair transaction for the selling shareholders…
>
> Mr. Kesler also spoke with Ms. Day on October 8, 2004 wherein he requested information regarding the proposed transaction. Ms. Day prepared a package of information for Mr. Kesler…The materials provided to Mr. Kesler do not contain the information or calculations prepared by Ms. Day concerning the sale of an interest to a third party at a price of $71.5 million.

In his undertaking response Mr. Kesler pointed to several documents in the productions to support his recollection including:

(a) An August 18, 2004 memo to file by David Katz stating: "Rick Kesler had a brief conversation with Gerry Levitz yesterday to obtain Gerry's opinion as to the benefits of the CIBC process. In addition, Rick asked Gerry what he thought would happen if the proposed transaction was unsuccessful";

(b) One page of GGFL docket entries for the period June 3, 2004 through August 31, 2004 supporting an invoice of that date. Mr. Kesler did not identify any particular docket entry to support his answer. There appears to be one entry by Mr. Levitz regarding some contact with Rick Kesler on August 17, 2004. It read: "RK/BF".

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[573] Gerald Levitz died after this action was commenced, but before the summary judgment motion was heard. Section 13 of the Ontario *Evidence Act*, R.S.O. 1990, c. E.23 states:

> 13. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

Recently, in *Brisco Estate v. Canadian Premier Life Insurance Co.*, the Court of Appeal held that given the "anomalous" place of that section in the modern law of evidence, there is no reason to give section 13 a broad interpretation when considering its application, nor a narrow one when considering the scope of evidence capable of corroborating the evidence of the interested party.[121] In *Sands Estate v. Sonnwald*, the court stated that "corroboration should be such as to enhance the probability of truth of the suspect witness' evidence upon a substantive part of the case raised by the pleadings", and "several pieces of circumstantial evidence, taken together, may potentially corroborate the evidence of an opposite or interested party, notwithstanding that each item or piece of evidence viewed in isolation may not be so capable…"[122]

[574] In the present case both Josephine Harris and Rick Kesler testified that they had received assurances from Mr. Levitz about the soundness and fairness of the LOI transactions. Both rested their allegations on two forms of contact they allegedly had with Levitz: (i) un-particularized telephone conversations with Levitz, and (ii) discussions with him during breaks at Board meetings. As to the first form of contact, although the GGFL dockets were produced – Kesler mentioned one entry in his undertaking response – the plaintiffs could not point to any

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[121] (2012), 113 O.R. (3d) 161 (C.A.), para. 61.
[122] Quoted in *Brisco Estate, supra.*, at para. 65.

entries recording telephone conversations with Levitz in which he allegedly gave them advice about the fairness or reasonableness of the transaction, nor did they adduce any of their own phone records in support of that assertion. Nor could they produce any notes of those conversations, any emails to Levitz confirming the conversations, or any emails to their own lawyers and accountant, Mainzer, letting them know about the advice or assurance they allegedly had received from Levitz.

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[575] As to the Board meetings, the Boards of the Leikin Group confirmed the retainer of CIBC Mid-Markets at their July 23, 2004 meeting. The first meeting held by the Boards following the delivery of the CIBC Report was the one on September 28, 2004. The parties did not file in evidence the agenda or minutes for any Board meeting held thereafter and prior to the signing of the April 15, 2005 LOI. I was left with the distinct impression from the witnesses' evidence that no Board meeting was held during that period time, and while I have referred to the Lewy message to Jameson of December 16, 2004 requesting a Board meeting, there was no suggestion in the evidence that one was held.

[576] In the absence of evidence that Board meetings were held between September 29, 2004, after the delivery of the CIBC Report, and April 18, 2005, when the LOI was signed, the plaintiffs have failed to establish the opportunity for their get-togethers with Levitz at which he allegedly gave them assurances. Those assurances could not have been given prior to the September 28 Board meeting, because that was the first meeting at which the CIBC Report was considered. Further, those assurances could not have been given at the September 28 Board meeting because the Board decided at that meeting to obtain a peer review of the Altus Group Report – i.e. it would be difficult for Mr. Levitz to give assurances about the soundness and fairness of an appraisal process when the process had not yet ended.

[577] No other witness offered evidence which would corroborate the assertions made by Harris and Kesler about advice they had received from Mr. Levitz.

[578] At common law, the evidence of one witness is capable of meeting the burden of proof in civil proceedings.[123] Section 13 of the *Evidence Act* stands as a statutory exception to that principle. In the present case, putting to one side the requirements of section 13, I find that Harris and Kesler have not established that Mr. Levitz gave them assurances and advice about the soundness and fairness of the LOI transaction. Their evidence simply was far too vague and lacking in particulars to surmount the threshold of proof on the balance of probabilities, and I

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[123] *Brisco Estate, supra.*, para. 59.

have commented elsewhere in these Reasons about Mr. Rick Kesler's poor credibility. Further, the requirements of section 13 of the *Evidence Act* do apply to their evidence against Mr. Levitz, and for the reasons I have identified above, their evidence lacks corroboration. Consequently, I find that the plaintiffs have not established that Mr. Levitz gave assurances or advice to Harris or Kesler about the soundness or fairness of the LOI transaction, including the fair value of College Square, and I find that no undertaking by Mr. Levitz to protect their interests in the share redemption transaction can be implied from the evidence.

[579] Further, I find that the plaintiffs have not demonstrated that GGFL, Levitz or Day exercised a power which could affect the legal or substantial practical interests of the Selling Shareholders. I repeat what I have already said: the plaintiffs had retained their own professionals, including Mainzer who was an accountant, to protect their interests in the share redemption transaction, and the GGFL defendants were not involved in the negotiation of the LOI or its share price.

[580] I do wish to make one final set of comments about the allegations the plaintiffs made against the Accountant Defendants regarding the disclosure of financial information. First, in paragraph 239 of their Factum on the summary judgment motion the plaintiffs argued: "The GGFL Defendants seek to hide behind the semantics of "hypotheticals" and "calculations" in arguing that they owed no fiduciary duty." I reviewed in some detail earlier in these Reasons the various calculations run by Ms. Day, in large part from June through to October, with some thereafter, at the direction of the management of the Leikin Group. I accept Ms. Day's evidence that those calculations were designed to show the outcomes under various scenarios, whether pay-outs to shareholders or the calculation of a financing number. Second, I accepted Ms. Day's evidence that FCR was not discussed in her presence at the portion of the July 14 meeting she attended. Third, it follows that there is no basis for the plaintiffs' contention, found in paragraph 46(d) of their Closing Submissions at trial, that the GGFL advisors "sat silently" at the September 28 Board meeting and, by so doing, condoned the share redemption transaction in the eyes of the Selling Shareholders. It is clear on the evidence that the only information either Mr. Levitz or Ms. Day had about Katz's dealings with FCR by that point of time is what Levitz would have heard at the April 15 Board meeting. Further, as noted in the portion of the minutes of the September 28 Board meeting reproduced in paragraph 225 above, Levitz specifically explained the significance of the calculations which GGFL had made prior to the meeting:

> Gerald Levitz indicated that prior estimates were not valuation opinions but that they were merely stating that a valuation of $60 million was possible and that it may be worth doing the calculations.

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In sum, I see no basis for the allegations asserted by the plaintiffs concerning the disclosure of information by the Accountant Defendants.

[581] For these reasons, I conclude that the plaintiffs have not established that the Accountant Defendants owed them a fiduciary duty in respect of the share redemption transaction, and I dismiss their action against Ginsburg Gluzman Fage & Levitz LLP, Patricia Day and Ingrid Levitz, in her capacity as Estate Trustee with a will of the Estate of Gerald Levitz.

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XXXII. Conclusion and costs

[582] For the reasons set out above, I dismiss the plaintiffs' action.

[583] I would encourage the parties to try to settle the costs of this action. If they cannot, the defendants may serve and file with my office written cost submissions, together with Bills of Costs, by April 3, 2013. The plaintiffs may serve and file with my office responding written cost submissions by April 26, 2013. The defendants may serve and file reply written cost submissions, if required, by May 8, 2013.

[584] Responding cost submissions should include a Bill of Costs setting out the costs which that party would have claimed on a full, substantial, and partial indemnity basis. If a party opposing a cost request fails to file its own Bill of Costs, I shall take that failure into account as one factor when considering the objections made by the party to the costs sought by any other party. As Winkler J., as he then was, observed in *Risorto v. State Farm Mutual Automobile Insurance Co.*, an attack on the quantum of costs where the court did not have before it the bill of costs of the unsuccessful party "is no more than an attack in the air".[124]

XXXIII. In memoriam

[585] Some months following the conclusion of this trial Mr. Randy Bennett, one of the plaintiffs' counsel, unexpectedly passed away. I wish to express formally my condolences to his family. His passing was a great loss to our legal community.

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[124] (2003), 64 O.R. (3d) 135 (S.C.J.), para. 10, quoted with approval by the Divisional Court in *United States of America v. Yemec*, [2007] O.J. No. 2066 (Div. Ct.), para. 54.

______(original signed by)______________
D. M. Brown J.

Released: March 12, 2013

2013 ONSC 1525 (CanLII)

COURT FILE NO.: 08-CL-7482

2013 ONSC 1525 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Adam Leikin Harris, Naomi Sara (Harris) Stanton, Sheira Rachel Harris, Zena Leah Harris, Hilliard Brian (Rick) Kesler and David Joseph Spieler

Plaintiffs

– and –

Leikin Group Inc., Barbara Linda Farber, David Lawrence Katz, Andrew Mark Katz, Grant Jameson, Geoffrey Gilbert, Ogilvy Renault LLP, Ingrid Levitz, in her capacity as estate trustee with a will of the Estate of Gerald Levitz, Patricia Day, Ginsburg Gluzman Fage & Levitz LLP and First Capital Realty Inc.

Defendants

REASONS FOR JUDGMENT

D. M. Brown J.

Released: March 12, 2013

Carey Canada Inc., formerly known as Carey-Canadian Mines Ltd., National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited and Lac d'amiante du Québec Ltée, formerly known as Lake Asbestos Company Ltd. *Appellants*

v.

George Ernest Hunt *Respondent*

and

T & N, P.L.C. and Flintkote Mines Limited *Respondents*

and between

Flintkote Mines Limited, National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited and Lac d'amiante du Québec Ltée, formerly known as Lake Asbestos Company Ltd. *Appellants*

v.

George Ernest Hunt *Respondent*

and

T & N, P.L.C. and Carey Canada Inc., formerly known as Carey-Canadian Mines Ltd. *Respondents*

INDEXED AS: HUNT *v.* CAREY CANADA INC.

File Nos.: 21508, 21536.

1990: February 22; 1990: October 4.

Present: Lamer C.J.* and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Practice — Motion to strike — Action brought by person suffering from disease allegedly caused by exposure to asbestos fibres — Allegation of conspiracy to withhold information of potential health risks — Allegations of other nominate torts — Circumstances in which a statement of claim (or portions of it) could be struck out — Whether allegations based on the tort of

* Chief Justice at the time of judgment.

Carey Canada Inc., antérieurement Carey-Canadian Mines Ltd., National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited et Lac d'amiante du Québec Ltée, antérieurement Lake Asbestos Company Ltd. *Appelantes*

c.

George Ernest Hunt *Intimé*

et

T & N, P.L.C. et Flintkote Mines Limited *Intimées*

et entre

Flintkote Mines Limited, National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited et Lac d'amiante du Québec Ltée, antérieurement Lake Asbestos Company Ltd. *Appelantes*

c.

George Ernest Hunt *Intimé*

et

T & N, P.L.C. et Carey Canada Inc., antérieurement Carey-Canadian Mines Ltd. *Intimées*

RÉPERTORIÉ: HUNT *c.* CAREY CANADA INC.

N[os] du greffe: 21508, 21536.

1990: 22 février; 1990: 4 octobre.

Présents: Le juge en chef Lamer* et les juges Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier et Cory.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Pratique — Requête en radiation — Action intentée par une personne souffrant d'une maladie qui résulterait de l'exposition aux fibres d'amiante — Allégation de complot en vue de cacher des renseignements quant aux risques possibles pour la santé — Allégations d'autres délits énumérés — Circonstances dans lesquelles une déclaration (ou des parties de celle-ci) peut être

* Juge en chef à la date du jugement.

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conspiracy should be struck out — Rules of Court [British Columbia], Rule 19(24).

Respondent Hunt, a retired electrician, brought an action alleging that he had contracted mesothelioma because of exposure to asbestos fibres over the course of his employment. The defendants had been involved in the mining of asbestos and the production and supply of a variety of asbestos products between 1940 and 1967. It was alleged that they knew from 1934 that asbestos fibres could cause disease in those exposed to the fibres. Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville and T & N, P.L.C. were sued not only in negligence but also for their alleged conspiracy to withhold information about the dangers associated with asbestos which ultimately resulted in Mr. Hunt's contracting mesothelioma. Flintkote Mines Limited and T & N, P.L.C. were named as respondents to the appeal in the Court of Appeal by order of the British Columbia Court of Appeal.

Carey Canada Inc. successfully applied to have the action against it struck for want of a reasonable claim. (The action had been based solely on allegations of conspiracy.) The Court of Appeal allowed an appeal from that decision. The issues here dealt with the circumstances in which a statement of claim (or portions of it) could be struck out, and whether the allegations based on the tort of conspiracy should be struck out.

Held: The appeals should be dismissed.

The test to be applied is whether it is "plain and obvious" that the plaintiff's statement of claim discloses no reasonable claim. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

Here, it was not "plain and obvious" that the plaintiff's statement of claim failed to disclose a reasonable claim, given this Court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim of conspiracy. Nor was it plain and obvious that allowing this action to proceed would amount to an abuse of process. Whether or not there is good reason to extend the tort to the present context is for the trial judge to consider in light of the evidence.

radiée — Les allégations fondées sur le délit civil de complot devraient-elles être radiées? — Rules of Court [Colombie-Britannique], règle 19(24).

L'intimé Hunt, un électricien à la retraite, a intenté une action dans laquelle il allègue qu'il souffre de mésothéliome parce qu'il a été exposé aux fibres d'amiante au cours de son emploi. Les défenderesses ont exploité des mines d'amiante en vue de produire et de fournir une variété de produits d'amiante entre les années 1940 et 1967. Il est allégué qu'elles savaient depuis 1934 que les fibres d'amiante pouvaient causer des maladies chez ceux qui y étaient exposés. Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville et T & N, P.L.C sont non seulement poursuivies pour négligence, mais encore il est allégué qu'elles ont comploté en vue de cacher des renseignements quant aux dangers associés à l'amiante et que, par suite de ce complot, M. Hunt a souffert de mésothéliome. Par ordre de la Cour d'appel de la Colombie-Britannique, Flintkote Mines Limited et T & N, P.L.C. ont été ajoutées comme intimées dans l'appel en Cour d'appel.

Carey Canada Inc. a demandé avec succès que l'action intentée contre elle soit rejetée parce qu'elle ne révélait aucune demande raisonnable. (L'action n'était fondée que sur des allégations de complot.) La Cour d'appel a accueilli l'appel interjeté contre cette décision. En l'espèce, il s'agit de déterminer dans quelles circonstances une déclaration (ou des parties de celle-ci) peut être radiée et si les allégations fondées sur le délit civil de complot doivent être radiées.

Arrêt: Les pourvois sont rejetés.

Le critère à appliquer est de savoir s'il est «évident et manifeste» que la déclaration du demandeur ne révèle aucune demande raisonnable. Ce n'est que si l'action est vouée à l'échec parce qu'elle contient un vice fondamental qui se range parmi les autres énumérés à la règle 19(24) que les parties pertinentes de la déclaration du demandeur devraient être radiées en vertu de la règle 19(24)a).

En l'espèce, il n'est pas «évident et manifeste» que la déclaration du demandeur ne révèle pas une demande raisonnable, compte tenu de la plus récente décision de notre Cour sur les circonstances dans lesquelles le droit de la responsabilité civile reconnaîtra une telle demande fondée sur le complot. Il n'est pas non plus évident et manifeste qu'en permettant à cette action de suivre son cours, il y aurait recours abusif au tribunal. Il appartient au juge de première instance de décider, compte tenu de la preuve, s'il existe de bonnes raisons d'étendre le délit civil au présent contexte.

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It is not for this Court on a motion to strike to reach a decision as to the plaintiff's chances of success. It is enough that the plaintiff has some chance of success. Whether or not a predominant purpose had been established and whether or not Quebec's *Business Concerns Records Act* limited the range of information that the defendants could produce at trial was not relevant to whether the plaintiff's statement of claim disclosed a reasonable claim. Striking out cannot be justified because a pleading reveals "an arguable, difficult or important point of law". On the contrary, it may well be critical that the action be allowed to proceed.

Alleging the tort of conspiracy is not precluded by the allegation of another tort. While it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. Whether the plaintiff should be barred from recovery under the tort of conspiracy can only be determined when the question of whether it has established that the defendant did in fact commit the other alleged torts has been decided.

Cases Cited

Considered: *Dyson v. Attorney-General*, [1911] 1 K.B. 410; *Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094; *Ross v. Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Lonrho Ltd. v. Shell Petroleum Co. (No. 2)*, [1982] A.C. 173; *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452; **distinguished**: *Frame v. Smith*, [1987] 2 S.C.R. 99; **referred to**: *Metropolitan Bank, Ltd. v. Pooley*, [1881-85] All E.R. 949; *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489; *Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd.*, [1899] 1 Q.B. 86; *Attorney-General of the Duchy of Lancaster v. London & North Western Railway Co.*, [1892] 3 Ch. 274; *Evans v. Barclays Bank and Galloway*, [1924] W.N. 97; *Kemsley v. Foot*, [1951] 1 T.L.R. 197; *Nagle v. Feilden*, [1966] 2 Q.B. 633; *Rex ex rel. Tolfree v. Clark*, [1943] O.R. 501; *Gilbert Surgical Supply Co. v. F. W. Horner Ltd.*, [1960] O.W.N. 289; *Minnes v. Minnes* (1962), 39 W.W.R. 112; *McNaughton and McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Dumont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279; *Metall und*

Il n'appartient pas à notre Cour, suite à une requête en radiation, de rendre une décision quant aux chances de succès du demandeur. Il suffit que le demandeur ait quelque chance de succès. Les questions de savoir si un objet prédominant a été établi et si la *Loi sur les dossiers d'entreprises* du Québec restreint l'éventail des renseignements que les défenderesses peuvent produire à l'audience sont des questions qui n'ont rien à voir avec celle de savoir si la déclaration du demandeur révèle une demande raisonnable. La radiation ne saurait être justifiée parce qu'un acte de procédure révèle «une question de droit contestable, difficile ou importante». Au contraire, il peut fort bien être capital que l'action puisse suivre son cours.

L'allégation d'un délit civil de complot n'est pas interdite parce qu'on a allégué la perpétration d'un autre délit. Bien qu'il puisse être discutable que si une partie a gain de cause contre un défendeur en invoquant un délit civil spécifique distinct, une action fondée sur le complot ne devrait pas alors être recevable contre ce défendeur, il est loin d'être clair que le simple fait qu'un demandeur allègue qu'un défendeur a commis d'autres délits l'empêche d'invoquer le délit civil de complot. On peut déterminer si le demandeur devrait être privé du recours fondé sur le délit civil de complot seulement lorsque l'on a décidé s'il a établi que le défendeur a réellement commis les autres délits allégués.

Jurisprudence

Arrêts examinés: *Dyson v. Attorney-General*, [1911] 1 K.B. 410; *Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094; *Ross v. Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308; *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735; *Lonrho Ltd. v. Shell Petroleum Co. (No. 2)*, [1982] A.C. 173; *Ciments Canada LaFarge Ltée c. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 R.C.S. 452; **distinction d'avec l'arrêt:** *Frame c. Smith*, [1987] 2 R.C.S. 99; **arrêts mentionnés**: *Metropolitan Bank, Ltd. v. Pooley*, [1881-85] All E.R. 949; *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489; *Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd.*, [1899] 1 Q.B. 86; *Attorney-General of the Duchy of Lancaster v. London & North Western Railway Co.*, [1892] 3 Ch. 274; *Evans v. Barclays Bank and Galloway*, [1924] W.N. 97; *Kemsley v. Foot*, [1951] 1 T.L.R. 197; *Nagle v. Feilden*, [1966] 2 Q.B. 633; *Rex ex rel. Tolfree v. Clark*, [1943] O.R. 501; *Gilbert Surgical Supply Co. v. F. W. Horner Ltd.*, [1960] O.W.N. 289; *Minnes v. Minnes* (1962), 39 W.W.R. 112; *McNaughton and McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17; *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441; *Dumont c. Canada (Procureur général)*, [1990] 1

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Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., [1989] 3 W.L.R. 563; *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598.

Statutes and Regulations Cited

Business Concerns Records Act, R.S.Q. 1977, c. D-12.
Rules of Civil Procedure, O. Reg. 560/84, Rule 21.01.
Rules of Court [British Columbia], Rule 19(24).
Rules of the Supreme Court [England], R.S.C. 1883, O. 25, r. 4 [rep. & sub. R.S.C. (Revision) 1962, O. 18, r. 19].
Supreme Court of Judicature Act, 1873, (Eng.) 36 & 37 Vict., c. 66.

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McLachlin, Beverly M. and James P. Taylor. *British Columbia Practice*, vol. 1, 2nd ed. Vancouver: Butterworths, 1979.
Milsom, S. F. C. *Historical Foundations of the Common Law*, 2nd ed. Toronto: Butterworths, 1981.

APPEALS from a judgment of the British Columbia Court of Appeal reversing the judgment of Hollinrake J. dismissing the action against Carey Canada Inc. on the basis that it disclosed no reasonable claim. Appeals dismissed.

Jack Giles, Q.C., and *Robert McDonell*, for Carey Canada Inc.

D. M. M. Goldie, Q.C., for Lac d'amiante du Québec Ltée.

Marvyn Koenigsberg, for National Gypsum Co.

David Martin and *Michael P. Maryn*, for Atlas Turner Inc., Asbestos Corporation Limited and Bell Asbestos Mines Limited.

James A. Macaulay, Q.C., and *K. N. Affleck*, for T & N, P.L.C.

R.C.S. 279; *Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, [1989] 3 W.L.R. 563; *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598.

Lois et règlements cités

Loi sur les dossiers d'entreprises, L.R.Q. 1977, ch. D-12.
Règles de procédure civile, Règl. de l'Ont. 560/84, règle 21.01.
Rules of Court [Colombie-Britannique], règle 19(24).
Rules of the Supreme Court [Angleterre], R.S.C. 1883, ord. 25, règle 4 [abr. & rempl. R.S.C. (Révision) 1962, ord. 18, règle 19].
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Doctrine citée

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Milsom, S. F. C. *Historical Foundations of the Common Law*, 2nd ed. Toronto: Butterworths, 1981.

POURVOIS contre un arrêt de la Cour d'appel de la Colombie-Britannique qui a infirmé un jugement du juge Hollinrake qui avait rejeté l'action contre Carey Canada Inc. parce qu'elle ne révélait aucune demande raisonnable. Pourvois rejetés.

Jack Giles, c.r., et *Robert McDonell*, pour Carey Canada Inc.

D. M. M. Goldie, c.r., pour Lac d'amiante du Québec Ltée.

Marvyn Koenigsberg, pour National Gypsum Co.

David Martin et *Michael P. Maryn*, pour Atlas Turner Inc., Asbestos Corporation Limited et Bell Asbestos Mines Limited.

James A. Macaulay, c.r., et *K. N. Affleck*, pour T & N, P.L.C.

1990 CanLII 90 (SCC)

Robert Ward and *S. E. Fraser*, for Flintkote Mines Limited.

J. J. Camp, Q.C., and *P. G. Foy*, for George Ernest Hunt.

The judgment of the Court was delivered by

WILSON J.—The issue raised in these appeals is whether it is open to the respondent to proceed with an action against the appellants for the tort of conspiracy. In particular, the appeals raise the question whether those portions of the respondent [Hunt's] statement of claim in which he alleges that the appellants conspired to withhold information concerning the effects of asbestos fibres disclose a reasonable claim within the meaning of Rule 19(24)(a) of the British Columbia *Rules of Court*.

1. The Facts

The respondent, George Hunt, is a retired electrician who alleges that he was exposed to asbestos fibres over the course of his employment. Mr. Hunt has brought an action against Atlas Turner Inc., Asbestos Corporation Limited, The Asbestos Institute, Babcock & Wilcox Industries Ltd., Bell Asbestos Mines Limited, Caposite Insulations Ltd., Carey Canada Inc., Flintkote Mines Limited, Holmes Insulations Ltd., Johns-Manville Amiante Canada Inc., Lac d'amiante du Québec Ltée, National Asbestos Mines Limited, The Quebec Asbestos Mining Association and T & N, P.L.C. ("the defendants").

Mr. Hunt alleges that the defendants were involved in the mining of asbestos and the production and supply of a variety of asbestos products between 1940 and 1967. He alleges that after 1934 the defendants knew that asbestos fibres could cause disease in those exposed to the fibres. In addition to suing Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville and T & N in negligence, Mr. Hunt alleges that all of the defendants conspired to withhold information about the dangers associated with asbestos and that as a result of that conspiracy he contracted mesothelioma.

Robert Ward et *S. E. Fraser*, pour Flintkote Mines Limited.

J. J. Camp, c.r., et *P. G. Foy*, pour George Ernest Hunt.

Version française du jugement de la Cour rendu par

LE JUGE WILSON—La question que soulèvent ces pourvois est de savoir si l'intimé peut intenter contre les appelantes une action pour délit civil de complot. Les pourvois soulèvent plus particulièrement la question de savoir si les parties de la déclaration de l'intimé [Hunt] dans lesquelles il allègue que les appelantes ont comploté en vue de cacher des renseignements concernant les effets des fibres d'amiante font état d'une demande raisonnable au sens de la règle 19(24)a) des *Rules of Court* de la Colombie-Britannique.

1. Les faits

L'intimé, George Hunt, est un électricien à la retraite qui prétend avoir été exposé aux fibres d'amiante au cours de son emploi. M. Hunt a intenté une action contre Atlas Turner Inc., Asbestos Corporation Limited, The Asbestos Institute, Babcock & Wilcox Industries Ltd., Bell Asbestos Mines Limited, Caposite Insulations Ltd., Carey Canada Inc., Flintkote Mines Limited, Holmes Insulations Ltd., Johns-Manville Amiante Canada Inc., Lac d'amiante du Québec Ltée, National Asbestos Mines Limited, The Quebec Asbestos Mining Association et T & N, P.L.C. («les défenderesses»).

Monsieur Hunt allègue que les défenderesses exploitaient des mines d'amiante en vue de produire et de fournir une variété de produits d'amiante entre les années 1940 et 1967. Il allègue qu'après 1934 les défenderesses savaient que les fibres d'amiante pouvaient causer des maladies chez ceux qui y étaient exposés. En plus de poursuivre Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville et T & N pour négligence, M. Hunt allègue que toutes les défenderesses ont comploté en vue de cacher des renseignements quant aux dangers associés à l'amiante et que, par suite de ce complot, il a souffert de mésothéliome.

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The relevant portions of Mr. Hunt's statement of claim read as follows:

16. At various times, the particulars of which are well known to the defendants, including the period between 1940 and 1967, the defendants mined and processed asbestos and designed, manufactured, packaged, advertised, promoted, distributed and sold a variety of products containing asbestos fibres (the "Products"), the particulars of which are also well known to the defendants.

17. After about 1934 the defendants knew or ought to have known that the asbestos fibres contained in the Products could cause diseases, including cancer and asbestosis, in those who worked with or were otherwise exposed to those fibres.

18. After about 1934, some or all of the defendants conspired with each other with the predominant purpose of injuring the plantiff [*sic*] and others who would be exposed to the asbestos fibres in the Products, by preventing this knowledge becoming public knowledge and, in particular, by preventing it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products.

19. Alternatively, after about 1934, some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff and others who would be exposed to the asbestos fibres in the Products would result from the defendants' acts.

20. The defendants' acts in furtherance of the conspiracy referred to in paragraphs 18 and 19 include:

(a) fraudulently, deceitfully or negligently suppressing, distorting and misrepresenting the results of medical and scientific research on the disease-causing effects of asbestos;

(b) fraudulently, deceitfully or negligently misrepresenting the disease-causing effects of asbestos by disseminating incorrect, incomplete, outdated, misleading and distorted information about those effects;

(c) fraudulently, deceitfully or negligently attempting to discredit doctors and scientists who claimed that asbestos caused disease;

Les parties pertinentes de la déclaration de M. Hunt se lisent ainsi:

[TRADUCTION] 16. À diverses époques dont les détails sont bien connus des défenderesses, y compris pendant la période comprise entre 1940 et 1967, les défenderesses ont procédé à l'extraction et à la transformation de l'amiante et ont conçu, fabriqué, emballé, annoncé, promu, distribué et vendu une variété de produits contenant des fibres d'amiante (les «produits»), dont les détails sont également bien connus des défenderesses.

17. Après 1934 environ, les défenderesses savaient ou auraient dû savoir que les fibres d'amiante contenues dans les produits pouvaient causer des maladies, y compris le cancer et l'amiantose chez les travailleurs ou ceux qui étaient par ailleurs exposés à ces fibres.

18. Après 1934 environ, les défenderesses ou certaines d'entre elles ont comploté ensemble dans le but prédominant de nuire au demandeur et aux autres personnes susceptibles d'être exposées aux fibres d'amiante contenues dans les produits, en empêchant la diffusion de ces renseignements dans le public et, en particulier, auprès du demandeur et des autres personnes susceptibles d'être exposées aux fibres d'amiante contenues dans les produits.

19. Subsidiairement, après 1934 environ, les défenderesses ou certaines d'entre elles ont comploté ensemble pour empêcher, par des moyens illégaux, la diffusion de ces renseignements dans le public et, en particulier, auprès du demandeur et des autres personnes susceptibles d'être exposées aux fibres d'amiante contenues dans les produits, dans des circonstances où les défenderesses savaient ou auraient dû savoir que le préjudice causé au demandeur et aux autres personnes qui seraient exposées aux fibres d'amiante contenues dans les produits découlerait de la conduite des défenderesses.

20. La conduite des défenderesses dans le cadre du complot mentionné aux paragraphes 18 et 19 comprend les actions suivantes:

a) avoir frauduleusement, par supercherie ou négligemment supprimé, déformé et présenté de façon inexacte les résultats des recherches médicales et scientifiques sur les effets nocifs de l'amiante sur la santé;

b) avoir frauduleusement, par supercherie ou négligemment présenté de façon inexacte les effets nocifs de l'amiante sur la santé en diffusant des renseignements inexacts, incomplets, périmés, erronés et déformés quant à ces effets;

c) avoir frauduleusement, par supercherie ou négligemment tenté de nuire à la réputation des médecins et des scientifiques qui prétendaient que l'amiante était à l'origine de maladies;

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(d) fraudulently, deceitfully or negligently marketing and promoting the Products without any or adequate warning of the dangers they posed to those exposed to them; and

(e) fraudulently, deceitfully or negligently attempting to influence to their benefit government regulation of the use of asbestos and the Products.

Carey Canada Inc. brought an application before the Supreme Court of British Columbia under Rule 19(24)(a) of the British Columbia *Rules of Court* seeking to have the action against it, which was based solely on the allegations of conspiracy, dismissed on the basis that it disclosed no reasonable claim. Rule 19(24) provides:

> 19(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
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> (a) it discloses no reasonable claim or defence as the case may be, or
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> (b) it is unnecessary, scandalous, frivolous, or vexatious, or
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> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
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> (d) it is otherwise an abuse of the process of the court,
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> and may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as between solicitor and client.

2. The Courts Below

(a) *Supreme Court of British Columbia*

Hollinrake J. accepted Carey Canada's submission that the only damage that could be the subject of a conspiracy action was "direct damage". Although counsels' memorandum summarizing Hollinrake J.'s oral reasons for judgment does not explain precisely what he understood the term "direct damage" to mean, it would appear that he meant damage suffered by a plaintiff that flows directly from acts aimed specifically at that plaintiff. Hollinrake J. stated:

d) avoir frauduleusement, par supercherie ou négligemment mis en marché et promu les produits sans avoir avisé ou suffisamment avisé ceux qui y étaient exposés des dangers qu'ils comportaient;

e) avoir frauduleusement, par supercherie ou négligemment tenté d'influencer à leur avantage la réglementation gouvernementale de l'usage de l'amiante et des produits.

Carey Canada Inc. a présenté une requête devant la Cour suprême de la Colombie-Britannique en vertu de la règle 19(24)a) des *Rules of Court* de cette province pour que l'action intentée contre elle, qui était fondée seulement sur des allégations de complot, soit rejetée parce qu'elle ne révélait aucune demande raisonnable. La règle 19(24) prévoit:

> [TRADUCTION] 19(24) À toute étape d'une procédure, la cour peut ordonner que soient radiés ou modifiés en totalité ou en partie une inscription, un acte de procédure, une requête ou autre document pour le motif
>
> a) qu'ils ne révèlent aucune demande ou défense raisonnable, selon le cas,
>
> b) qu'ils sont inutiles, scandaleux, frivoles ou vexatoires,
>
> c) qu'ils peuvent nuire à l'instruction équitable de la procédure, ou encore la gêner ou la retarder, ou
>
> d) qu'ils constituent par ailleurs un recours abusif au tribunal,
>
> et elle peut rendre jugement ou ordonner que la procédure soit suspendue ou rejetée et peut ordonner que les dépens de la requête soient payés sur la base de procureur à client.

2. Les décisions des tribunaux d'instance inférieure

a) *La Cour suprême de la Colombie-Britannique*

Le juge Hollinrake a retenu la prétention de Carey Canada que le seul préjudice qui pouvait faire l'objet d'une action pour complot était un [TRADUCTION] «dommage direct». Bien que, dans le mémoire des avocats, le résumé des motifs prononcés oralement par le juge Hollinrake n'explique pas précisément ce que celui-ci entendait par l'expression «dommage direct», il semblerait qu'il ait voulu parler du préjudice subi par le demandeur, qui découle directement des actes qui le visaient précisément. Le juge Hollinrake affirme:

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Dealing with the issue of direct or indirect damage, in the first kind of conspiracy Estey, J. refers to the "predominant purpose" of the defendants' conduct [see: *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, at p. 471]. I think this does import direct damage. The second type of conspiracy refers to conduct "directed towards the plaintiff". I think this imports direct damage. I think these conclusions are justified by what happened in *Canada Cement LaFarge Ltd.*

Hollinrake J. therefore allowed the motion and dismissed the action against Carey Canada as disclosing no reasonable claim.

(b) *British Columbia Court of Appeal*

By order of the British Columbia Court of Appeal (dated March 30, 1989), Flintkote Mines Limited and T & N, P.L.C. were named as respondents to the appeal in the Court of Appeal.

Anderson J.A. (Macfarlane and Esson JJ.A. concurring) allowed the appeal and set aside Hollinrake J.'s order. Anderson J.A. explained his reasons:

(1) The cases relied upon by counsel for the respondent Carey Canada Inc. and the learned trial judge to the effect that there is no such tort as a conspiracy to injure by unlawful means where the damage is indirect, all relate to the area of competition in the marketplace and to labour-management disputes. They may not be applicable to the very different circumstances alleged in this case and to very different social considerations.

(2) The arguments as to law and fact are intricate and complex and should be dealt with at trial after all the evidence is adduced. At this stage of the proceedings it is impossible to reach the conclusion that there is no cause of action in fact or law. (See *Minnes v. Minnes* (1962), 39 W.W.R. 112 at 122).

Esson J.A. (Anderson and Macfarlane JJ.A. agreeing) gave additional reasons stressing that the "language of predominant purpose and direct damage" in *Canada Cement LaFarge Ltd.* had arisen in cases that involved competition and pure economic loss. In Mr. Hunt's case, however, the context was very different. Mr. Hunt had suffered

Quant à la question du dommage direct ou indirect, dans le premier type de complot, le juge Estey parle de ce que «vise principalement» la conduite des défendeurs [voir: *Ciments Canada LaFarge Ltée c. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 R.C.S. 452, à la p. 471]. Je pense que cela signifie un dommage direct. Le deuxième type de complot parle d'une conduite «dirigée contre le demandeur». Je pense que cela signifie un dommage direct. Je pense que ces conclusions sont justifiées par ce qui s'est produit dans l'arrêt *Ciments Canada LaFarge Ltée.*

Le juge Hollinrake a donc accueilli la requête et rejeté l'action contre Carey Canada parce qu'elle ne révélait aucune demande raisonnable.

b) *La Cour d'appel de la Colombie-Britannique*

Par ordre de la Cour d'appel de la Colombie-Britannique (en date du 30 mars 1989), Flintkote Mines Limited et T & N, P.L.C. ont été ajoutées comme intimées dans l'appel en Cour d'appel.

Le juge Anderson (les juges Macfarlane et Esson souscrivant à ses motifs) a accueilli l'appel et annulé l'ordonnance du juge Hollinrake. Le juge Anderson justifie ses raisons de la façon suivante:

[TRADUCTION]

(1) La jurisprudence invoquée par l'avocat de l'intimée Carey Canada Inc. et par le juge de première instance selon laquelle il n'existe aucun délit civil tel le complot de nuire par des moyens illégaux lorsque le dommage est indirect, se rapporte au domaine de la concurrence sur le marché et aux différends en matière de travail. Elle peut ne pas s'appliquer aux circonstances très différentes invoquées en l'espèce et aux considérations sociales très différentes.

(2) Les arguments relatifs au droit et aux faits sont complexes et devraient être évalués au procès après la présentation de toute la preuve. À ce stade de la procédure, il est impossible de conclure qu'il n'y a aucune cause d'action en fait ou en droit (voir l'arrêt *Minnes v. Minnes* (1962), 39 W.W.R. 112, à la p. 122).

Le juge Esson (les juges Anderson et Macfarlane partageant son avis) a donné d'autres raisons soulignant que les [TRADUCTION] «expressions de l'objet prédominant et du dommage direct» dans l'arrêt *Ciments Canada LaFarge Ltée* s'étaient présentées dans des décisions en matière de concurrence et de perte purement économique. Cepen-

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personal injury and claimed that by conspiring to suppress information the defendants had created a foreseeable risk of causing him the harm which he in fact suffered. It was not possible at this stage in the proceedings to determine that the damage was not sufficiently direct to be able to support an action rooted in the tort of conspiracy. Esson J.A. specifically declined to embark upon a detailed consideration of the law of conspiracy, noting:

> It has not generally been part of our tradition and, given the complexity and novelty of some of the issues raised in this case, it would I think be particularly undesirable to render a such decisions [*sic*], as it were, in a vacuum. For those reasons, as well as the reasons given by Mr. Justice Anderson, I agree in allowing the appeal.

3. The Issues

The issues that arise in this appeal are:

1. In what circumstances may a statement of claim (or portions of it) be struck out?

2. Should Mr. Hunt's allegations based on the tort of conspiracy be struck out?

4. Analysis

(1) *In What Circumstances May a Statement of Claim be Struck Out?*

Carey Canada's motion to have the action dismissed was made pursuant to Rule 19(24)(a) of the British Columbia *Rules of Court*. This rule stipulates that a court may strike out any part of a statement of claim that "discloses no reasonable claim". The rules of practice with respect to striking out a statement of claim are similar in other provinces. In Ontario, for example, Rule 21.01 of the *Rules of Civil Procedure*, O. Reg. 560/84, states:

> **21.01** (1) A party may move before a judge,

dant, dans le cas de M. Hunt, le contexte était très différent. Monsieur Hunt avait subi un préjudice personnel et prétendait que le complot des défenderesses pour supprimer des renseignements avait *a* créé un risque prévisible de causer le préjudice dont il avait réellement souffert. Il était impossible à cette étape de la procédure de déterminer que le dommage n'était pas suffisamment direct pour justifier une action fondée sur le délit civil de *b* complot. Le juge Esson a explicitement refusé de s'engager dans un examen détaillé du droit relatif au complot, soulignant:

> [TRADUCTION] Il ne fait généralement pas partie de *c* notre tradition et, compte tenu de la complexité et de la nouveauté de certaines des questions soulevées en l'espèce, j'estime qu'il ne serait particulièrement pas souhaitable de rendre une telle décision en l'absence de contexte. Pour ces motifs, ainsi que pour ceux qu'a exposés *d* le juge Anderson, je suis d'avis d'accueillir l'appel.

3. Les questions

Les questions que soulève ce pourvoi sont les *e* suivantes:

1. Dans quelles circonstances une déclaration (ou des parties de celle-ci) peut-elle être radiée?

f 2. Les allégations de M. Hunt fondées sur le délit civil de complot devraient-elles être radiées?

4. L'analyse

g (1) *Dans quelles circonstances une déclaration peut-elle être radiée?*

La requête de Carey Canada visant à obtenir le *h* rejet de l'action a été présentée conformément à la règle 19(24)a) des *Rules of Court* de la Colombie-Britannique. Cette règle prévoit qu'un tribunal peut radier en totalité ou en partie une déclaration qui ne [TRADUCTION] «révèle [...] aucune *i* demande [...] raisonnable». Les règles de pratique en matière de radiation des déclarations sont semblables dans les autres provinces. Par exemple, en Ontario, la règle 21.01 des *Règles de procédure civile*, Règl. de l'Ont. 560/84, prévoit:

j

> **21.01** (1) Une partie peut demander à un juge, par voie de motion:

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(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1)(a), except with leave of a judge or on consent of the parties;

(b) under clause (1)(b). [Emphasis added.]

Rule 19(24) of the British Columbia *Rules of Court* and analogous provisions in other provinces are the result of a "codification" of the court's power under its inherent jurisdiction to stay actions that are an abuse of process or that disclose no reasonable cause of action: see McLachlin and Taylor, *British Columbia Practice* (2nd ed. 1979), vol. 1, p. 19-71. This process of codification first took place in England shortly after the *Supreme Court of Judicature Act, 1873*, (Eng.) 36 & 37 Vict., c. 66, was enacted. It is therefore of some interest to review the interpretation the courts in England have given to their rules relating to the striking out of a statement of claim.

(a) England:

In *Metropolitan Bank, Ltd. v. Pooley*, [1881-85] All E.R. 949 (H.L.), the Lord Chancellor explained at p. 951 that before the *Supreme Court of Judicature Act, 1873*, courts were prepared to stay a "manifestly vexatious suit which was plainly an abuse of the authority of the court" even although there was no written rule stating that courts could do so. The Lord Chancellor noted, at p. 951, that "The power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its procedure". That is, it was open to courts to ensure that their process was

a) soit, qu'une question de droit soulevée par un acte de procédure dans une action soit décidée avant l'instruction, si la décision de la question est susceptible de régler la totalité ou une partie de l'action, d'abréger considérablement l'instruction ou de réduire considérablement les dépens;

b) soit, qu'un acte de procédure soit radié parce qu'il ne révèle aucune cause d'action ou de défense fondée.

Le juge peut rendre une ordonnance ou un jugement en conséquence.

(2) Aucune preuve n'est admissible à l'appui d'une motion:

a) présentée en application de l'alinéa (1)a), sans l'autorisation d'un juge ou le consentement des parties;

b) présentée en application de l'alinéa (1)b). [Je souligne.]

La règle 19(24) des *Rules of Court* de la Colombie-Britannique et les dispositions semblables des autres provinces résultent d'une [TRADUCTION] «codification» du pouvoir d'un tribunal en vertu de sa compétence inhérente de suspendre des actions qui constituent un abus de procédure ou qui ne révèlent aucune cause d'action raisonnable: voir McLachlin et Taylor, *British Columbia Practice* (2e éd. 1979), vol. 1, p. 19-71. Ce processus de codification a d'abord eu lieu en Angleterre peu de temps après l'adoption de la *Supreme Court of Judicature Act, 1873*, (Angl.) 36 & 37 Vict., ch. 66. Il peut donc être intéressant d'examiner l'interprétation que les tribunaux d'Angleterre ont donnée à leurs règles en matière de radiation d'une déclaration.

a) L'Angleterre:

Dans l'arrêt *Metropolitan Bank, Ltd. v. Pooley*, [1881-85] All E.R. 949 (H.L.), à la p. 951, le lord chancelier a expliqué qu'avant l'adoption de la *Supreme Court of Judicature Act, 1873*, les tribunaux étaient prêts à suspendre une [TRADUCTION] «poursuite manifestement vexatoire qui constituait clairement un recours abusif au tribunal» même s'il n'existait aucune règle écrite permettant aux tribunaux d'agir ainsi. Le lord chancelier a souligné, à la p. 951, que [TRADUCTION] «Ce pouvoir semblait inhérent à la compétence qu'a chaque cour de justice pour se protéger elle-même contre

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not used simply to harass parties through the initiation of actions that were obviously without merit.

Before the advent of the *Supreme Court of Judicature Act, 1873* and the new *Rules of the Supreme Court* (enacted in 1883) it had been open to parties to use a "demurrer" to challenge a statement of claim. That is, it had been open to a defendant to admit all the facts that the plaintiff's pleadings alleged and to assert that these facts were not sufficient in law to sustain the plaintiff's case. When a demurrer was pleaded the question of law that was thereby raised was immediately set down for argument and decision: see *Halsbury's Laws of England* (4th ed. 1981), vol. 36, para. 2, n. 7 and para. 35, n. 5; Milsom, *Historical Foundations of the Common Law* (2nd ed. 1981), at p. 72; and Baker, *An Introduction to English Legal History* (2nd ed. 1979), at p. 69. But a formal and technical practice eventually grew up around demurrer and judges were notoriously reluctant to provide definitive answers to the points of law that were thereby raised. As the Lord Chancellor explained in *Pooley*, it was eventually thought best to replace demurrers with an easier summary process for getting rid of an action that was on its face manifestly groundless. It was with this objective in mind that O. 25, r. 4 of the 1883 *Rules of the Supreme Court* came into force:

4. The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

Commenting on the relative merits of demurrers and the new rule, Chitty J. observed in *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489, at p. 496:

le recours abusif à ses procédures». Ce qui veut dire que les tribunaux pouvaient veiller à ce qu'on ne recoure pas à leurs procédures simplement pour harceler les parties en intentant des actions qui *a* étaient manifestement non fondées.

Avant l'adoption de la *Supreme Court of Judicature Act, 1873*, et des nouvelles *Rules of the Supreme Court* (adoptées en 1883), les parties *b* pouvaient faire valoir un [TRADUCTION] «moyen d'irrecevabilité» («*demurrer*») pour contester une déclaration. Ce qui veut dire qu'un défendeur pouvait reconnaître tous les faits invoqués dans les actes de procédure du demandeur et affirmer que *c* ces faits ne suffisaient pas en droit pour justifier l'action du demandeur. Lorsqu'un moyen d'irrecevabilité était invoqué, la question de droit ainsi soulevée faisait immédiatement l'objet d'un débat *d* et d'une décision: voir *Halsbury's Laws of England* (4ᵉ éd. 1981), vol. 36, par. 2, n. 7 et par. 35, n. 5, Milsom, *Historical Foundations of the Common Law* (2ᵉ éd. 1981), à la p. 72, et Baker, *An Introduction to English Legal History* (2ᵉ éd. *e* 1979), à la p. 69. Mais le moyen d'irrecevabilité a éventuellement fait l'objet d'une pratique formelle et technique et il était notoire que les juges hésitaient à apporter des réponses définitives aux questions de droit qui étaient ainsi soulevées. Comme le *f* lord chancelier l'explique dans l'arrêt *Pooley*, on en est finalement venu à croire qu'il était préférable de remplacer les moyens d'irrecevabilité par une procédure sommaire plus simple pour écarter *g* les actions qui, à première vue, étaient manifestement non fondées. C'est avec cet objectif à l'esprit qu'on a adopté la règle 4 de l'ordonnance 25 des *Rules of the Supreme Court* de 1883:

[TRADUCTION] 4. La cour ou le juge peut ordonner la *h* radiation de tout acte de procédure pour le motif qu'il ne révèle aucune cause d'action ou défense raisonnable et, dans un tel cas ou lorsque l'acte de procédure révèle que la cause d'action ou la défense est frivole ou vexatoire, la cour ou le juge peut ordonner que l'action soit suspendue *i* ou rejetée ou qu'un jugement soit rendu en conséquence, selon ce qui peut se révéler juste de faire.

Le juge Chitty, dans ses remarques sur les mérites relatifs des moyens d'irrecevabilité et de la nou- *j* velle règle, a souligné dans l'arrêt *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489, à la p. 496:

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Having regard to the terms of rule 4, and to the decisions on it, I think that this rule is more favourable to the pleading objected to than the old procedure by demurrer. Under the new rule the pleading will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading, which would have been fatal on a demurrer, the Court sees that a substantial case is presented the Court should, I think, decline to strike out that pleading; but when the pleading discloses a case which the Court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation.

One of the most important points advanced in the early decisions dealing with O. 25, r. 4 was the proposition that the rule was derived from the courts' power to ensure both that they remained a forum in which genuine legal issues were addressed and that they did not become a vehicle for "vexatious" actions without legal merit designed solely to harass another party. In *Pooley*, *supra*, at p. 954, Lord Blackburn asserted that the new rule "considerably extends the power of the court to act in such a manner as I have stated, and enables it to stay an action on further grounds than those on which it could have been stayed at common law." Nonetheless, as Chitty J. subsequently observed in *Peruvian Guano Co.*, the rule was not intended to prevent a "substantial case" from coming forward. Its summary procedures were only to be used where it was apparent that allowing the case to go forward would amount to an abuse of the court's process.

In one of the better-known decisions concerning the circumstances in which resort should be had to the rule Lindley M.R. stated:

The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. <u>The use of the expression "reasonable cause of action" in rule 4 shews that the summary procedure there introduced is only intended to</u>

[TRADUCTION] Compte tenu de la formulation de la règle 4 et des décisions rendues en vertu de celle-ci, j'estime que cette règle est plus favorable quant à l'acte de procédure auquel on s'oppose que l'ancienne procédure du moyen d'irrecevabilité (*demurrer*). En vertu de la nouvelle règle, l'acte de procédure ne sera pas radié à moins de pouvoir faire l'objet d'un moyen d'irrecevabilité ou pis encore. Si, malgré des vices à l'acte de procédure qui auraient été fatals en vertu de la procédure d'irrecevabilité, la cour croit que des questions de fond lui sont présentées, j'estime qu'elle devrait refuser de radier cet acte de procédure; mais lorsque l'acte de procédure révèle une cause d'action à l'égard de laquelle la cour est convaincue qu'elle n'a aucune chance de succès, elle devrait alors le radier et mettre sommairement fin au litige.

L'un des arguments les plus importants à avoir été invoqué dans les premières décisions portant sur la règle 4 de l'ordonnance 25 était que la règle découlait du pouvoir des cours de justice de veiller à ce qu'elles demeurent une tribune où de véritables questions de droit sont abordées et qu'on ne s'en serve pas pour présenter des actions «vexatoires» dépourvues de fondement juridique et destinées seulement à harceler une autre partie. Dans l'arrêt *Pooley*, précité, à la p. 954, lord Blackburn a affirmé que la nouvelle règle [TRADUCTION] «étend considérablement le pouvoir du tribunal d'intervenir de la manière que j'ai décrite, et lui permet de suspendre une action pour d'autres motifs que ceux pour lesquels elle aurait pu être suspendue en common law.» Néanmoins, comme l'a souligné ultérieurement le juge Chitty dans l'arrêt *Peruvian Guano Co.*, la règle n'avait pas pour but d'empêcher que des [TRADUCTION] «questions de fond» soient présentées. Ses procédures sommaires ne devaient être utilisées que s'il était manifeste que permettre la poursuite de l'instance constituerait un recours abusif au tribunal.

Dans une des décisions les plus connues au sujet des circonstances dans lesquelles il faut recourir à la règle, le maître des rôles Lindley a affirmé:

[TRADUCTION] La seconde procédure plus sommaire n'est appropriée que dans les cas évidents et manifestes, de sorte que tout maître ou juge puisse immédiatement affirmer que la déclaration, telle qu'elle se présente, est insuffisante même si on en fait la preuve pour accorder gain de cause au demandeur. <u>L'emploi de l'expression «cause d'action [...] raisonnable» à la règle 4 indique</u>

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be had recourse to in plain and obvious cases. [Emphasis added.]

[See: *Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd.*, [1899] 1 Q.B. 86 (C.A), at p. 91.]

Lindley M.R.'s observations made clear that even if the rule expanded the court's power to stay actions, courts were to use the rule only in those exceptional instances where it was "plain and obvious" that, even if one accepted the version of the facts put forward in the statement of claim, the plaintiff's case did not disclose a reasonable cause of action. The question was not whether the plaintiff could succeed since this was a matter properly left for determination at trial. The question was simply whether the plaintiff was advancing a "reasonable" argument that could properly form the subject matter of a trial.

The Master of the Rolls had made this very point some six years earlier:

> Then the Vice-Chancellor says: "The questions raised upon this application are of such importance and such difficulty that I cannot say that this pleading discloses no reasonable cause of action, or that there is anything frivolous or vexatious; therefore, I should let the parties plead in the usual way". It appears to me that this is perfectly right. To what extent is the Court to go on inquiring into difficult questions of fact or law in the exercise of the power which is given it under Order XXV., rule 4? It appears to me that the object of the rule is to stop cases which ought not to be launched—cases which are obviously frivolous or vexatious, or obviously unsustainable; and if it will take a long time, as is suggested, to satisfy the Court by historical research or otherwise that the County Palatine has no jurisdiction, I am clearly of opinion that such a motion as this ought not to be made. There may be an application in Chambers to get rid of vexatious actions; but to apply the rule to a case like this appears to me to misapply it altogether. [Emphasis added.]

[See: *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co.*, [1892] 3 Ch. 274 (C.A.), at pp. 276-77.]

qu'on ne peut avoir recours à la procédure sommaire qu'elle prévoit que dans les cas évidents et manifestes. [Je souligne.]

[Voir: *Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd.*, [1899] 1 Q.B. 86 (C.A.), à la p. 91.]

Dans ses remarques, le maître des rôles Lindley a expliqué clairement que même si la règle étendait le pouvoir de la cour de suspendre des actions, les tribunaux ne devaient employer la règle que dans les cas exceptionnels où il était [TRADUCTION] «évident et manifeste» que, même si on acceptait la version des faits présentée dans la déclaration, l'action du demandeur ne révélait pas une cause d'action raisonnable. La question n'était pas de savoir si le demandeur pouvait avoir gain de cause puisqu'il s'agissait d'une question qui devait à bon droit être tranchée à l'audience. La question était simplement de savoir si le demandeur faisait valoir un argument «raisonnable» qui pouvait légitimement constituer matière à procès.

Le maître des rôles avait justement affirmé la même chose quelque six années auparavant:

> [TRADUCTION] Le vice-chancelier affirme ensuite: «Les questions que soulève cette demande sont d'une telle importance et d'une telle difficulté que je ne puis affirmer que cet acte de procédure ne révèle aucune cause d'action raisonnable ou qu'il y a quelque chose de frivole ou de vexatoire; par conséquent, je vais laisser les parties plaider régulièrement». Cela me semble tout à fait juste. Dans quelle mesure est-ce que la cour doit examiner les questions de fait ou de droit difficiles dans l'exercice du pouvoir qui lui est conféré en vertu de la règle 4 de l'ordonnance XXV? Il me semble que l'objet de la règle est d'écarter les actions qui ne doivent pas être instituées—les actions qui sont manifestement frivoles ou vexatoires, ou manifestement non fondées; et si, comme on le laisse entendre, un délai important est nécessaire pour convaincre la cour par des recherches historiques ou autrement que le comté palatin n'a aucune compétence, je suis clairement d'avis qu'une telle requête ne doit pas être présentée. On peut demander au juge en chambre d'écarter les actions vexatoires; mais j'estime qu'appliquer la règle dans un cas comme celui-ci revient à mal l'appliquer. [Je souligne.]

[Voir: *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co.*, [1892] 3 Ch. 274 (C.A.), aux pp. 276 et 277.]

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Thus, the fact that the plaintiff's case was a complicated one could not justify striking out the statement of claim. Complex matters that disclosed substantive questions of law were most appropriately addressed at trial where evidence concerning the facts could be led and where arguments about the merits of a plaintiff's case could be made.

The requirement that it be "plain and obvious" that some or all of the statement of claim discloses no reasonable cause of action before it can be struck out, as well as the proposition that it is singularly inappropriate to use the rule's summary procedure to prevent a party from proceeding to trial on the grounds that the action raises difficult questions, has been affirmed repeatedly in the last century: see *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (C.A.); *Evans v. Barclays Bank and Galloway*, [1924] W.N. 97 (C.A.); *Kemsley v. Foot*, [1951] 1 T.L.R. 197 (C.A.); and *Nagle v. Feilden*, [1966] 2 Q.B. 633 (C.A.). Lord Justice Fletcher Moulton's observations in *Dyson*, *supra*, at pp. 418-19, are particularly instructive:

> Now it is unquestionable that, both under the inherent power of the Court and also under a specific rule to that effect made under the Judicature Act, the Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the Courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of

Ainsi, le fait que l'action du demandeur soit complexe ne pouvait justifier la radiation de la déclaration. Les affaires complexes qui révélaient des questions juridiques de fond étaient tranchées de la façon la plus appropriée au procès où la preuve relative aux faits pouvait être présentée ainsi que des arguments sur le bien-fondé de l'action du demandeur.

L'exigence qu'il soit «évident et manifeste» que la totalité ou une partie de la déclaration ne révèle aucune cause d'action raisonnable pour qu'elle puisse être radiée ainsi que l'affirmation qu'il ne convient particulièrement pas d'utiliser la procédure sommaire de la règle pour empêcher une partie d'ester en justice parce que l'action soulève des questions difficiles a été confirmée à maintes reprises au cours du dernier siècle: voir *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (C.A.), *Evans v. Barclays Bank and Galloway*, [1924] W.N. 97 (C.A.), *Kemsley v. Foot*, [1951] 1 T.L.R. 197 (C.A.), et *Nagle v. Feilden*, [1966] 2 Q.B. 633 (C.A.). Les observations du lord juge Fletcher Moulton dans l'arrêt *Dyson*, précité, aux pp. 418 et 419, sont particulièrement révélatrices:

> [TRADUCTION] Il est incontestable, tant en vertu du pouvoir inhérent de la cour qu'en vertu d'une règle précise édictée en ce sens en vertu de la Judicature Act, que la cour a le droit de mettre fin à une action à cette étape si elle est présentée de façon injustifiée et sans apparence de fondement de sorte que permettre qu'elle franchisse les étapes ordinaires jusqu'au procès reviendrait à assujettir le défendeur à des vexations au moyen du processus judiciaire lorsqu'à quelque étape que ce soit il ne pouvait faire aucun doute que l'action était non fondée. Mais il y a toute une distinction entre cette décision et le rejet sommaire des actions parce que le juge en chambre ne croit pas qu'elle pourra réussir en fin de compte, et les cours ont considéré à juste titre que ce pouvoir de mettre fin à une action et de la trancher sans audition doit être utilisé très modérément et rarement, si jamais, sauf dans les cas où l'action constitue un recours abusif à la procédure judiciaire. On a répété à maintes reprises que cette procédure n'a pas pour but de remplacer l'ancien moyen d'irrecevabilité par lequel le défendeur contestait la validité en droit de l'action du demandeur. Les divergences quant au droit, tout comme les divergences quant aux faits, doivent normalement faire l'objet d'une décision au procès à la suite d'une audience devant le tribunal et non se voir privées d'une audition devant le tribunal par une ordonnance d'un

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such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a Court. To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad. [Emphasis added.]

A more recent and no less instructive discussion of these principles may be found in Lord Pearson's reasons in *Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094 (C.A.). I note that in *Drummond-Jackson* the Court of Appeal dealt with the *Rules of the Supreme Court*, O. 18, r. 19 (the provision that replaced R.S.C. O. 25, r. 4 in 1962), a provision very similar to the rules that now govern the striking out of pleadings in Canada:

19. —(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—

(*a*) it discloses no reasonable cause of action or defence, as the case may be; or

(*b*) it is scandalous, frivolous or vexatious; or

(*c*) it may prejudice, embarrass or delay the fair trial of the action; or

(*d*) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(*a*).

Responding to Lord Denning's suggestion that the potential length and complexity of a trial should be taken into account when considering whether to strike out a statement of claim, Lord Pearson (with whom Sir Gordon Willmer concurred in separate reasons) reaffirmed the proposition that Lord Justice Lindley had advanced some

juge en chambre. La preuve on ne peut plus claire de l'objet de la règle est que le demandeur ne peut interjeter appel de plein droit de la décision du juge en chambre dans le cas d'une telle ordonnance. En ce qui concerne ces règles, cette procédure permet de mettre fin à une action sans même que soit soumise à un tribunal la question de son bien-fondé. À mon avis, il est évident que notre système judiciaire ne permettrait jamais qu'un demandeur soit ainsi privé d'un jugement sans qu'une cour ait examiné son droit d'être entendu, sauf dans les cas où la cause d'action est manifestement et presque incontestablement mal fondée. [Je souligne.]

Dans les motifs qu'il a rédigés dans l'affaire *Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094 (C.A.), lord Pearson nous fournit une analyse plus récente et tout aussi révélatrice de ces principes. Je note que, dans l'arrêt *Drummond-Jackson*, la Cour d'appel a examiné la règle 19 de l'ordonnance 18 des *Rules of the Supreme Court* (qui a remplacé la règle 4 de l'ordonnance 25 des R.S.C. en 1962), une disposition très semblable aux règles qui régissent maintenant la radiation des actes de procédure au Canada:

[TRADUCTION] 19. —(1) La cour peut, à toute étape d'une instance, ordonner que soient radiés ou modifiés tout acte de procédure ou l'inscription sur un bref dans l'action ou quoi que ce soit dans tout acte de procédure ou l'inscription pour le motif—

a) qu'ils ne révèlent aucune cause d'action ou défense raisonnable, selon le cas;

b) qu'ils sont scandaleux, frivoles ou vexatoires;

c) qu'ils peuvent nuire à l'instruction équitable de l'action, ou encore la gêner ou la retarder; ou

d) qu'ils constituent par ailleurs un recours abusif au tribunal;

et peut ordonner que l'action soit suspendue ou rejetée ou qu'un jugement soit rendu en conséquence, selon le cas.

(2) Aucune preuve n'est admissible à l'appui d'une requête présentée en application de l'alinéa (1)*a*).

Répondant à l'idée exprimée par lord Denning que la longueur et la complexité potentielles d'une instance devrait être prise en compte pour déterminer si une déclaration doit être radiée, lord Pearson (aux motifs duquel sir Gordon Willmer a souscrit dans une opinion distincte) a réaffirmé la proposition que le lord juge Lindley avait avancée

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eighty years earlier in *Attorney-General of the Duchy of Lancaster*: length and complexity were not appropriate factors to consider when deciding whether a statement of claim should be struck out. Lord Pearson said at pp. 1101-02:

Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.

. . .

In my opinion the traditional and hitherto accepted view—that the power should only be used in plain and obvious cases—is correct according to the evident intention of the rule for several reasons. First, there is in r 19 (1) (*a*) the expression 'reasonable cause of action' to which Sir Nathaniel Lindley MR called attention in *Hubbuck & Sons Ltd v. Wilkinson, Heywood and Clark Ltd.* No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by r 19 (2)) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In *Nagle v Feilden* Danckwerts LJ said:

'The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the court'.

Salmon LJ said:

'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable'.

Secondly, r 19 (1) (*a*) takes some colour from its context in r 19 (1) (*b*)—'scandalous, frivolous and vexatious'—r 19 (1) (*c*)—'prejudice, embarrass or delay the fair trial of the action'—and r. 19 (1) (*d*)—otherwise an abuse of the process of the court'. The defect referred to in r 19 (1) (*a*) is a radical defect ranking with those referred to in the other paragraphs. Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not

quelque quatre-vingts ans plus tôt dans l'arrêt *Attorney-General of the Duchy of Lancaster*: la longueur et la complexité ne sont pas des facteurs qu'il convient de prendre en considération pour décider si une déclaration doit être radiée. Lord Pearson a affirmé, aux pp. 1101 et 1102:

[TRADUCTION] Depuis plusieurs années, bon nombre de précédents ont fermement établi que le pouvoir de radier une déclaration parce qu'elle ne révèle aucune cause d'action raisonnable est un pouvoir sommaire qui ne doit être exercé que dans des cas évidents et manifestes.

. . .

À mon avis, l'opinion traditionnelle suivie jusqu'à présent—que le pouvoir ne devrait être exercé que dans des cas évidents et manifestes—est juste pour plusieurs raisons compte tenu de l'objet évident de la règle. Premièrement, on relève dans la règle 19(1)*a*) l'expression «cause d'action ... raisonnable» sur laquelle le maître des rôles Nathaniel Lindley a attiré notre attention dans l'arrêt *Hubbuck & Sons Ltd. v. Wilkinson, Heywood and Clark Ltd.* On ne peut fournir de paraphrase exacte, mais je pense que l'expression «cause d'action ... raisonnable» signifie une cause d'action qui a quelque chance de succès lorsque (comme l'exige la règle 19(2)) on ne considère que les allégations contenues dans les actes de procédure. Si l'examen de ces allégations révèle que la cause d'action invoquée est vouée à l'échec, la déclaration devrait être radiée. Dans l'arrêt *Nagle v. Feilden*, le lord juge Danckwerts affirme:

«Le recours sommaire entériné dans cette action ne devrait être employé que dans les cas évidents et manifestes lorsque l'action n'a aucune chance de succès ou constitue en quelque sorte un recours abusif à la cour».

Le lord juge Salmon a affirmé:

«Il est bien établi qu'une déclaration ne devrait pas être radiée et qu'un demandeur ne devrait pas être privé d'un jugement à moins que la cause ne puisse faire l'objet d'un débat».

Deuxièmement, la règle 19(1)*a*) acquiert un certain sens du contexte de la règle 19(1)*b*)—«scandaleux, frivoles et vexatoires»—de la règle 19(1)*c*)—«nuire à l'instruction équitable de l'action, ou encore la gêner ou la retarder»—et de la règle 19(1)*d*)—constituent par ailleurs un recours abusif au tribunal». Le vice dont il est question à la règle 19(1)*a*) est fondamental et se range parmi ceux qui sont mentionnés dans les autres alinéas. Troisièmement, une demande de radiation de la déclaration en vertu de cette règle est présentée à l'une des toutes premières étapes de l'action lorsqu'il n'existe que la

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be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success. [Emphasis added.]

déclaration sans autre acte de procédure et sans aucun élément de preuve. Le demandeur ne devrait pas être privé d'un jugement à cette toute première étape à moins qu'il ne soit très clair que la cause d'action qu'il invoque n'a aucune chance de succès. [Je souligne.]

Lord Pearson concluded at p. 1102:

Lord Pearson conclut, à la p. 1102:

That is the basis of the rule and practice on which one has to approach the question whether the plaintiff's statement of claim in the present case discloses any reasonable cause of action. It is not permissible to anticipate the defence or defences—possibly some very strong ones—which the defendants may plead and be able to prove at the trial, nor anything which the plaintiff may plead in reply and seek to rely on at the trial. [Emphasis added.]

[TRADUCTION] C'est là le fondement de la règle et de la pratique qui doivent servir à déterminer si la déclaration du demandeur en l'espèce révèle une cause d'action raisonnable. Il n'est pas permis d'anticiper la défense ou les défenses—il peut en exister de très bien fondées—que les défendeurs peuvent faire valoir et être en mesure d'établir au procès, ni quoi que ce soit que le demandeur peut invoquer en réponse et chercher à faire valoir au procès. [Je souligne.]

In England, then, the test that governs an application under R.S.C. O. 18, r. 19 has always been and remains a simple one: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? Is there a defect in the statement of claim that can properly be characterized as a "radical defect" ranking with the others listed in O. 18, r. 19? If it is plain and obvious that the action is certain to fail because it contains some such radical defect, then the relevant portions of the statement of claim may properly be struck out. To allow such an action to proceed, even although it was certain to fail, would be to permit the defendant to be "vexed" and would therefore amount to the very kind of abuse of the court's process that the rule was meant to prevent. But if there is a chance that the plaintiff might succeed, then that plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues of law and fact that might have to be addressed nor the potential for the defendant to present a strong defence should prevent a plaintiff from proceeding with his or her case. Provided that the plaintiff can present a "substantive" case, that case should be heard.

Ainsi, en Angleterre, le critère qui régit une requête présentée en vertu de la règle 19 de l'ordonnance 18 des R.S.C. a toujours été simple et le demeure: en supposant que les faits exposés dans la déclaration peuvent être prouvés, est-il «évident et manifeste» que la déclaration du demandeur ne révèle aucune cause d'action raisonnable? La déclaration est-elle entachée d'un vice que l'on peut correctement qualifier de [TRADUCTION] «vice fondamental» qui se range parmi les autres énumérés à la règle 19 de l'ordonnance 18? S'il est évident et manifeste que l'action est vouée à l'échec parce qu'elle contient un tel vice fondamental, il convient alors de radier les parties pertinentes de la déclaration. Permettre que cette action suive son cours, même si elle est vouée à l'échec, l'échec, reviendrait à assujettir le défendeur à des «vexations» et constituerait dès lors un recours abusif au tribunal du genre même de celui que la règle visait à prévenir. Mais si le demandeur a une chance de réussir, il ne devrait pas alors être [TRADUCTION] «privé d'un jugement». Ni la longueur ni la complexité des questions de droit et de fait qu'il pourrait être nécessaire d'examiner, ni la possibilité que le défendeur présente une défense bien fondée ne devrait empêcher un demandeur de poursuivre son action. Pourvu que le demandeur puisse présenter des questions «de fond», cette affaire devrait être entendue.

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(b) Canada

(i) *Ontario and British Columbia Courts of Appeal*

In Canada, provincial courts of appeal have long had to grapple with the very same issues concerning the rules with respect to statements of claim that courts in England have dealt with for over a century. As noted earlier, the rules of practice in this country are to a large extent modelled on England's rules of practice. It comes as no surprise, therefore, that the test Canadian courts of appeal have adopted is in essence the same one that the courts in England favour.

Ontario

In Ontario, for example, the Court of Appeal dealt with Rule 124 (the predecessor to Rule 21.01) in *Ross v. Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308 (C.A.). The rule followed closely the wording of England's R.S.C. 1883, O. 25, r. 4 and read as follows:

124. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

In *Ross*, Magee J.A. embraced the "plain and obvious" test developed in England, stating at p. 316:

That inherent jurisdiction is partly embodied in our Rule 124, which allows pleadings to be struck out if disclosing no reasonable cause of action or defence, and thereby, in such case, or if the action or defence is shewn to be vexatious or frivolous, the action may be stayed or dismissed or judgment be entered accordingly. The Rule has only been acted upon in plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence. [Emphasis added.]

Magee J.A. went on to note at p. 317:

To justify the use of Rule 124, a statement of claim should not be merely demurrable, but it should be

b) Le Canada

(i) *Les cours d'appel de l'Ontario et de la Colombie-Britannique*

Au Canada, les cours d'appel provinciales ont eu à débattre pendant longtemps les mêmes questions concernant les règles applicables aux déclarations, dont ont été saisis les tribunaux d'Angleterre pendant plus d'un siècle. Comme je l'ai déjà souligné, les règles de pratique de notre pays s'inspirent en grande partie des règles de pratique de l'Angleterre. Il n'y a donc rien de surprenant à ce que le critère adopté par les cours d'appel canadiennes soit essentiellement le même que celui favorisé par les tribunaux anglais.

L'Ontario

Par exemple, en Ontario, la Cour d'appel a examiné la règle 124 (qui a précédé la règle 21.01) dans l'arrêt *Ross v. Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308 (C.A.). La règle suivait de près la formulation de la règle 4 de l'ordonnance 25 des R.S.C. de 1883 de l'Angleterre et se lisait comme suit:

[TRADUCTION] 124. Un juge peut ordonner la radiation de tout acte de procédure pour le motif qu'il ne révèle aucune cause d'action ou défense raisonnable et, dans un tel cas ou lorsqu'il se révèle que la cause d'action ou la défense est frivole ou vexatoire, il peut ordonner que l'action soit suspendue ou rejetée ou qu'un jugement soit rendu en conséquence.

Dans l'arrêt *Ross*, le juge Magee a fait sien le critère de «évident et manifeste» élaboré en Angleterre, affirmant à la p. 316:

[TRADUCTION] Cette compétence inhérente se retrouve en partie dans notre règle 124 qui permet la radiation d'un acte de procédure qui ne révèle aucune cause d'action ou défense raisonnable et qui permet donc, dans un tel cas, ou lorsqu'il se révèle que la cause d'action ou la défense est vexatoire ou frivole, que l'action soit suspendue ou rejetée ou qu'un jugement soit rendu en conséquence. La règle n'a été utilisée que dans les cas évidents et manifestes, et il ne devrait en être ainsi que lorsque la cour est convaincue qu'il s'agit d'un cas qui ne soulève aucun doute et qu'il n'y a aucune cause d'action ou défense raisonnable. [Je souligne.]

Le juge Magee a poursuivi, à la p. 317:

[TRADUCTION] Pour justifier le recours à la règle 124, une déclaration ne devrait pas simplement pouvoir faire

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manifest that it is something worse, so that it will not be curable by amendment: *Dadswell* v. *Jacobs* (1887), 34 Ch. D. 278, 281; *Republic of Peru* v. *Peruvian Guano Co.* (1887), 36 Ch. D. 489; and it is not sufficient that the plaintiff is not likely to succeed at the trial: *Boaler* v. *Holder* (1886), 54 L.T.R. 298.

At an early date, then, the Ontario Court of Appeal had modelled its approach to Rule 124 on the approach that had been consistently favoured in England. And over time the Ontario Court of Appeal has gone on to show the same concern that statements of claim not be struck out in anything other than the clearest of cases. As Laidlaw J.A. put it in *Rex ex rel. Tolfree v. Clark*, [1943] O.R. 501 (C.A.), at p. 515:

> The power to strike out proceedings should be exercised with great care and reluctance. Proceedings should not be arrested and a claim for relief determined without trial, except in cases where the Court is well satisfied that a continuation of them would be an abuse of procedure: *Evans v. Barclay's Bank et al.*, [1924] W.N. 97. But if it be made clear to the Court that an action is frivolous or vexatious, or that no reasonable cause of action is disclosed, it would be improper to permit the proceedings to be maintained.

More recently, in *Gilbert Surgical Supply Co. v. F. W. Horner Ltd.*, [1960] O.W.N. 289 (C.A.), at pp. 289-90, Aylesworth J.A. observed that the fact that an action might be novel was no justification for striking out a statement of claim. The court would still have to conclude that "the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown".

Thus, the Ontario Court of Appeal has firmly embraced the "plain and obvious" test and has made clear that it too is of the view that the test is rooted in the need for courts to ensure that their process is not abused. The fact that the case the plaintiff wishes to present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action.

l'objet d'un moyen d'irrecevabilité, mais il devrait être manifeste que la situation est pire au point de ne pouvoir être corrigée par une modification: *Dadswell* v. *Jacobs* (1887), 34 Ch. D. 278, p. 281, *Republic of Peru* v. *Peruvian Guano Co.* (1887), 36 Ch. D. 489; et il ne suffit pas que l'action du demandeur n'ait vraisemblablement aucune chance de réussir: *Boaler* v. *Holder* (1886), 54 L.T.R. 298.

Ainsi, très tôt, la Cour d'appel de l'Ontario a fondé son interprétation de la règle 124 sur celle que les tribunaux avaient toujours favorisée en Angleterre. Avec le temps, la Cour d'appel de l'Ontario a manifesté le même souci que les déclarations ne soient radiées que dans les cas les plus clairs. Comme le juge Laidlaw l'explique dans l'arrêt *Rex ex rel. Tolfree v. Clark*, [1943] O.R. 501 (C.A.), à la p. 515:

> [TRADUCTION] C'est avec beaucoup de prudence et d'hésitation que le pouvoir de radier des procédures devrait être exercé. Les procédures ne devraient pas être arrêtées et les demandes de redressement décidées sans procès, sauf dans les cas où la cour est convaincue que leur poursuite constituerait un abus de procédure: *Evans v. Barclay's Bank et al.*, [1924] W.N. 97. Mais si l'on démontre clairement à la cour qu'une action est frivole ou vexatoire, ou qu'elle ne révèle aucune cause d'action raisonnable, il ne conviendrait pas de permettre que les procédures se poursuivent.

Plus récemment, dans l'arrêt *Gilbert Surgical Supply Co. v. F. W. Horner Ltd.*, [1960] O.W.N. 289 (C.A.), aux pp. 289 et 290, le juge Aylesworth a fait remarquer que le fait qu'une action puisse être inédite ne justifie pas la radiation d'une déclaration. La cour devrait quand même conclure que [TRADUCTION] «l'action de la demanderesse n'avait aucune chance d'être accueillie ou qu'il était manifeste et hors de tout doute qu'aucune cause d'action raisonnable n'avait été établie».

Ainsi, la Cour d'appel de l'Ontario a fermement retenu le critère des cas «évidents et manifestes» et affirmé clairement qu'elle aussi est d'avis que le critère découle de la nécessité pour les tribunaux de veiller à ce qu'on ne recoure pas à eux de façon abusive. Le fait que la preuve que le demandeur veut présenter puisse comporter des questions complexes de fait et de droit ou qu'elle puisse soulever une nouvelle formulation du droit ne devrait pas l'empêcher de poursuivre son action.

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British Columbia

In British Columbia the Court of Appeal has approached the matter in a similar way. The predecessor to the rule that Carey Canada invokes in this appeal was worded in exactly the same way as England's R.S.C. 1883, O. 25, r. 4. Not surprisingly the British Columbia Court of Appeal's treatment of that rule has been similar to that taken in England and Ontario. For example, in *Minnes v. Minnes* (1962), 39 W.W.R. 112 (B.C.C.A.), Tysoe J.A. observed at p. 122:

> In my respectful view it is only in plain and obvious cases that recourse should be had to the summary process under O. 25, R. 4, and the power given by the Rule should be exercised only where the case is absolutely beyond doubt. So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by a judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out. If the action involves investigation of serious questions of law or questions of general importance, or if facts are to be known before rights are definitely decided, the Rule ought not to be applied. [Emphasis added.]

For his part Norris J.A. noted at p. 116 (agreeing with Tysoe J.A.):

> I might add that upon the motion, with respect, it was not for the learned trial judge as it is not for this court to consider the issues between the parties as they would be considered on trial. All that was required of the plaintiff on the motion was that she should show that on the statement of claim, accepting the allegations therein made as true, there was disclosed from that pleading with such amendments as might reasonably be made, a proper case to be tried. [Emphasis added.]

The law as stated in *Minnes v. Minnes* was recently reaffirmed in *McNaughton and McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.), at p. 23, *per* McLachlin J.A. Similarly, Anderson and Esson JJ.A. relied on *Minnes v. Minnes* in this appeal.

Once again then the "plain and obvious" test has been firmly embraced. The British Columbia

La Colombie-Britannique

En Colombie-Britannique, la Cour d'appel a abordé la question d'une façon similaire. La règle qui a précédé celle qu'invoque Carey Canada en l'espèce était formulée exactement de la même façon que la règle 4 de l'ordonnance 25 des R.S.C. de 1883 de l'Angleterre. Il n'est pas étonnant que la Cour d'appel de la Colombie-Britannique ait interprété cette règle de la même façon que l'Angleterre et l'Ontario. Par exemple, dans l'arrêt *Minnes v. Minnes* (1962), 39 W.W.R. 112 (C.A.C.-B.), le juge Tysoe fait remarquer, à la p. 122:

> [TRADUCTION] À mon avis, ce n'est que dans les cas évidents et manifestes que l'on devrait recourir à la procédure sommaire de la règle 4 de l'ordonnance 25 et le pouvoir conféré par la règle ne devrait être exercé que si le cas est absolument au-delà de tout doute. Dans la mesure où la déclaration, telle qu'elle existe ou telle qu'elle peut être modifiée, révèle l'existence d'une question susceptible d'instruction par un juge ou un jury, le simple fait que la cause soit faible ou ait peu de chance de réussir ne justifie pas de la radier. Si l'action comporte l'examen de questions de droit sérieuses ou de questions d'importance générale, ou si les faits doivent être connus avant de se prononcer définitivement sur les droits, la règle ne doit pas être appliquée. [Je souligne.]

De son côté, le juge Norris souligne, à la p. 116 (partageant l'opinion du juge Tysoe):

> [TRADUCTION] En toute déférence, je pourrais ajouter que, suite à la requête, il n'appartenait pas au juge de première instance, comme il ne nous appartient pas de le faire, d'examiner les questions que soulèvent les parties comme elles le seraient au procès. À l'étape de la requête, il suffisait que la demanderesse établisse que la déclaration, en tenant pour avérées les allégations qu'elle contenait, révélait, avec les modifications que l'on pourrait raisonnablement apporter, une véritable question à trancher. [Je souligne.]

Le juge McLachlin de la Cour d'appel a récemment confirmé dans l'arrêt *McNaughton and McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.), à la p. 23, la règle de droit formulée dans l'arrêt *Minnes v. Minnes*. De même, les juges Anderson et Esson se sont appuyés sur l'arrêt *Minnes v. Minnes* dans le présent pourvoi.

Encore une fois, le critère des cas «évidents et manifestes» a clairement été retenu. La Cour d'ap-

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Court of Appeal has confirmed that the summary proceedings available under the rule in question do not afford an appropriate forum in which to engage in a detailed examination of the strengths and weaknesses of the plaintiff's case. The sole question is whether, assuming that all the facts the plaintiff alleges are true, the plaintiff can present a question "fit to be tried". The complexity or novelty of the question that the plaintiff wishes to bring to trial should not act as a bar to that trial taking place.

(ii) *Supreme Court of Canada*

While this Court has had a somewhat limited opportunity to consider how the rules regarding the striking out of a statement of claim are to be applied, it has nonetheless consistently upheld the "plain and obvious" test. Justice Estey, speaking for the Court in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, stated at p. 740:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co.*

I had occasion to affirm this proposition in *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441. At pages 486-87 I provided the following summary of the law in this area (with which the rest of the Court concurred):

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, *i.e.* a cause of action "with some chance of success" (*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dowson v. Government of Canada* (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed?"

And at p. 477 I observed:

> It would seem then that as a general principle the Courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. The fact that

pel de la Colombie-Britannique a confirmé que la procédure sommaire à laquelle il est possible de recourir en vertu de la règle en question n'établit pas une tribune où il convient d'examiner en détail les points forts et les points faibles de l'action du demandeur. La seule question est de savoir si, en tenant pour avérés tous les faits allégués par le demandeur, celui-ci peut présenter une question «susceptible d'instruction». La complexité ou la nouveauté de la question que le demandeur veut faire trancher au procès ne devrait pas constituer un empêchement à la tenue du procès.

(ii) *La Cour suprême du Canada*

Bien que notre Cour n'ait eu que peu d'occasions d'examiner l'application des règles concernant la radiation d'une déclaration, elle a toutefois toujours confirmé le critère des cas «évidents et manifestes». Le juge Estey, s'exprimant au nom de la Cour dans l'arrêt *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735, affirme, à la p. 740:

> Comme je l'ai dit, il faut tenir tous les faits allégués dans la déclaration pour avérés. Sur une requête comme celle-ci, un tribunal doit rejeter l'action ou radier une déclaration du demandeur seulement dans les cas évidents et lorsqu'il est convaincu qu'il s'agit d'un cas «au-delà de tout doute»: *Ross v. Scottish Union and National Insurance Co.*

J'ai eu l'occasion de confirmer cette affirmation dans l'arrêt *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441. Aux pages 486 et 487, j'ai présenté le résumé suivant du droit dans ce domaine (auquel les autres membres de la Cour ont souscrit):

> Le droit donc paraît clair. Les faits articulés doivent être considérés comme démontrés. Alors, la question est de savoir s'ils révèlent une cause raisonnable d'action, c.-à-d. une cause d'action «qui a quelques chances de succès» (*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) ou, comme dit le juge Le Dain dans l'arrêt *Dowson c. Gouvernement du Canada* (1981), 37 N.R. 127 (C.A.F.), à la p. 138, est-il «évident et manifeste que l'action ne saurait aboutir»?

Et, à la p. 477, j'ai fait remarquer:

> Il semble donc qu'en règle générale les tribunaux hésitent à radier une déclaration pour le motif qu'elle ne révèle aucune cause raisonnable d'action. La nécessité

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reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs. [Emphasis added.]

Most recently, in *Dumont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279, I made clear at p. 280 that it was my view that the test set out in *Inuit Tapirisat* was the correct test. The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".

Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

The question therefore to which we must now turn in this appeal is whether it is "plain and obvious" that the plaintiff's claims in the tort of conspiracy disclose no reasonable cause of action or whether the plaintiff has presented a case that is "fit to be tried", even although it may call for a complex or novel application of the tort of conspiracy.

(2) *Should Mr. Hunt's Allegations Based on the Tort of Conspiracy Be Struck From his Statement of Claim?*

In the last decade the tort of conspiracy has received a considerable amount of attention. In

d'un débat pour arriver à une conclusion sur ce point préliminaire n'est pas un élément décisif et la nouveauté de la cause d'action ne joue pas contre les demandeurs. [Je souligne.]

Plus récemment, dans l'arrêt *Dumont c. Canada (Procureur général)*, [1990] 1 R.C.S. 279, j'ai expliqué clairement, à la p. 280, que j'estimais que le critère formulé dans l'arrêt *Inuit Tapirisat* était le bon critère. Le critère est toujours de savoir si l'issue de l'affaire est «évidente et manifeste» ou «au-delà de tout doute raisonnable».

Ainsi, au Canada, le critère régissant l'application de dispositions comme la règle 19(24)a) des *Rules of Court* de la Colombie-Britannique est le même que celui régissant une requête présentée en vertu de la règle 19 de l'ordonnance 18 des R.S.C.: dans l'hypothèse où les faits mentionnés dans la déclaration peuvent être prouvés, est-il «évident et manifeste» que la déclaration du demandeur ne révèle aucune cause d'action raisonnable? Comme en Angleterre, s'il y a une chance que le demandeur ait gain de cause, alors il ne devrait pas être «privé d'un jugement». La longueur et la complexité des questions, la nouveauté de la cause d'action ou la possibilité que les défendeurs présentent une défense solide ne devraient pas empêcher le demandeur d'intenter son action. Ce n'est que si l'action est vouée à l'échec parce qu'elle contient un vice fondamental qui se range parmi les autres énumérés à la règle 19(24) des *Rules of Court* de la Colombie-Britannique que les parties pertinentes de la déclaration du demandeur devraient être radiées en application de la règle 19(24)a).

La question qu'il nous faut maintenant trancher en l'espèce est de savoir s'il est «évident et manifeste» que les prétentions du demandeur en ce qui concerne le délit civil de complot ne révèlent aucune cause d'action raisonnable ou si le demandeur a présenté une question «susceptible d'instruction», même si elle peut exiger une application complexe ou nouvelle du délit civil de complot.

(2) *Les allégations de M. Hunt fondées sur le délit civil de complot devraient-elles être radiées de sa déclaration?*

Au cours de la dernière décennie, le délit civil de complot a fait l'objet de plusieurs décisions. Par

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England, for example, both the House of Lords and the Court of Appeal have recently had occasion to review the tort in some detail. These decisions have made clear that the tort of conspiracy may apply in at least two situations: (i) where the defendants agree to use lawful means to harm the plaintiff and (ii) where the defendants use unlawful means to harm the plaintiff. The law with respect to the first situation is not in doubt:

> If A and B agree to commit acts which would be lawful if done by either of them alone but which are done in combination and cause damage to C, no tortious conspiracy actionable at the suit of C exists unless the predominant purpose of A and B in making the agreement and carrying out the acts which cause the damage is to injure C and not to protect the lawful commercial interests of A and B. This proposition is established by five decisions at the highest level: *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.* [1892] A.C. 25; *Quinn v. Leathem*, [1901] A.C. 495; *Sorrell v. Smith*, [1925] A.C. 700; *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 and *Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)*, [1982] A.C. 173. [See: *Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, [1989] 3 W.L.R. 563, at p. 593, *per* Slade L.J.] [Emphasis added.]

Courts in England have, however, encountered greater difficulty in stating with precision the applicable principles governing situations in which unlawful means are employed. In particular, they have struggled to decide whether the plaintiff must establish, not just that the defendants used means that were unlawful and resulted in harm to the plaintiff, but also that the defendants actually intended to harm the plaintiff.

In *Lonrho Ltd. v. Shell Petroleum Co. (No. 2)*, [1982] A.C. 173, the House of Lords dealt with a consultative case stated by arbitrators in which it was asked to consider whether the tort of conspiracy could be extended to embrace a situation where the agreement in question resulted in a contravention of penal law (unlawful means) but did not include an intention to injure the plaintiff.

exemple, en Angleterre, tant la Chambre des lords que la Cour d'appel ont eu récemment l'occasion d'examiner de façon quelque peu détaillée le délit en question. Ces arrêts ont établi clairement que le délit civil de complot peut s'appliquer à tout le moins dans deux situations: (i) lorsque les défendeurs conviennent de recourir à des moyens légaux pour causer un préjudice au demandeur et (ii) lorsque les défendeurs recourent à des moyens illégaux pour causer un préjudice au demandeur. En ce qui concerne la première situation, le droit est clair:

> [TRADUCTION] Si A et B conviennent d'accomplir des actes qui seraient légaux s'ils étaient accomplis par l'un d'entre eux seulement mais qu'ils accomplissent ensemble et causent un préjudice à C, celui-ci ne peut intenter une action fondée sur le délit civil de complot à moins que l'objet prédominant visé par A et B en concluant leur entente et en accomplissant les actes qui causent le préjudice soit de nuire à C et non de protéger les intérêts commerciaux légitimes de A et B. Cette affirmation est confirmée par cinq arrêts rendus par les plus hautes instances: *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.*, [1892] A.C. 25; *Quinn v. Leathem*, [1901] A.C. 495; *Sorrell v. Smith*, [1925] A.C. 700; *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435, et *Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)*, [1982] A.C. 173. [Voir: *Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, [1989] 3 W.L.R. 563, à la p. 593, le lord juge Slade]. [Je souligne.]

En Angleterre, les tribunaux ont cependant éprouvé plus de difficultés à formuler avec précision les principes applicables qui régissent les situations dans lesquelles des moyens illégaux sont utilisés. En particulier, ils ont eu beaucoup de mal à décider si le demandeur devait établir non seulement que les défendeurs ont utilisé des moyens illégaux qui ont causé un préjudice au demandeur, mais également si les défendeurs avaient réellement eu l'intention de causer un préjudice au demandeur.

Dans l'arrêt *Lonrho Ltd. v. Shell Petroleum Co. (No. 2)*, [1982] A.C. 173, la Chambre des lords était saisie d'un déféré consultatif formulé par des arbitres dans lequel on demandait d'examiner la possibilité d'étendre la portée du délit civil de complot pour comprendre une situation où la convention en question avait donné lieu à une violation du droit pénal (moyens illégaux), mais n'avait

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In the process of deciding whether the tort should be so extended Lord Diplock noted at pp. 188-89:

> My Lords, conspiracy as a criminal offence has a long history. It consists of "the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim, or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it." I cite from Viscount Simon L.C.'s now classic speech in *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435, 439. Regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the cause of action is damage to the plaintiff; so long as it remains unexecuted the agreement which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement.

Lord Diplock went on to observe that he was of the view that the rationale that had apparently fuelled the development of the tort in the late nineteenth and early twentieth centuries, namely that "a combination may make oppressive or dangerous that which if proceeded only from a single person would be otherwise" (see: *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598, at p. 616, *per* Bowen L.J.) was somewhat anachronistic in light of modern commercial developments. Nevertheless he did not feel that this meant that the tort could now be dispensed with. He said at p. 189:

> But to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or B.P. does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II. The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to

comporté aucune intention de nuire au demandeur. En décidant si la portée du délit devait être ainsi étendue, lord Diplock souligne, aux pp. 188 et 189:

> [TRADUCTION] Vos Seigneuries, le complot comme infraction criminelle existe depuis longtemps. Il s'agit «d'une convention entre deux ou plusieurs personnes visant une fin illégale, soit comme but ultime ou seulement comme moyen de le réaliser, et le crime est complet dès qu'il y a convention, même si rien n'est accompli pour y donner suite.» Je reproduis les propos maintenant classiques du lord chancelier, le vicomte Simon, dans l'arrêt *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435, p. 439. Vu comme un délit civil, cependant, le complot est une cause d'action très exceptionnelle. Elle est fondée sur un préjudice causé au demandeur; tant que la convention, qui à elle seule constitue le crime de complot, n'est pas exécutée, il n'en résulte aucun préjudice; seuls peuvent avoir cet effet les actes accomplis en exécution de la convention. Donc le délit civil, à la différence du crime, consiste non pas en la convention, mais en l'action concertée entreprise pour l'exécuter.

Lord Diplock a poursuivi en soulignant qu'il était d'avis que la justification rationnelle manifestement à l'origine de l'apparition du délit à la fin du dix-neuvième et au début du vingtième siècles, c'est-à-dire [TRADUCTION] «une combinaison qui peut rendre oppressif ou dangereux ce qui ne le serait pas si cela provenait d'une seule personne» (voir: *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598, à la p. 616, le lord juge Bowen) constituait en quelque sorte un anachronisme compte tenu de l'évolution moderne du commerce. Quoi qu'il en soit, il n'était pas d'avis que cela signifiait que le délit devait maintenant être écarté. Il affirme, à la p. 189:

> [TRADUCTION] Mais dire aujourd'hui que les actes accomplis par un épicier du coin de concert avec un autre épicier sont plus oppressifs et dangereux pour un concurrent que les mêmes actes accomplis par une chaîne de supermarchés appartenant à un seul propriétaire ou qu'un conglomérat multinational comme Lonrho ou une compagnie pétrolière comme Shell ou B.P. n'exerce pas un pouvoir économique plus grand que toute combinaison de petites entreprises, revient à se fermer les yeux sur ce qui s'est passé dans le monde commercial et industriel depuis le début du siècle et, en particulier, depuis la fin de la Deuxième Guerre mondiale. Selon moi, cette Chambre doit reconnaître le délit civil de complot en vue de nuire aux intérêts commer-

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the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today. It was applied by this House 80 years ago in *Quinn* v. *Leathem*, [1901] A.C. 495, and accepted as good law in the *Crofter* case [1942] A.C. 435, where it was made clear that injury to the plaintiff and not the self-interest of the defendants must be the predominant purpose of the agreement in execution of which the damage-causing acts were done.

Having set out this groundwork and having thereby confirmed that the tort of conspiracy was applicable in circumstances where the defendants entered into an agreement the predominant purpose of which was to injure the plaintiff, Lord Diplock turned to the question whether the tort should be extended beyond these confines. He concluded at p. 189:

This House, in my view, has an unfettered choice whether to confine the civil action of conspiracy to the narrow field to which alone it has an established claim or whether to extend this already anomalous tort beyond those narrow limits that are all that common sense and the application of the legal logic of the decided cases require.

My Lords, my choice is unhesitatingly the same as that of Parker J. and all three members of the Court of Appeal. I am against extending the scope of the civil tort of conspiracy beyond acts done in execution of an agreement entered into by two or more persons for the purpose not of protecting their own interests but of injuring the interests of the plaintiff.

Lord Diplock's observations made clear that in order to succeed with the tort of conspiracy in England a plaintiff would have to demonstrate that the purpose for which parties acted in accordance with their agreement was to harm the plaintiff. The English Court of Appeal has recently had an opportunity to consider Lord Diplock's judgment in *Lonrho* (see: *Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, *supra*) and has confirmed at p. 604 that "the House plainly intended the presence of a predominant intention to injure to be the touchstone of an actionable conspiracy". The Court of Appeal continued:

ciaux du demandeur lorsque tel est l'objet prédominant de la convention entre les défendeurs et des actes accomplis en exécution de cette convention qui ont causé un préjudice au demandeur, car il s'agit d'un délit civil trop bien établi pour être écarté, quelque exceptionnel qu'il puisse paraître aujourd'hui. Cette Chambre l'a appliqué il y a 80 ans dans l'arrêt *Quinn* v. *Leathem*, [1901] A.C. 495, et a confirmé sa validité en droit dans l'arrêt *Crofter*, [1942] A.C. 435, où l'on a signalé clairement que l'accord en exécution duquel les actes dommageables ont été accomplis doit avoir pour objet prédominant de causer un préjudice au demandeur et non pas simplement de servir les intérêts personnels des défendeurs.

Après avoir établi ces paramètres et ainsi confirmé que le délit civil de complot s'appliquait dans des circonstances où les défendeurs ont conclu une entente dont l'objet prédominant était de nuire au demandeur, lord Diplock s'est demandé si la portée du délit devait être étendue au-delà de ces limites. Il conclut, à la p. 189:

[TRADUCTION] À mon avis, cette Chambre a l'embarras du choix; elle peut confiner l'action civile en matière de complot dans le domaine restreint où elle est reconnue ou elle peut étendre ce délit, déjà perçu comme une anomalie, au-delà de ces limites étroites qui correspondent à tout ce que le sens commun et l'application de la logique juridique de la jurisprudence exigent.

Vos Seigneuries, je me range sans hésitation à l'avis du juge Parker et des trois membres de la Cour d'appel. Je m'oppose à ce que le délit civil de complot soit étendu au-delà des actes accomplis en exécution d'une convention conclue par au moins deux personnes, non pas pour protéger leurs propres intérêts, mais dans la seule intention de nuire à ceux du demandeur.

Les observations de lord Diplock établissent clairement que, pour avoir gain de cause dans une action fondée sur le délit civil de complot en Angleterre, un demandeur doit démontrer que l'objet pour lequel les parties ont agi conformément à leur entente était de nuire au demandeur. La Cour d'appel de l'Angleterre a récemment eu l'occasion d'examiner la décision de lord Diplock dans l'arrêt *Lonrho* (voir: *Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, précité) et a confirmé, à la p. 604, que [TRADUCTION] «la Chambre a clairement voulu que la présence d'une intention prédominante de nuire constitue la pierre angulaire d'un complot donnant droit à une action». La Cour d'appel poursuit:

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Where the predominant intention to injure is absent but the defendants pursuant to agreement commit torts against the plaintiff, the House held, we conclude, that common sense and the legal logic of the decided cases are satisfied if the plaintiff is denied a remedy in conspiracy and left to sue on the substantive torts.

Thus, regardless of whether the alleged conspirators used lawful or unlawful means, the law in England required the plaintiff to establish that the defendants entered into the agreement with the predominant purpose of injuring the plaintiff.

Although Canadian jurisprudence has taken note of the developments in England, the law governing the tort of conspiracy in Canada is not in all respects the same as the law set out in *Lonrho*. Indeed, this Court had occasion to consider both the tort of conspiracy and Lord Diplock's observations in *Lonrho* in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452. Justice Estey stated at p. 468:

> The question which must now be considered is whether the scope of the tort of conspiracy in this country extends beyond situations in which the defendants' predominant purpose is to cause injury to the plaintiff, and includes cases in which this intention to injure is absent but the conduct of the defendants is by itself unlawful, and in fact causes damage to the plaintiff.

This passage made clear that this Court agreed with the House of Lords that where a plaintiff alleges that the defendants entered into an agreement whose predominant purpose was to injure the plaintiff and where the plaintiff alleges that he or she has in fact suffered damage as a result of the agreement, then regardless of the lawfulness of the means that the defendants are alleged to have used to implement the agreement the plaintiff will have made out a cognizable claim in the tort of conspiracy.

But what of situations in which the plaintiff alleges that there was an agreement that involved the use of unlawful means and that resulted in the plaintiff's suffering damage? Must the plaintiff also establish that the predominant purpose of the

[TRADUCTION] Lorsque l'intention prédominante de nuire est absente, mais que les défendeurs, conformément à la convention intervenue, commettent des délits contre le demandeur, la Chambre a jugé, concluons-nous, que le sens commun et la logique juridique de la jurisprudence sont respectés si on prive le demandeur d'un redressement en matière de complot et qu'on le laisse intenter une action relativement aux délits matériels précis.

Ainsi, sans égard à la question de savoir si les auteurs présumés du complot ont utilisé des moyens légaux ou illégaux, le droit en Angleterre exige que le demandeur établisse que les défendeurs ont conclu une entente dont l'objet prédominant était de nuire au demandeur.

Bien que la jurisprudence canadienne ait tenu compte de l'évolution en Angleterre, la règle applicable au délit civil de complot au Canada n'est pas en tous points identique à celle formulée dans l'arrêt *Lonrho*. En effet, notre Cour a eu l'occasion d'examiner, dans l'arrêt *Ciments Canada LaFarge Ltée c. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 R.C.S. 452, tant le délit civil de complot que les observations de lord Diplock dans l'arrêt *Lonrho*. Le juge Estey affirme, à la p. 468:

> La question qui se pose maintenant est de savoir si, au Canada, le délit civil de complot s'étend au-delà des situations où le but prédominant des défendeurs est de nuire au demandeur et s'il englobe les cas où cette intention de nuire est absente, quoique la conduite du défendeur soit en elle-même illégale et porte en fait préjudice au demandeur.

Cet extrait illustre clairement que notre Cour partage l'avis de la Chambre des lords que lorsqu'un demandeur prétend que les défendeurs ont conclu une entente dont l'objet prédominant était de nuire au demandeur et lorsque le demandeur allègue qu'il a, dans les faits, subi un préjudice par suite de l'entente, alors, sans égard à la légalité des moyens que les défendeurs auraient utilisés pour exécuter l'entente, le demandeur aura fait la preuve qu'il a un recours recevable pour délit civil de complot.

Mais qu'en est-il lorsque le demandeur allègue qu'il y avait une entente qui comportait le recours à des moyens illégaux et qui a eu pour effet de causer un préjudice au demandeur? Le demandeur doit-il également établir que l'objet prédominant

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agreement was to injure him or her? It is in answering this question that Estey J. chose to follow a somewhat different path from Lord Diplock. Estey J. was of the view that it was not appropriate to go as far as the House of Lords had gone in precluding the action. He said at pp. 471-72:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff. [Emphasis added.]

Estey J.'s summary of the law in Canada suggests that in cases falling into the second category it may not be necessary to prove actual intent. As Fridman has noted in *The Law of Torts in Canada*, vol. 2, at p. 265:

> The difference between the English and Canadian formulations of the tort of conspiracy lies in the way the intent of the defendants is expressed. The language of Lord Diplock seems to indicate that the necessary intent should be actual. That of Estey J. suggests that it may be possible for a court to infer an intent to injure from the circumstances even if the defendants deny they acted with any such intent.

Fridman goes on to observe at pp. 265-66

de l'entente était de lui nuire? C'est en répondant à cette question que le juge Estey a choisi de suivre une voie quelque peu différente de celle de lord Diplock. Le juge Estey était d'avis qu'il n'était pas approprié d'aller aussi loin que la Chambre des lords qui avait interdit l'action. Il affirme, aux pp. 471 et 472:

> Bien que le droit soit loin d'être clair sur l'étendue du délit civil de complot, je suis d'avis qu'en matière de responsabilité délictuelle, on ne peut poursuivre un défendeur seul qui a causé préjudice à un demandeur, mais que, lorsqu'il y a au moins deux défendeurs qui ont agi de concert, il est possible d'exercer contre eux un recours délictuel pour complot, si:
>
> (1) indépendamment du caractère légal ou illégal des moyens employés, la conduite des défendeurs vise principalement à causer un préjudice au demandeur; ou
>
> (2) lorsqu'il s'agit d'une conduite illégale, elle est dirigée contre le demandeur seul ou contre lui et d'autres personnes en même temps et que les défendeurs eussent dû savoir dans les circonstances que le préjudice subi par le demandeur était une conséquence probable.
>
> Dans le second cas, il n'est pas nécessaire que l'objet prédominant de la conduite des défendeurs soit de nuire au demandeur, mais il doit y avoir dans les circonstances une intention implicite découlant du fait que les défendeurs auraient dû savoir que le demandeur en subirait un préjudice. Dans l'un et l'autre cas, cependant, le demandeur doit subir un préjudice réel. [Je souligne.]

Selon le résumé du droit au Canada que fait le juge Estey, il se peut que, dans les cas relevant de la deuxième catégorie, il ne soit pas nécessaire d'établir une intention réelle. Comme Fridman le souligne dans son ouvrage *The Law of Torts in Canada*, vol. 2, à la p. 265:

> [TRADUCTION] La différence entre les formulations anglaise et canadienne du délit civil de complot réside dans la façon dont l'intention des défendeurs est décrite. Le langage utilisé par lord Diplock semble indiquer que l'intention nécessaire devrait être réelle. Celui du juge Estey laisse entendre qu'un tribunal peut conclure à l'existence d'une intention de nuire à partir des circonstances même si les défendeurs nient qu'ils ont agi dans cette intention.

Fridman poursuit en soulignant, aux pp. 265 et 266:

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In modern Canada, therefore, conspiracy as a tort comprehends three distinct situations. In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the predominating purpose of injuring the plaintiff. Second, there will be an actionable conspiracy if the defendants combine to act lawfully with the predominating purpose of injuring the plaintiff. Third, an actionable conspiracy will exist if defendants combine to act unlawfully, their conduct is directed towards the plaintiff (or the plaintiff and others), and the likelihood of injury to the plaintiff is known to the defendants or should have been known to them in the circumstances.

In my view, this passage provides a useful summary of the current state of the law in Canada with respect to the tort of conspiracy. Whether it is "good law", it seems to me, it is not for the Court to consider in this proceeding where the issue is simply whether the plaintiff's pleadings disclose a reasonable cause of action. I agree completely with Esson J.A. that it is not appropriate at this stage to engage in a detailed analysis of the strengths and weaknesses of Canadian law on the tort of conspiracy.

I note that in this appeal Mr. Hunt was clearly fully aware of Estey J.'s observation in *Canada Cement LaFarge Ltd.* when he prepared paragraphs 18 and 19 of his statement of claim. Paragraph 18 of his statement of claim follows faithfully the first proposition that Estey J. put forward at p. 471, alleging that some or all of the defendants "conspired with each other with the predominant purpose of injuring" Mr. Hunt. Paragraph 19 of the statement of claim presents an alternative argument that is faithful to the wording of Estey J.'s second proposition, alleging that "some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff" would result. If there is a defect in Mr. Hunt's statement of claim, it is certainly not that paragraphs 18 or 19 fail to follow the language of this Court's most

[TRADUCTION] De nos jours, au Canada, le complot en tant que délit civil vise donc trois situations distinctes. Premièrement, il y aura complot donnant droit à une action si au moins deux personnes s'entendent et s'associent pour agir illégalement dans le but prédominant de nuire au demandeur. Deuxièmement, il y aura complot donnant droit à une action si les défendeurs s'associent pour agir légalement dans le but prédominant de nuire au demandeur. Troisièmement, il y aura complot donnant droit à une action si les défendeurs s'associent pour agir illégalement, si leur conduite vise le demandeur (ou le demandeur et d'autres personnes) et si les défendeurs savaient ou auraient dû savoir dans les circonstances que le demandeur risquait d'en subir un préjudice.

À mon avis, cet extrait présente un résumé utile de l'état actuel du droit au Canada en ce qui concerne le délit civil de complot. J'estime qu'il n'appartient pas à la Cour d'examiner en l'espèce si c'est du «droit valable» lorsque la question est simplement de savoir si les actes de procédure du demandeur révèlent une cause d'action raisonnable. Je suis tout à fait d'accord avec le juge Esson qu'il n'est pas approprié à cette étape d'entreprendre une analyse détaillée des points forts et des points faibles du droit canadien en matière de délit civil de complot.

Je remarque qu'il ne fait pas de doute, en l'espèce, que M. Hunt était tout à fait conscient des observations du juge Estey dans l'arrêt *Ciments Canada LaFarge Ltée* lorsqu'il a rédigé les paragraphes 18 et 19 de sa déclaration. Au paragraphe 18 de sa déclaration, il reproduit fidèlement la première proposition formulée par le juge Estey à la p. 471, alléguant que les défenderesses ou certaines d'entre elles [TRADUCTION] «ont comploté ensemble dans le but prédominant de nuire» à M. Hunt. Au paragraphe 19 de sa déclaration, il présente un argument subsidiaire qui est conforme à la formulation de la deuxième proposition du juge Estey, alléguant que [TRADUCTION] «les défenderesses ou certaines d'entre elles ont comploté ensemble pour empêcher, par des moyens illégaux, la diffusion de ces renseignements dans le public et, en particulier, auprès du demandeur et des autres personnes susceptibles d'être exposées aux fibres d'amiante contenues dans les produits, dans des circonstances où les défenderesses savaient ou auraient dû savoir» que le demandeur

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recent pronouncement on the conditions that must be met in order to ground a claim in the tort of conspiracy. In other words, given this Court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim, it is not "plain and obvious" that the plaintiff's statement of claim fails to disclose a reasonable claim.

The defendants contend, however, that this Court's recent pronouncements, as well as those of courts in England, make clear that the tort of conspiracy cannot be invoked outside a commercial law context and that it certainly cannot be invoked in personal injury litigation. They point out that in *Lonrho*, *supra*, at p. 189, Lord Diplock was not prepared to extend the tort to cover the facts of the case before him. They emphasize that Estey J. displayed a measure of sympathy for Lord Diplock's reluctance to extend the scope of the tort when he stated at p. 473 of *Canada Cement LaFarge Ltd.*:

> The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in *Lonrho*, *supra*, at pp. 188-89. In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law world. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise.

Finally, the defendants point to my observations in *Frame v. Smith*, [1987] 2 S.C.R. 99, where I had occasion to consider whether the tort of conspiracy might be extended to cover a case in which

en subirait un préjudice. Si la déclaration de M. Hunt comporte un vice, ce n'est certainement pas parce que les paragraphes 18 ou 19 ne sont pas conformes aux termes utilisés par notre Cour dans sa plus récente décision sur les conditions à respecter pour justifier une demande en matière de délit civil de complot. En d'autres termes, compte tenu de la plus récente décision de notre Cour sur les circonstances dans lesquelles le droit en matière de responsabilité civile reconnaîtra une telle demande, il n'est pas «évident et manifeste» que la déclaration du demandeur ne révèle pas une demande raisonnable.

Les défenderesses prétendent cependant que les récentes décisions de notre Cour ainsi que celles des tribunaux d'Angleterre établissent clairement que le délit civil de complot ne peut être invoqué en dehors du contexte du droit commercial et qu'il ne peut certainement pas être invoqué dans un litige en matière de lésions corporelles. Elles soulignent que, dans l'arrêt *Lonrho*, précité, à la p. 189, lord Diplock n'était pas disposé à étendre la portée du délit aux faits de l'affaire qui lui était présentée. Elles soulignent que le juge Estey a fait preuve d'une certaine sympathie à l'égard de l'hésitation de lord Diplock d'étendre la portée du délit lorsqu'il a affirmé, à la p. 473 de l'arrêt *Ciments Canada LaFarge Ltée*:

> Le délit civil de complot en vue de nuire, même s'il n'est pas étendu de manière à comprendre un complot en vue d'accomplir des actes illégaux lorsqu'il y a une intention implicite de causer un préjudice, a été la cible de nombreuses critiques partout dans le monde de la *common law*. Comme l'indique si bien lord Diplock dans l'arrêt *Lonrho*, précité, aux pp. 188 et 189, il s'agit réellement d'un anachronisme commercial. En fait, il est possible que dans le contexte commercial actuel cette action ait perdu en grande partie son utilité et qu'elle survive comme une anomalie dans notre droit. Quoi qu'il en soit, il est maintenant trop tard pour déraciner de la *common law* le délit civil de complot en vue de nuire. Sans aucun doute, les cours tenteront dans l'avenir, pour les mêmes motifs que certains invoquent actuellement à l'appui de sa suppression, de limiter l'application de ce délit civil.

Enfin, les défenderesses font état de mes observations dans l'arrêt *Frame c. Smith*, [1987] 2 R.C.S. 99, où j'ai eu l'occasion d'examiner si le délit civil de complot pouvait s'appliquer à un cas

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a father was suing his former wife for denying him access to his children. Although I was in dissent in the final result, the Court agreed with my observations about the tort of conspiracy (see La Forest J. at p. 109). The defendants place a good deal of weight on my suggestion, at p. 124, that "the criticisms which have been levelled at the tort give good reason to pause before extending it beyond the commercial context". I concluded that even although the tort could in theory be extended to the facts of *Frame*, it was not desirable to extend the tort to the custody and access context.

Not surprisingly, the defendants contend that it would be equally inappropriate to extend the tort of conspiracy to cover the facts of this case. The difficulty I have, however, is that in this appeal we are asked to consider whether the allegations of conspiracy should be struck from the plaintiff's statement of claim, not whether the plaintiff will be successful in convincing a court that the tort of conspiracy should extend to cover the facts of this case. In other words, the question before us is simply whether it is "plain and obvious" that the statement of claim contains a radical defect.

Is it plain and obvious that allowing this action to proceed amounts to an abuse of process? I do not think so. While there has clearly been judicial reluctance to extend the scope of the tort beyond the commercial context, I do not think this Court has ever suggested that the tort could not have application in other contexts. While Estey J. expressed the view in *Canada Cement LaFarge Ltd.*, *supra*, at p. 473, that the action had lost much of its usefulness, and while I noted in *Frame v. Smith*, *supra*, at pp. 124-25, that some have even suggested that consideration should be given to abolishing the tort entirely (see: Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982), 16 *U.B.C. L. Rev.* 229, at p. 254), we both affirmed the ongoing existence of the tort at the date of these judgments. In my view, it would be highly inappropriate for this Court to deny a litigant who is capable of fitting his allegations into Estey J.'s two-pronged summary of the law on civil conspiracy the opportunity

où le père intentait une action contre son ex-épouse parce qu'elle l'empêchait de voir ses enfants. Bien que je sois dissidente quant au résultat final, la Cour a fait siennes mes remarques quant au délit civil de complot (voir le juge La Forest, à la p. 109). Les défenderesses accordent beaucoup d'importance à mon idée, à la p. 124, que «les critiques à l'égard de ce délit constituent un bon motif pour qu'on hésite à l'étendre au-delà du contexte commercial». J'ai conclu que même si le délit pouvait en théorie être étendu aux faits de l'arrêt *Frame*, il n'était pas souhaitable de l'étendre au contexte de la garde des enfants et du droit de visite.

Il n'est pas étonnant que les défenderesses prétendent qu'il serait tout aussi inadéquat d'étendre l'application du délit civil de complot aux faits de la présente affaire. La difficulté que j'éprouve cependant, c'est qu'on nous demande en l'espèce d'examiner si les allégations de complot devraient être radiées de la déclaration du demandeur et non pas si le demandeur réussira à convaincre un tribunal que l'application du délit civil de complot devrait être étendue aux faits de l'espèce. En d'autres mots, la question qu'on nous pose est simplement de savoir s'il est «évident et manifeste» que la déclaration contient un vice fondamental.

Est-il évident et manifeste qu'en permettant à cette action de suivre son cours, il y a recours abusif au tribunal? Je ne le pense pas. Bien que les tribunaux aient clairement hésité à étendre la portée du délit au-delà du contexte commercial, je ne crois pas que notre Cour ait jamais laissé entendre que le délit ne pouvait pas s'appliquer dans d'autres contextes. Bien que le juge Estey ait exprimé l'avis dans l'arrêt *Ciments Canada LaFarge Ltée*, précité, à la p. 473, que l'action avait en grande partie perdu son utilité, et que j'aie souligné, dans l'arrêt *Frame c. Smith*, précité, aux pp. 124 et 125, que certains avaient même proposé qu'on examine la possibilité de l'abolir complètement (voir: Burns, «Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest» (1982), 16 *U.B.C. L. Rev.* 229, à la p. 254), nous avons tous les deux affirmé que ce délit existait toujours à la date de ces jugements. À mon avis, il ne serait pas du tout approprié que notre Cour prive une partie, capable de formuler ses allégations de manière

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to persuade a court that the facts are as alleged and that the tort of conspiracy should be held to apply on these facts. While courts should pause before extending the tort beyond its existing confines, careful consideration might conceivably lead to the conclusion that the tort has a useful role to play in new contexts.

I note that in *Frame v. Smith*, *supra*, at p. 125, I was not prepared to extend the tort of conspiracy to the custody and access context both because such an extension was not in the best interests of children and because such an extension would not have been consistent with the rationale that underlies the tort of conspiracy: "namely that the tort be available where the fact of combination creates an evil which does not exist in the absence of combination". But in the appeal now before us it seems to me much less obvious that a similar conclusion would necessarily be reached. If the facts as alleged by the plaintiff are true, and for the purposes of this appeal we must assume that they are, then it may well be that an agreement between corporations to withhold information about a toxic product might give rise to harm of a magnitude that could not have arisen from the decision of just one company to withhold such information. There may, accordingly, be good reason to extend the tort to this context. However, this is precisely the kind of question that it is for the trial judge to consider in light of the evidence. It is not for this Court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff's chances of success. As the law that spawned the "plain and obvious" test makes clear, it is enough that the plaintiff has some chance of success.

The issues that will arise at the trial of the plaintiff's action in conspiracy will unquestionably be difficult. The plaintiff may have to make complex submissions about whether the evidence

qu'elles respectent les deux critères du résumé que fait le juge Estey du droit en matière de délit civil de complot, de l'occasion de convaincre un tribunal que les faits allégués sont exacts et qu'il y a lieu de conclure que le délit civil de complot s'applique à ceux-ci. Même si les tribunaux devraient hésiter à étendre le délit au-delà de ses limites existantes, il se pourrait bien qu'un examen minutieux conduise à la conclusion que ce délit civil a un rôle utile à jouer dans de nouveaux contextes.

Je souligne que, dans l'arrêt *Frame c. Smith*, précité, à la p. 125, je n'étais pas prête à étendre le délit civil de complot au contexte de la garde des enfants et du droit de visite à la fois parce que cette extension n'était pas dans les meilleurs intérêts des enfants et parce que cette extension n'aurait pas été conforme au raisonnement qui sous-tend le délit civil de complot: «savoir que le délit doit exister lorsque la combinaison crée un préjudice qui n'existe pas en l'absence de combinaison». Mais dans le présent pourvoi, j'estime qu'il est loin d'être aussi évident qu'on parviendrait nécessairement à une conclusion similaire. Si les faits allégués par le demandeur sont exacts, et pour les fins de ce pourvoi nous devons présumer qu'ils le sont, il se peut alors fort bien qu'une entente entre des sociétés pour retenir des renseignements au sujet d'un produit toxique puisse engendrer un préjudice qui n'aurait pas pu prendre une telle ampleur si une seule société avait décidé de retenir ces renseignements. Par conséquent, il peut y avoir de bonnes raisons d'étendre le délit civil à ce contexte. Cependant, c'est précisément le genre de question qu'il appartient au juge de première instance d'examiner en fonction de la preuve. Il n'appartient pas à notre Cour, suite à une requête en radiation de certaines parties d'une déclaration de rendre une décision dans un sens ou dans l'autre quant aux chances de succès du demandeur. Comme le droit à l'origine du critère des cas «évidents et manifestes» l'établit clairement, il suffit que le demandeur ait quelque chance de succès.

Il est certain que les questions qui seront soulevées à l'audition de l'action du demandeur en matière de complot seront difficiles. Le demandeur devra peut-être présenter des arguments complexes

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establishes that the defendants conspired either with a view to causing him harm or in circumstances where they should have known that their actions would cause him harm. He may well have to make novel arguments concerning whether it is enough that the defendants knew or ought to have known that a class of which the plaintiff was a member would suffer harm. The trial judge might conclude, as some of the defendants have submitted, that the plaintiff should have sued the defendants as joint tortfeasors rather than alleging the tort of conspiracy. But this Court's statements in *Inuit Tapirisat of Canada* and *Operation Dismantle Inc.*, as well as decisions such as *Dyson* and *Drummond-Jackson*, make clear that none of these considerations may be taken into account on an application brought under Rule 19(24) of the British Columbia *Rules of Court.*

In my view, Anderson and Esson JJ.A. were entirely correct in suggesting that it should be left to the trial judge to ascertain whether the plaintiff can establish that the predominant purpose of the alleged conspiracy was to injure the plaintiff. It seems to me that they were also correct in suggesting that it should be left to the trial judge to consider the merits of any arguments that may be advanced to the effect that the "predominant purpose" test should be modified in the context of this case. Similarly, it seems to me that the argument that some of the defendants advanced, to the effect that Quebec's *Business Concerns Records Act*, R.S.Q. 1977, c. D-12, might limit the range of information that the defendants could produce at trial, is a matter that is not relevant to the question whether the plaintiff's statement of claim discloses a reasonable claim.

The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can

pour établir que la preuve démontre que les défenderesses ont conspiré en vue de lui causer un préjudice ou dans des circonstances où elles auraient dû savoir que leurs actions lui causeraient un préjudice. Il se peut fort bien qu'il ait à présenter des arguments inédits pour déterminer s'il est suffisant que les défenderesses aient su ou eussent dû savoir que le groupe dont faisait partie l'appelant subirait un préjudice. Comme certaines des défenderesses l'ont prétendu, le juge de première instance pourrait peut-être conclure que le demandeur aurait dû poursuivre les défenderesses comme coauteurs des délits plutôt que d'alléguer le délit civil de complot. Mais les affirmations de notre Cour dans les arrêts *Inuit Tapirisat of Canada* et *Operation Dismantle Inc.*, ainsi que des arrêts comme *Dyson* et *Drummond-Jackson*, établissent clairement qu'aucun de ces facteurs ne peut être pris en considération dans une demande présentée en vertu de la règle 19(24) des *Rules of Court* de la Colombie-Britannique.

À mon avis, les juges Anderson et Esson avaient tout à fait raison de dire qu'il devrait revenir au juge de première instance de déterminer si le demandeur peut établir que l'objet prédominant du complot allégué était de nuire au demandeur. Il me semble qu'ils avaient également raison de dire qu'il devrait appartenir au juge de première instance d'examiner le bien-fondé des arguments qui peuvent être présentés pour établir que le critère de «l'objet prédominant» devrait être modifié dans le contexte de cette affaire. De même, il me semble que l'argument invoqué par certaines des défenderesses, selon lequel il se pourrait que la *Loi sur les dossiers d'entreprises* du Québec, L.R.Q. 1977, ch. D-12, restreigne l'éventail des renseignements que les défenderesses pourraient produire à l'audience, est une question qui n'a rien à voir avec celle de savoir si la déclaration du demandeur révèle une demande raisonnable.

Ce n'est pas parce qu'un acte de procédure révèle [TRADUCTION] «une question de droit contestable, difficile ou importante» que l'on peut radier certaines parties de la déclaration. Certes, j'irais jusqu'à dire que, lorsqu'une déclaration révèle une question de droit difficile et importante, il peut fort bien être capital que l'action puisse

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we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

Finally, the defendants also submit that a cause of action in conspiracy is not available when a plaintiff has available another cause of action. Since the plaintiff has alleged in paragraph 20 of his statement of claim that the defendants engaged in various tortious acts, the defendants contend that it is not open to the plaintiff to proceed with his claim in conspiracy.

In my view, there are at least two problems with this submission. First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the facts as pleaded are true, I do not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts. Thus, even if one were to accept the appellants' (defendants) submission that "upon proof of the commission of the tortious acts alleged" in paragraph 20 of the plaintiff's statement of claim "the conspiracy merges with the tort", one simply could not decide whether this "merger" had taken place without first deciding whether the plaintiff had proved that the other tortious acts had been committed.

This brings me to the second difficulty I have with the defendants' submission. It seems to me totally inappropriate on a motion to strike out a

suivre son cours. Ce n'est que de cette façon que nous pouvons nous assurer que la common law en général, et le droit en matière de responsabilité civile en particulier, vont continuer à évoluer pour répondre aux contestations judiciaires qui se présentent dans notre société industrielle moderne.

Enfin, les défenderesses prétendent également qu'une cause d'action en matière de complot ne peut être invoquée lorsqu'un demandeur dispose d'une autre cause d'action. Puisque le demandeur a allégué au paragraphe 20 de sa déclaration que les défenderesses ont commis divers délits, les défenderesses prétendent que le demandeur ne peut fonder sa demande sur le complot.

À mon avis, cet argument présente au moins deux problèmes. Premièrement, bien qu'il puisse être discutable que si une partie a gain de cause contre un défendeur en invoquant un délit civil spécifique distinct, une action fondée sur le complot ne devrait pas alors être recevable contre ce défendeur, il est loin d'être clair que le simple fait qu'un demandeur allègue qu'un défendeur a commis d'autres délits l'empêche d'invoquer le délit civil de complot. Il me semble que l'on peut déterminer si le demandeur devrait être privé du recours fondé sur le délit civil de complot seulement lorsqu'on a décidé s'il a établi que le défendeur a réellement commis les autres délits allégués. Et bien qu'en présence d'une requête en radiation nous soyons tenus de présumer que les faits allégués sont exacts, je ne crois pas que nous puissions supposer que le demandeur réussira nécessairement à convaincre le tribunal que ces faits établissent la perpétration des autres délits distincts qu'il allègue. Ainsi, même si l'on acceptait la prétention des appelantes (défenderesses) que, [TRADUCTION] «dès qu'il y a preuve de la perpétration des autres délits allégués» au paragraphe 20 de la déclaration du demandeur, [TRADUCTION] «le complot se confond avec le délit», on ne pourrait tout simplement pas déterminer si cette [TRADUCTION] «fusion» a eu lieu sans décider d'abord si le demandeur a établi la perpétration des autres délits civils.

Cela m'amène à examiner la seconde difficulté que soulève dans mon esprit l'argument des défenderesses. J'estime qu'en présence d'une requête en

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statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

In the result the appellants have not demonstrated that those portions of the respondent's statement of claim which allege the tort of conspiracy fail to disclose a reasonable claim. They should not therefore be struck out under Rule 19(24)(a) of the British Columbia *Rules of Court*.

5. Disposition

The appeals should be dismissed with costs.

Appeals dismissed with costs.

Solicitors for Carey Canada Inc.: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for Lac d'amiante du Québec Ltée: Davis & Co., Vancouver.

Solicitors for National Gypsum Co.: Koenigsberg & Russell, Vancouver.

Solicitors for Atlas Turner Inc., Asbestos Corporation Limited and Bell Asbestos Mines Limited: Douglas, Symes & Brissenden, Vancouver.

radiation d'une déclaration il est tout à fait inopportun de se demander si les allégations du demandeur concernant les autres délits civils spécifiques mentionnés seront couronnées de succès. Il s'agit d'une question qui devrait être examinée au procès où une preuve quant aux autres délits peut être apportée et où une décision totalement éclairée concernant l'applicabilité du délit civil de complot peut être prise en fonction de cette preuve et des arguments des avocats. Si le demandeur réussit à faire la preuve des autres délits mentionnés, le juge de première instance peut alors examiner les arguments des défenderesses quant à l'impossibilité de faire valoir le délit civil de complot. Si le demandeur ne réussit pas à faire la preuve des autres délits, le juge de première instance peut alors examiner s'il pourrait quand même avoir gain de cause en faisant valoir le délit civil de complot. Sans égard à l'issue de l'affaire, il ne m'apparaît pas approprié à cette étape des procédures de tirer une conclusion quant à la validité des prétentions des défenderesses au sujet de la fusion. J'estime qu'il s'agit d'une question qu'il appartient encore au juge de première instance d'examiner.

En conséquence, les appelantes n'ont pas démontré que les parties de la déclaration de l'intimé où le délit civil de complot est allégué ne révèlent pas une demande raisonnable. Ces parties de la déclaration ne devraient donc pas être radiées en application de la règle 19(24)a) des *Rules of Court* de la Colombie-Britannique.

5. Le dispositif

Je suis d'avis de rejeter les pourvois avec dépens.

Pourvois rejetés avec dépens.

Procureurs de Carey Canada Inc.: Farris, Vaughan, Wills & Murphy, Vancouver.

Procureurs de Lac d'amiante du Québec Ltée: Davis & Co., Vancouver.

Procureurs de National Gypsum Co.: Koenigsberg & Russell, Vancouver.

Procureurs d'Atlas Turner Inc., Asbestos Corporation Limited and Bell Asbestos Mines Limited: Douglas, Symes & Brissenden, Vancouver.

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Solicitors for T & N, P.L.C.: Macaulay & Company, Vancouver.

Solicitors for Flintkote Mines Limited: Edwards, Kenny & Bray, Vancouver.

Solicitors for George Ernest Hunt: Ladner Downs, Vancouver.

Procureurs de T & N, P.L.C.: Macaulay & Company, Vancouver.

Procureurs de Flintkote Mines Limited: Edwards, Kenny & Bray, Vancouver.

Procureurs de George Ernest Hunt: Ladner Downs, Vancouver.

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Joncas et al. v. Spruce Falls and Power and Paper Company Limited et al.

[Indexed as: Joncas v. Spruce Falls Power & Paper Co.]

48 O.R. (3d) 179
[2000] O.J. No. 1721
Court File No. 97-CV-138924

Ontario Superior Court of Justice
Cumming J.
May 15, 2000

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Corporations -- Oppression -- Complainant -- Employees -- Employees having expectation of receiving shares on corporate reorganization -- Reorganization agreement excluding employees with long-term disability from being eligible to receive shares -- Excluded employees applying under oppression remedy provisions of Ontario Business Corporations Act -- Excluded employees being complainants but not entitled to claim oppression remedy -- Oppression remedy available only to security holder, creditor, director or officer -- Offending conduct must relate to someone who falls within one or more of four protected categories -- Employees not falling within protected categories for which oppression remedy available -- Ontario Business Corporations Act, R.S.O. 1990, c. B.16, ss. 245, 248.

The defendants Kimberly-Clark and New York Times owned the shares of the defendant Spruce Falls Paper, which owned a pulp and paper mill in Kapuskasing, Ontario. Spruce Falls Paper also owned a generating station that supplied electrical power for its mill. In 1990, the mill was encountering serious problems

as an operating business and a significant downsizing with a loss of up to 1,200 jobs and harm to the surrounding communities was a possibility. The employees formed committees to examine alternatives and, ultimately, after negotiations involving the provincial government and others, a scheme for reorganization was reached under which Kimberly-Clark and New York Times agreed to sell its shares in Spruce Falls Paper for $1 nominal consideration to the defendant SFAC, a new corporation that was to be owned by employees and community residents as to about a 60 per cent interest and by Tembec as to the remaining 40 per cent. This sale was conditional upon Spruce Falls Paper first having sold its generating station to the provincial government for $142 million, the proceeds of sale being paid out as a dividend to Kimberly-Clark and New York Times. It was also a part of the reorganization that shares in the new corporation known as Class 3 Restricted Voting Special Shares ("Class 3 shares") would be gifted to employees of Spruce Falls Paper. The entitlement to the Class 3 shares was determined by the chairman and chief executive officer of Kimberly-Clark and New York Times after discussions with the employees' committees. The entitlement criteria for Class 3 shares excluded employees on worker's compensation or long-term disability for more than one year as of September 1, 1991. The employees to be excluded were not advised that they would not be eligible for Class 3 shares.

The plaintiffs, who were employees on long-term disability and who had a reasonable expectation of being amongst those receiving Class 3 shares, commenced a class proceeding under the Class Proceedings Act, 1992, S.O. 1992, c. 6. The action was certified for the class of employees on long-term disability and the basis of their claim was that the act of excluding them from receiving Class 3 shares was unlawful because it was oppressive or unfair as prohibited by the Ontario Business Corporations Act ("OBCA"). The plaintiffs moved for summary judgment and the defendants brought a cross-motion for a summary judgment dismissing the action.

Held, the defendants' motion for summary judgment dismissing the action should be granted and the plaintiffs' motion should be dismissed.

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The plaintiffs had standing to bring forward an oppression application on the basis that they were a "complainant" pursuant to the court's discretion under s. 245(c) of the OBCA, which provides that a "complainant means any other person who, in the discretion of the court, is a proper person to make an application under this Part". The next issue was whether the plaintiffs were within the scope of protection offered by s. 248(2) of the OBCA. This section concerns conduct that is "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer." Thus, to be impugned, the offending conduct must relate to someone who falls within one or more of the four protected categories of persons. In the immediate case, the class members were not creditors, directors or officers, and, to be considered a security holder, a putative complainant must either be a registered owner or at least a beneficial owner, which is to be b roadly defined. However, a putative complainant must have at least a legal right to become a shareholder before it can assert that it is a beneficial owner. It is not enough simply to haveb a reasonable expectation of becoming a shareholder based upon a general sense of fairness. The issue in the immediate case then was who had a legal right to become an owner of Class 3 shares. Upon analysis of the reorganization agreement, the answer was that employees who were third party beneficiaries of the agreement between the government and Kimberly-Clark and New York Times were entitled to Class 3 shares. These third party beneficiaries, however, did not include the employees with long-term disabilities because the negotiated terms of the reorganization agreement excluded them. Therefore, the class members of the class proceeding were not beneficial owners of securities and they could not seek protection for their asserted reasonable expectations that they would have the opportunity to subscribe for Class 3 shares. Those expectations arose solely out of their relationship to Spruce Falls Paper as employees and not through any interest as security holders. The oppression remedy cannot be employed to redress the disappointed expectations of employees. There were no genuine issues of material fact underlying the class members' asserted status as security holders able to claim relief from oppression

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under the OBCA. Accordingly, the defendants' motion for summary judgment should be granted and the plaintiffs' motion dismissed.

Cases referred to

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), affg (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.); Bayliss v. Harris, [1993] O.J. No. 2655 (Gen. Div.); Cameron v. Nel-Gor Castle Nursing Home (1984), 5 C.H.R.R. D/2170 (Ont. Bd. of Inquiry), affd Ont. Div. Ct., September 17, 1985 (unreported); Csak v. Aumon (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.); Dashney v. McKinlay (1996), 30 B.L.R. (2d) 211, 43 C.C.E.L. (2d) 313 (Ont. Gen. Div.); First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1989), 71 Alta. L.R. (2d) 61, [1990] 2 W.W.R. 670, 45 B.L.R. 110 (C.A.), staying (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28 (Q.B.) (sub nom. 315888 v. First Ed. Place); HSBC Capital Canada Inc. v. First Mortgage Alberta Fund Inc., [1999] A.J. No. 614 (Q.B.); Mackenzie v. Craig (1999), 70 Alta. L.R. (3d) 166, 171 D.L.R. (4th) 268, [1999] 10 W.W.R. 450 (C.A.); Naneff v. Con-Crete Holdings Ltd. (1995), 23 O.R. (3d) 481, 23 B.L.R. (2d) 286 (C.A.); Ontario Human Rights Commission v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536, 52 O.R. (2d) 799, 12 O.A.C. 241, 23 D.L.R. (4th) 321, 64 N.R. 161, 17 Admin. L.R. 89, 9 C.C.E.L. 185, 86 C.L.L.C. 17,002; PMSM Investments Ltd. v. Bureau (1995), 25 O.R. (3d) 586, 24 B.L.R. (2d) 295 (Gen. Div.); Singh v. Security and Investment Services Ltd., Ont. Bd. of Inquiry, May 31, 1977 (unreported); Westfair Foods Ltd. v. Watt (1991), 79 Alta. L.R. (2d) 363, 79 D.L.R. (4th) 48, [1991] 4 W.W.R. 695, 5 B.L.R. (2d) 160 (C.A.), affg (1990), 73 Alta. L.R. (2d) 326, [1990] 4 W.W.R. 685, 48 B.L.R. 43 (Q.B.)

Statutes referred to

Business Corporations Act, R.S.O. 1990, c. B.16, ss. 1(1), 245 "complainant", 248 Class Proceedings Act, S.O. 1992, c. 6, s. 24 Human Rights Code, R.S.O. 1990, c. H.19, ss. 5, 9, 10, 11

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Authorities referred to

Peterson, Shareholder Remedies in Canada (looseleaf) (Toronto: Butterworths, 1989), para. 18.101.1, p. 18.47

MOTION and CROSS-MOTION for summary judgment.

Kirk M. Baert and Gabrielle Pop-Lazic, for plaintiffs.
Gary Luftspring and Robby Bernstein, for defendants, Spruce Falls Inc., Spruce Falls Acquisition Corporation and Spruce Falls Power and Paper Company.
William Scott and Peter Neumann, for defendants, Kimberly-Clark Corporation and New York Times Company.

CUMMING J.: --

The Motions

[1] The plaintiffs' action is a class proceeding under the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA"). Certification was granted on April 13, 1999. On consent, the plaintiffs have converted their action to an application as putative complainants under the oppression provisions of the Business Corporations Act, R.S.O. 1990, c. B.16 as amended ("OBCA").

[2] The plaintiffs bring a motion for summary judgment. The plaintiffs submit that there are no issues of fact or law requiring a trial for their resolution. They seek a declaration that the defendants unfairly disregarded the interests of the class members by excluding them from those entitled to receive certain corporate shares. If successful, they then seek a

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hearing under s. 24 of the CPA to determine the monetary remedy to be awarded. The defendants also bring cross-motions for summary judgment to dismiss the application.

Background

[3] For many years the defendant, Spruce Falls Power and Paper Company Limited, owned and operated a pulp and paper mill in Kapuskasing, Ontario. The defendant Kimberly-Clark Corporation ("Kimberly-Clark") was a 51 per cent shareholder of Spruce Falls. The defendant New York Times Company ("New York Times") was a 49 per cent shareholder. All the shares in Spruce Falls Power and Paper Company Limited held by Kimberly-Clark and the New York Times were transferred to the defendant Spruce Falls Acquisition Corporation ("SFAC") in late 1991 for nominal consideration of $1. The defendant Spruce Falls Inc. became the successor corporation to the defendant Spruce Falls Power and Paper Company Limited (both are referred to herein as "Spruce Falls Paper"). SFAC was the mechanism employed in a corporate reorganization of Spruce Falls Paper.

[4] Each of the class members was employed in the Spruce Falls mill for many years, but went on long-term disability due to injuries or illness prior to 1991. The representative plaintiff Claude Joncas went on workers' compensation June 18, 1990, after 23 years of service. The representative plaintiff, Robert C. Stackhouse, went on workers' compensation June 7, 1989, upon suffering a serious injury, after 22 years of service.

[5] In 1990, Spruce Falls Paper was encountering serious problems as an operating business, such that it required a major reorganization. A very significant downsizing of some 75 per cent of the workforce, resulting in a loss of up to 1,200 jobs, was a distinct possibility. If this happened there would be very serious adverse consequences for not only the employees but also for Kapuskasing and the surrounding communities. Kimberly-Clark and New York Times were unsuccessful in efforts to sell their shares in Spruce Falls Paper.

[6] The employees formed committees to examine alternative

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possibilities. Mr. Darwin E. Smith, the Chairman of the Board of Directors and Chief Executive Officer of Kimberly-Clark and Chairman of the Board of Directors of Spruce Falls Paper, proposed in January 1991, that Kimberly-Clark and New York Times might give their shares in Spruce Falls Paper to its employees.

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[7] At a later point in time a group of employee representatives called the Employee Ownership Group ("EOG") was formed. The EOG consisted of representatives of management and the unionized employees of Spruce Falls Paper. It was determined that Tembec Inc. ("Tembec"), as a "strategic partner" with extensive pulp and paper expertise, might be prepared to take over Spruce Falls Paper. Ultimately, an "agreement in principle" was reached and a new company, SFAC, was incorporated as the mechanism for implementation.

[8] Briefly, the proposed reorganization of the business was to be as follows. Three classes of shares were created in SFAC. Class 1 shares were restricted to employees and their spouses. Class 2 shares were offered to residents of Kapuskasing and the surrounding communities. All Spruce Falls employees were permitted and encouraged to purchase Class 1 shares. Employees and community residents would own about 60 per cent of SFAC, conditional upon $12.5 million in equity being raised through Class 1 and 2 shares. Tembec would own the other 40 per cent, injecting a further $25 million. SFAC would own the shares in Spruce Falls Paper.

[9] The third class of shares consisted of Class 3 restricted voting special shares. These shares were to be gifted to employees of Spruce Falls Paper. The total number of Class 3 shares offered to eligible employees was fixed. Under the entitlement criteria, temporary and part-time employees and employees on long-term disability or workers' compensation for more than one year as at September 1, 1991 were not offered Class 3 shares. The Class 3 shares were gifts from SFAC to those employees who received them. The plaintiffs' expectations were that they, as employees, expected to receive shares also as they assumed all employees would receive shares.

The Issue

[10] The sole issue for the court is to decide whether or not the act of excluding the class members within the group of employees receiving Class 3 shares is unlawful because the act was oppressive or unfair as prohibited by the OBCA.

The Evidence

[11] During the ongoing discussions and negotiations, Kimberly-Clark emphasized that it was offering to give the mill to the employees. However, Kimberly-Clark was also contemporaneously negotiating to complete the sale of Spruce Falls Paper's Smoky Falls Generating Station, which provided some 50 per cent of the mill's electricity requirements, to Ontario Hydro for some $142 million. The evidence establishes that the so-called "gift" of the paper mill to the employees of Spruce Falls was conditional upon the Ontario Government facilitating the completion of the purchase of the generating station by Ontario Hydro, with Kimberly-Clark and New York Times then receiving a dividend from Spruce Falls Paper of the proceeds of the sale of the generating station.

[12] The record establishes that it was Mr. Smith alone who made the decision as to which employees would receive Class 3 shares. Mr. Smith was acting on behalf of Kimberly-Clark, New York Times and Spruce Falls Paper in deciding who would receive Class 3 shares. The criteria for entitlement to subscribe for the Class 3 shares was set by Mr. Smith after discussions with the EOG. Kimberly-Clark advised the EOG of the criteria determined by Mr. Smith for entitlement by way of a memorandum dated October 5, 1991. The EOG was asked to verify the list of eligible employees to ensure that it was complete according to the criteria. Kimberly-Clark did not take part in the eventual allocation of notices of entitlement and subscription forms to the fixed number of Class 3 shares, all of which were subscribed for.

[13] The evidence establishes the class members were not told they would not be eligible to subscribe for Class 3 shares. There was no public statement ever made about the exclusionary

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criteria for the Class 3 shares. The public statements did not suggest exclusionary criteria.

[14] The SFAC prospectus had been filed with the Ontario Securities Commission in August 1991. Under the heading "Eligible Subscribers" the SFAC Prospectus states:

[SFAC] . . . will only accept subscriptions for Class 3 Restricted Voting Special Shares from those persons who have received written notification of their entitlement to subscribe . . . and, then, only as described in such written notification. See "Procedures for Subscription -- Subscriptions for Class 3 Restricted Special Voting Shares."

[15] Under the heading "Subscriptions for Class 3 Restricted Voting Special Shares" the SFAC prospectus states:

The Company has been advised that Spruce Falls will allocate the entitlement to subscribe for Class 3 Restricted Voting Special Shares based on employee classification and length of service. Approximately 45 percent of such shares will be allocated evenly among employees of Spruce Falls employed in connection with its woodlands operations at June 30, 1991, and among all other employees employed by Spruce Falls as at September 1, 1991. The balance of such shares will be allocated proportionately among all of such employees based on length of service with Spruce Falls. The subscription agreement for Class 3 Restricted Voting Special Shares is on green paper.

(Emphasis added)

[16] All the class members were employees of Spruce Falls Paper on September 1, 1991. The subscription forms went out about the end of October 1991.

[17] The evidence establishes that the EOG, the unions and Tembec would have been agreeable to including the disabled employees in the Class 3 shares group. Mr. Smith was not prepared to do this. The provincial government was not made

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cognizant of the criteria.

[18] A memo dated October 5, 1991, sets forth the allocation criteria as finally determined and provides that "[e]mployees on workers' compensation or long-term disability for more than one year as of September 1, 1991 were excluded from the gift".

[19] Kimberly-Clark submits that Mr. Smith excluded the long-term disabled for the reason that he wanted the Class 3 shares to be held by employees who probably would be staying with the business and who would be responsible for its success for the future. However, the criteria for entitlement was very crude in attempting to achieve this objective. About 300 employees who had been dismissed July 5, 1991, from the woodlands operations of Spruce Falls Paper were made eligible. It is estimated that of the 1,519 employees eligible for Class 3 shares that some 243 chose not to return to work. The class members number about 78. A few of the class members who were excluded from receiving Class 3 shares recovered their health and returned to work with Spruce Falls Paper without then becoming eligible for shares. Some employees who received Class 3 shares were offered early retirement severance packages in order to reduce the workforce and left their employment in late 1991 or 1992. Employees received Class 3 shares based in part upon seniority.

[20] Mr. Stackhouse states in his affidavit that when he realized he was not included in the group of employees receiving Class 3 shares, he spoke to his union representatives who advised him that employees who were off sick for more than one year did not qualify.

[21] The reorganization of Spruce Falls Paper was a success. The company prospered. Tembec purchased all the Class 3 shares for $10 each in 1997. Thus, if the class members had been allowed to subscribe for the gifted Class 3 shares in 1991 they would have profited by $10 a share and each would have received on average more than $50,000 for their shares.

The Law

[22] Sections 245 and 248(2) of the OBCA state:

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245. . . . "complainant" means,

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

. . . . .

248(1) A complainant . . . may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carded on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

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The issue of standing under s. 245

[23] The first issue raised is whether the plaintiffs have standing under s. 245 to bring forward their oppression application. The plaintiffs submit they each qualify as a "complainant" under s. 245(a) or (c).

[24] In so far as s. 245(a) is concerned, the plaintiffs were never registered holders of Class 3 shares of SFAC. Nor were they beneficial owners in the sense of a trust or legal agreement whereby they were to become shareholders being in existence. At most there was a reasonable expectation that as employees of Spruce Falls Paper they would receive Class 3 shares like other full-time employees. The evidentiary record establishes that this expectation was understandable in all the circumstances.

[25] The basis upon which the class members assert that they were entitled to Class 3 shares is that, as employees, they had the expectation to be treated the same as other employees.

[26] The undisputed facts are as follows. The class members were employees of Spruce Falls at all material times. They were not employees of Kimberly-Clark or New York Times. They were not registered security holders, directors, officers or creditors of any of the defendant corporations.

[27] The language of s. 245(a) of the OBCA contemplates a class of complainant without registered ownership. Having regard to the remedial nature of the oppression provisions of the statute, the courts give a liberal and purposive interpretation to the scope of the oppression remedy.

[28] Section 1(1) of the OBCA states that "beneficial ownership" includes the stated meanings of "ownership through a trustee, legal representative, agent or other intermediary": see Csak v. Aumon (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.). In that case, Mr. Justice Lane held that a "beneficial owner" could be someone who claimed shares that ought to have been issued to him or her.

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[29] However, that case differs markedly from the one at hand. In Csak the applicants claimed a beneficial interest in shares through a trust or contractual relationship arising from a pre-incorporation contract under which shares ought to have been issued (at pp. 570-71). That is, the applicants had an asserted legal right to became shareholders. Lane J. held that the applicants therefore had the necessary status to be complainants by way of an oppression application.

[30] The plaintiffs submit that, alternatively, they should be given the status of complainants via s. 245(c) through the court's exercise of discretion. In First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1988), 40 B.L.R. 28 at p. 63, 71 Alta. L.R. (2d) 61 (Q.B.), McDonald J. held that a putative complainant must establish that, "in the circumstances of the case, justice and equity require him or it to be given an opportunity to have the claim tried".

[31] An applicant need not be an aggrieved person whose interests have been affected. Rather, an applicant can be "someone whose interests is righting a wrong done to others": see PMSM Investments Ltd. v. Bureau (1995), 25 O.R. (3d) 586, 24 B.L.R. (2d) 295 (Gen. Div.), per Farley J.; see also HSBC Capital Canada Inc. v. First Mortgage Alberta Fund Inc., [1999] A.J. No. 614 (Q.B.).

Disposition of this issue

[32] Considering all the circumstances of this case, I exercise my discretion under s. 245(c) to give the plaintiffs the status of "complainants" for the purposes of the OBCA.

The issue as to the scope of protection under s. 248(2)

[33] The second issue raised relates to the scope of s. 248(2) as to who is afforded protection under the OBCA. Section 248(2) looks to conduct that "is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer" (emphasis added). Thus, to be impugned, the offending conduct must relate to someone who falls within one or more of the four protected

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categories of persons. The plaintiffs submit that each was a "security holder" within the meaning of s. 248(2). In Csak, at pp. 573-74, Lane J. held that if the applicants could establish a legal right to become shareholders then they fell within the meaning of "security holder" in what is now s. 248(2).

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[34] Section 248(2)(b) of the OBCA states that where the court is satisfied that "the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner that is oppressive", the court may take such remedial order as it sees fit. Each oppression case turns on its own facts.

[35] The oppression remedy is in essence an equitable remedy: Westfair Foods Ltd. v. Watt, [1990] 4 W.W.R. 685, 73 Alta. L.R. (2d) 326 (Q.B.). Equitable rights can arise in various ways, such as through reasonable expectations: Dennis Peterson, Shareholder Remedies in Canada (Toronto: Butterworths, 1989, loose-leaf) at para. 18.101.1, p. 18.47, Corporate conduct that is oppressive, unfairly prejudicial or unfairly disregards the interests of one of the four categories of protected persons is corporate conduct which defeats the reasonable expectations of such persons.

[36] However, reasonable expectations must derive from corporate conduct affecting a protected category of person: namely, a creditor, director, officer or security holder. To be considered a security holder, a putative complainant must either be a registered owner or at the least a beneficial owner. I agree that "beneficial owner" should be interpreted broadly. Nevertheless, a putative complainant must have a legal right to become a shareholder before it can be asserted that the person is a "beneficial owner". Reasonable expectations must be tied to legal or equitable rights as a security holder, whether as a registered owner or as a beneficial owner. It is not enough to simply have reasonable expectations to become a shareholder based upon a general sense of fairness.

[37] An analogy might help: A parent might, through statements, create a reasonable expectation on the part of her/

his two children that they will each be bequeathed one-half of the parent's shares owned in a corporation upon the parent's death. Yet if the parent in fact bequeaths all of the shares to one child upon the parent's death, the child who is ignored cannot challenge the parent's will simply upon the basis of a normative sense as to what is fair as between parents and their children. A prerequisite in seeking redress is that there must be a legal right founded upon some basis, such as by an enforceable contract.

[38] Turning to the case at hand, one can empathize with the class members. They had helped to build the success of Spruce Falls Paper. Many of them had worked for many years before being injured on the job. Through no fault of their own they were unable to work for at least the one year prior to September 1991, due to injury or illness. They had no control over the factor (the length of time they were sick or injured) which denied them participation in the offering of the Class 3 shares. Other employees participated in the share offering who left their employment shortly after the share offering. One can argue that the treatment of the class members unfairly disregarded their interests as employees.

[39] The plaintiffs submit that there was a violation of their human rights. The Human Rights Code, R.S.O. 1990, c. H.19, ss. 5, 10 ("Code") recognizes and affirms the right to equal treatment with respect to employment without discrimination because of handicap: see Cameron v. Nel-Gor Castle Nursing Home (1984), 5 C.H.R.R. D/2170 (Ont. Bd. of Inquiry), affirmed September 17, 1985 (Ont. Div. Ct.).

[40] The Code's protection extends to freedom from both intentional discrimination and constructive or systemic discrimination: ss. 9, 11: see Singh v. Security and Investigation Services Ltd., May 31, 1977 (Ont. Bd. of Inquiry) and Ontario Human Rights Commission v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321.

[41] The evidence in the case at hand does not establish either intentional or constructive discrimination on a prohibited ground. A disabled employee who was unable to work

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for Spruce Falls Paper but who had been absent for less than a year prior to September 1, 1991, was not excluded from receiving Class 3 shares. The exclusion was, in essence, a time-based criterion rather than related to disability. Part-time employees were also excluded.

[42] Moreover, the differential treatment of employees arose from the eligibility criteria for Class 3 shares. The eligibility criteria were determined by Kimberly-Clark and New York Times accepted by the other participants in the corporate reorganization. The eligibility criteria were neither determined nor implemented by the employer, Spruce Falls Paper, it being merely a passive object of the corporate reorganization.

[43] The plaintiffs and the defendants both characterized the transfer of the shares in Spruce Falls Paper from Kimberly-Clark and New York Times to SFAC as a "gift". However, the reality is otherwise. I find on the evidence that the transfer of shares by Kimberly-Clark and New York Times was subject to the conditions precedent that Spruce Falls Paper would achieve completion of the sale of the Smoky Falls Hydro-electric Generating Station on terms acceptable to Kimberly-Clark, the Ontario Government would ensure there was not any problem with the sale because of the need for environmental approvals, and the purchase money of about $142 million would be distributed to Kimberly-Clark by way of a dividend. The conditions were a term of the overarching agreement between the Ontario Government and Kimberly-Clark. The transfer of the shares in Spruce Falls Paper to the employees was dependent upon the fulfillment of the conditions precedent imposed by Kimberly-Clark and New York Times. They were not truly making a gift. They were receiving consideration for the transfer of the shares.

[44] Given this analysis, I find that those employees of Spruce Falls Paper who were to be entitled to Class 3 shares were, in reality, third party beneficiaries of the overarching agreement between the government, Kimberly-Clark and New York times. This begs the question: which employees were to be entitled to Class 3 shares? The remaining issue is, what were

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the terms of the agreement as to which employees would receive the benefit of the Class 3 shares in SFAC to be gifted?

The issue as to which employees were to receive Class 3 shares

[45] The evidence establishes that the government left the question as to which employees would receive shares to the parties negotiating the reorganization. This was understandable as the terms of the reorganization were matters for the various existing and intended stakeholders in Spruce Falls Paper. Mr. Smith of Kimberly-Clark sought input from Tembec and the EOG but ultimately decided what the criteria would be. The evidence establishes that on October 5, 1991, the EOG accepted Mr. Smith's imposition of the term that employees absent for the preceding year would not be able to subscribe for Class 3 shares. Although the union participants in the negotiations, and Tembec, favoured all employees being given the opportunity to subscribe for Class 3 shares, Mr. Smith insisted that he would define the class as he did. His position was accepted.

[46] The EOG had provided Kimberly-Clark with a very expansive definition of "employee" for the purpose of determining who should be entitled to subscribe for the Class 3 shares. That definition was rejected by Mr. Smith. His definition was accepted as the governing criterion for Class 3 shares through the reorganization.

[47] It is moot as to whether Mr. Smith would have backed down in his view if the other participants in the negotiations had insisted that all employees participate in the Class 3 share offering. The record suggests that he was generally very fixed in the merit and correctness of his own views. It is moot as to what might have happened if the other participants had advised the government that Mr. Smith was insisting that the long-term disabled employees be excluded from the Class 3 share offering. The other parties to the negotiations allowed Mr. Smith to prevail in his views. Thus, the eligibility criteria set forth in the October 5, 1991, memorandum as to which employees would participate in the share offering was accepted as a term of the reorganization agreement. The union

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representatives on the EOG should have communicated this result to all employees, including the long-term disabled. As I have already stated, the evidentiary record establishes there was not effective communication . However, this fact is not relevant to the legal issue. It is to be noted that at the time it was uncertain whether Class 3 shares had any value.

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[48] As I have found, the negotiated terms of the reorganization agreement excluded the class members from entitlement to receive Class 3 shares. The class members did not have any legal right to subscribe for Class 3 shares. Hence, the excluded class members were not third party beneficiaries under the agreements entered into in respect of the reorganization.

Disposition of this issue

[49] For the reasons given, I find that the class members were not "beneficial owners" of securities with respect to any Class 3 shares in any of the defendant corporations. They had no legal entitlement to Class 3 shares through the reorganization agreements. Therefore, they cannot seek protection for their asserted reasonable expectations that they would have the opportunity to subscribe for Class 3 shares. Their expectations arose solely out of their relationship with Spruce Falls Paper as employees and not through any interests as security holders. The fact that some of the class members may have subscribed for Class 1 shares in Spruce Falls Paper is not relevant to the independent issue as to whether they were entitled to Class 3 shares.

[50] An interest in a security constitutes an interest in property, a chose-in-action. A shareholder owns a bundle of rights enforceable through the legal process. There must be a legal right to obtain the security before one can be considered a "beneficial owner" thereof.

[51] There can be circumstances in which an anticipated shareholder is found to be a "beneficial owner" of shares. However, to qualify as the "beneficial owner" of a security, there must be some form of legal entitlement to the security:

see Mackenzie v. Craig (1999), 171 D.L.R. (4th) 268, 70 Alta. L.R. (3d) 166 (Alta. C.A.), per Fruman J.A. (Foisy J.A. concurring) at pp. 273-74. This could be by way of a contract: see, for example, Bayliss v. Harris, [1993] O.J. No. 2655 (Gen. Div.), per O'Driscoll J. at para. 7. This could also be by way of a beneficial interest through a trust.

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[52] The oppression remedy cannot be employed to redress the disappointed expectations of employees. Even if a person has status as a "security holder", expectations which are protected by the oppression remedy are limited to interests held in that capacity. The oppression remedy does not protect expectations which do not relate to a person's interest as a shareholder in a corporation: see Naneff v. Con-Crete Holdings Ltd. (1995), 23 O.R. (3d) 481, 23 B.L.R. (2d) 286 (C.A.), per Galligan J.A., at pp. 488-90; Dashney v. McKinlay (1996), 30 B.L.R. (2d) 211, 43 C.C.E.L. (2d) 313 (Ont. Gen. Div.), per Chadwick J., at p. 218; 820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.), per Farley J., at pp. 185-86, appeal dismissed (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.).

[53] There are no genuine issues of material fact underlying the class members' asserted status as security holders able to claim relief from oppression under s. 248(2) of the OBCA. As I have found, none of the alleged acts or omissions of the defendants which form the basis of the plaintiffs' oppression remedy claim was oppressive or unfairly prejudicial to any security holder, creditor, director or officer of any of the defendants or disregarded the interests of any such person in any of such capacities.

Overall Disposition

[54] For the reasons given, the plaintiffs' motion for summary judgment is dismissed. The defendants' motion for summary judgment is granted. The plaintiffs' application is dismissed as against all defendants.

Order accordingly.

cp/d/qlbbd/qlmjb

2000 CanLII 22359 (ON SC)

DATE: 20010426
DOCKET: C34419

COURT OF APPEAL FOR ONTARIO

RE: CLAUDE JONCAS and ROBERT C. STACKHOUSE (Plaintiffs/Appellants) v. SPRUCE FALLS POWER AND PAPER COMPANY LIMITED, SPRUCE FALLS INC., SPRUCE FALLS ACQUISITION CORPORATION, KIMBERLY-CLARK CORPORATION AND NEW YORK TIMES COMPANY (Defendants/Respondents)

BEFORE: LABROSSE, DOHERTY and FELDMAN JJ.A.

COUNSEL: Kirk M. Baert and G. Pop-Lasic, for the appellants

William Scott and Peter Neumann, for the respondents

HEARD: April 23 and 24, 2001

On appeal from the judgment of Justice Peter A. Cumming dated May 15, 2000

ENDORSEMENT

[1] The appellants (the named plaintiffs in a class proceeding) appeal the dismissal of their application as complainants under the oppression provisions of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (OBCA). In their application, the appellants were seeking a declaration that the respondents Kimberly-Clark Corporation and New York Times Company ("KC") unfairly disregarded the interests of the class members by excluding them from those entitled to receive certain corporate shares.

[2] In 1990 and 1991, KC decided either to divest itself of ownership of Spruce Falls Power and Paper Company Limited ("Spruce Falls" or "the company") in Kapuskasing, Ontario or to restructure and downsize the company with a significant loss of jobs.

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[3] At that time, discussions arose concerning the idea of an employee buyout of the company. A complex deal was being considered. It involved representatives of Spruce Falls, unionized and non-unionized employee groups of the company, the proposed "strategic partner" Tembec Inc. ("Tembec"), Ontario Hydro with respect to the sale of a generating station, an asset of Spruce Falls and the Ontario Government. The proposed deal called for employees of Spruce Falls and community members of Kapuskasing to own approximately 60% of the shares of a new company that would own Spruce Falls with substantial monies to be raised from the employees and members of the community through the sale of Class 1 and Class 2 shares of the new company. As part of the restructuring plan, a third class of shares, Class 3 shares, was to be subscribed for by KC for a nominal sum per share, then "gifted" to employees of Spruce Falls.

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[4] Class 1 and Class 2 shares were offered to employees and members of the Kapuskasing community in order to raise part of the required financing subscription. The issue in this appeal is with respect to the Class 3 shares (called "gift shares").

[5] The proposed deal made no reference to the basis for the distribution of the "gift shares" in the new company to the employees. Cumming J. ("the motions judge") found that the Ontario government left the question as to which employees would receive the Class 3 shares to the parties negotiating the reorganization of Spruce Falls, namely KC, the Employee Ownership Group and Tembec.

[6] There was evidence that in order to improve the chance of success of Spruce Falls, KC's strategy was to place the "gift shares" in the hands of employees who were then actively employed with Spruce Falls or who were likely to return to active employment. The motions judge found that, in the end, the other parties allowed KC's views to prevail. Accordingly, the criteria established for the receipt of "gift shares" excluded employees on worker's compensation or long-term disability for more than one year from a certain date, namely the appellants, temporary and part-time employees.

[7] Section 248 of the Ontario *Business Corporations Act* provides:

> 248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

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[8] The appellants were not shareholders or beneficial owners of a security, nor were they directors or officers of Spruce Falls. The appellants' oppression remedy claim was based on their view that they were entitled to receive Class 3 shares because as "employees" of Spruce Falls, they had a reasonable expectation and thus a right to be treated the same as eligible employees in the eligibility criteria.

[9] In his detailed and well considered reasons, the motions judge dealt with that claim in paragraph 36:

> However, reasonable expectations must derive from corporate conduct affecting a protected category of persons: namely, a creditor, director, officer or security holder. To be considered a security holder, a putative complainant must either be a registered owner or at the least a beneficial owner. I agree that "beneficial owner" should be interpreted broadly. Nevertheless, a putative complainant must have a legal right to become a shareholder before it can be asserted that the person is a "beneficial owner". Reasonable expectations must be tied to legal or equitable rights as a security holder, whether as a registered owner or as a beneficial owner. It is not enough to simply have reasonable expectations to become a shareholder based upon a general sense of fairness.

We agree with the motions judge's main basis for dismissing the application.

[10] We also agree that there is no proper basis for the contention that the appellants were beneficial security holders or third party beneficiaries (which issues were not pleaded but only arose during the hearing). There was never any enforceable agreement on which the appellants can rely. They did not have any legal right to the Class 3 shares. Their expectations arose solely out of their relationship as employees and not through any legal entitlement to receive the shares.

[11] In the result, we conclude that there is no merit to the appellants' oppression remedy claim.

[12] The appeal is dismissed with costs.

(signed) "J. M. Labrosse J.A."
(signed) "Doherty J.A."
(signed) "K. Feldman J.A."

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kikla v. Ayong,*
2016 BCSC 465

Date: 20160317
Docket: S172166
Registry: New Westminster

2016 BCSC 465 (CanLII)

Between:

Sunanda Kikla, Fraser Valley Community College

Plaintiffs

And

Moses Aseh Ayong, Yvette Enni Ayong, Elias Fokwak Ayong, Richard Dobila, Vandana Khetarpal, Grace Eghonghon Omonua, Paul Akhere Omonua, Canada International Career College Inc., Emily Pitcher, Claire Dollan

Defendants

\- and -

Docket: S171964
Registry: New Westminster

Between:

Sunanda Kikla, Fraser Valley Community College Inc.

Plaintiffs

And

Saidu Conteh, Monica Lust, Emily Pitcher, Joanna Cheng, Claire Dollan, Private Career Training Institutions Agency

Defendants

\- and -

Docket: S172005
Registry: New Westminster

Between:

Sunanda Kikla, Fraser Valley Community College

Plaintiffs

And

Monica Lust, Emily Pitcher, Jennifer Reid, Private Career Training Institutions Agency

Defendants

Corrected Judgment: The front page and the text of this judgment was corrected at paragraph 99(2)(a) on April 4, 2016.

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Appearing on her own behalf and on behalf of Fraser Valley Community College Inc.:	The Plaintiff, S. Kikla
Counsel for Private Career Training Institutions Agency, Monica Lust, Emily Pitcher, Joanna Cheng, Claire Dollan, and Jennifer Reid:	C. Hunter
Written submissions received from M. Maynes, counsel for S. Conteh, defendant in Action No. S171964, on:	November 20, 2015
Place and Dates of Hearing:	New Westminster, B.C. November 25-27, 2015
Place and Date of Judgment:	New Westminster, B.C. March 17, 2016

2016 BCSC 465 (CanLII)

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Introduction

[1] In British Columbia, privately owned career training institutions are regulated by the defendant Private Career Training Institutions Agency ("PCTIA" or the "Agency"), under a regulatory scheme established by the *Private Career Training Institutions Act*, S.B.C., 2003 c. 79 (the "*Act*"), and the *Private Career Training Institutions Regulation*, B.C. Reg. 466/2004 (the "Regulation").

[2] One such institution is the plaintiff Fraser Valley Community College ("FVCC"), which is owned by the plaintiff Ms. Sunanda Kikla.

[3] Under s. 5 of the *Act*, the board of directors of the Agency has the responsibility to serve the public interest, including the interests of students attending registered institutions, through governing, controlling, and administering the affairs of the Agency. To that end the directors, under the power granted by s. 6 of the *Act*, have enacted bylaws (the "Bylaws") that, among other things, establish requirements for registration of institutions, and establish requirements for renewal, suspension, cancellation or reinstatement of registration or accreditation. Generally, a registered institution may, under the Bylaws, apply for accreditation if it has continuously engaged in training of students for a period of 12 months.

[4] Since April 2014 the powers of the Agency's board of directors have been exercised by a Public Administrator, appointed by order-in-council.

[5] FVCC was registered with the Agency commencing in or about November 2010. It has never been accredited.

[6] FVCC's registration was suspended between July 22, 2014 and November 19, 2014. As will be seen, the pleadings in some of the proceedings referred to herein relate to that suspension.

[7] FVCC's registration was cancelled on October 26, 2015. This "Cancellation Decision" is not directly relevant to the subject matter of the present application as

argued, but it does have a bearing on the pleadings in related proceedings described later in these Reasons.

[8] The plaintiffs have commenced several petition proceedings in this court against the Agency, seeking judicial review of certain steps taken by the Agency in its regulation of FVCC.

[9] The plaintiffs have also commenced three actions – that is, proceedings commenced by way of Notice of Civil Claim – in which the Agency is named as a defendant. The actions - all commenced in New Westminster – are under Docket Nos. 172005 (the "Suspension Action"), 171964 (the "Conteh Action"), and 172166 (the "Ayong Action").

[10] Also named as defendants in one or more of these three actions are persons who were, at the material times, employees of the Agency (the "Employee Defendants"): Monica Lust, the Agency's Registrar and Chief Executive Officer; Emily Pitcher, the Agency's Legal Counsel; Joanna Cheng and Claire Dollan, who were Student Support Coordinators; and Jennifer Reid, Manager of Compliance and Investigation. The "Agency" and the "Employee Defendants" are referred to collectively herein as the "Agency Defendants". Another individual defendant, not named in the three impugned actions but named in related actions described below, is Sandra Carroll, who has at the material times served as Public Administrator.

[11] The Agency Defendants apply to have the three actions dismissed under subrule 9-5(1) (a), (b) and (d), as disclosing no reasonable claim, being frivolous and vexatious, and being an abuse of process of the court.

Background

[12] Some review of the background facts is necessary to explain the context of the three impugned actions.

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The 2014 Suspension Decision

[13] By way of a letter dated July 22, 2014, the Agency advised the plaintiffs that they had not remedied numerous concerns, previously communicated to FVCC, with respect to what were stated to have been significant non-compliance with basic education standards outlined in the Bylaws. FVCC's registration was therefore suspended. FVCC was directed to cease advertising, and to cease enrollment and career training of new students. I refer to this as the "Suspension Decision". The letter set out the conditions required to be met for FVCC's registration to be reinstated.

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[14] FVCC requested reconsideration of the Suspension Decision on July 22, 2014. The Registrar of the Agency issued her reconsideration decision on September 23, 2014, upholding the suspension.

[15] FVCC appealed that reconsideration decision to the Public Administrator on October 6, 2014.

[16] Following a period of continuing review by the Agency and correspondence with the plaintiffs, the suspension was lifted effective November 19, 2014.

[17] The Public Administrator issued her appeal decision on November 13, 2015, upholding the suspension.

[18] While the suspension was in effect, and while the requested reconsideration was pending, FVCC filed a petition on July 28, 2014 under Docket No. 163009, naming PCTIA as respondent. This "Suspension Petition" seeks, *inter alia*, an order staying the effect of the July 22, 2014 Suspension Decision and an order setting aside that Suspension Decision, on the basis of an alleged lack of procedural fairness.

[19] The Suspension Petition also seeks judicial review of decisions made by the Agency against FVCC on May 9, 2014, respecting a refund of tuition fees in the amount of $3,750 to a former student, one Dominic Gatsivi, and respecting a refund

of tuition fees in the amount of $3,020 each to former students Samuel Ebot Oben and Mani Etchi. These aspects of the Suspension Petition are not directly relevant to the present application, but again have a bearing on pleadings in related proceedings described later in these Reasons.

[20] FVCC amended the Suspension Petition on August 5, 2014. The Amended Petition did not set out any new matters of substance; the amendments dealt only with minor typographical errors.

[21] By way of a Notice of Civil Claim filed June 22, 2015, naming as defendants the Agency and its employees Lust, Pitcher and Reid, the plaintiffs commenced the Suspension Action, claiming various remedies – described in further detail below – in respect of the 2014 Suspension Decision.

The Conteh Complaint

[22] On or about August 18, 2014, a Mr. Saidu Conteh, father of a former student of FVCC named Alhassan Conteh, filed a complaint with the Agency alleging difficulties in obtaining a refund of tuition payments from FVCC (the “Conteh Complaint”). The complaint was formalized on or about December 15, 2014. On or about February 26, 2015, the Agency invited Saidu Conteh to reframe his complaint, and he filed a revised complaint on or about March 3, 2015, alleging that FVCC had misled him and his son with assurances regarding immigration assistance and with misrepresentations concerning the nature of FVCC’s program and courses.

[23] Following review of the complaint material and responses received from FVCC, the Public Administrator issued a decision dated July 31, 2015, finding that the complainant had been misled by FVCC. The Public Administrator ordered that the complainant Mr. Conteh receive a refund in the amount of $5,000, payable out of the Student Training Completion Fund established under s. 13 of the *Act* (the “Fund”). This “Conteh Refund Decision” was communicated to FVCC and to the complainant Saidu Conteh on August 26, 2015.

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[24] Decisions respecting claims against the Fund are subject to a privative clause set out in s. 16 of the *Act*. It provides:

> 16(3) The board has exclusive jurisdiction to hear and decide claims against the fund.
>
> (4) A decision, order or ruling of the board made under this Act in respect of a matter that relates to the fund and that is within the board's jurisdiction is final and conclusive and is not open to question or review in court except on a question of law or excess of jurisdiction.

The breadth of this privative clause implies that significant deference is owed the Agency's decision on a judicial review.

[25] I note parenthetically that it may be the case that the allegations in the Suspension Petition respecting refund payments to the former students Oben, Etchi and Gatsivi also relate to the Fund, though this is not spelled out in the pleadings.

[26] Prior to the Conteh Refund Decision being made, on June 11, 2015 FVCC as petitioner filed a petition under New Westminster Registry file 171800 against PCTIA and the Attorney General of British Columbia as respondents, seeking various orders respecting the Agency's investigation of the Conteh Complaint (the "Conteh Petition").

[27] The Agency's Response to Petition was filed June 19, 2015. The Agency's position was that the petition should be dismissed either on its merits or on the basis that it was premature, as no decision respecting the Conteh Complaint had been made at that time.

[28] Following the Conteh Refund Decision on July 31, 2015, the Agency filed an Amended Response to Petition on September 16, 2015. The Amended Response cited the aforementioned privative clauses. The Agency pleaded that the refund decision was reasonable, and that the procedure followed was fair. The Agency asked that the petition be dismissed.

[29] To date, there has been no amendment to the Conteh Petition challenging the Conteh Refund Decision.

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[30] By way of a Notice of Civil Claim filed June 19, 2015, naming as defendants the Agency, its employees Lust, Pitcher, Cheng and Dollan, and Saidu Conteh – the Conteh Action – Ms. Kikla and FVCC claim various remedies in respect of the Conteh Complaint, the Agency's investigation of the Conteh Complaint and the Agency's position on calculation of any refund.

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The Ayong Complaint

[31] On or about April 22, 2015 a former student of FVCC, Elias Ayong, filed a complaint with the Agency, alleging, generally, that he had been misled by FVCC in relation to the transferability of the credits and as to the program structure and schedule, and further complaining as to the manner in which his account with FVCC was handled (the "Ayong Complaint"). Following receipt of FVCC's response to the Ayong Complaint, Mr. Ayong was provided with a copy of FVCC's response, and Mr. Ayong made a reply on May 21, 2015.

[32] Upon receiving a copy of Mr. Ayong's reply, FVCC asked the Agency for the opportunity to make a sur-reply. This request was refused by the Agency's legal counsel, Ms. Pitcher, by way of an email dated June 8, 2015.

[33] By way of a decision forwarded to the plaintiffs on August 26, 2015, the Public Administrator of the Agency determined that Mr. Ayong had been misled by FVCC, and ordered that the complainant be paid $4,500 out of the Fund.

[34] By way of a petition filed June 11, 2015 – prior to the Agency's decision having been made – naming PCTIA and the Attorney General of British Columbia as respondents (the "Ayong Petition", New Westminster File 171801), FVCC seeks orders respecting the Agency's investigation of the Ayong Complaint. FVCC alleges that Mr. Ayong's May 21st reply contained fresh allegations, and claimed that the Agency's failure to allow for a sur-reply constituted a denial of natural justice.

[35] The third of the actions that are the subject of the present application, the Ayong Action, was commenced by way of a Notice of Civil Claim filed June 29, 2015. Named as defendants are several individuals including the aforesaid

Mr. Ayong and members of his family, who are – generally – alleged to have been engaged in a conspiracy to undermine the reputation of FVCC. Also named as defendants are Vandana Khetarpal, who is alleged to be a former instructor at FVCC and who is alleged to have mishandled confidential information; and two Employee Defendants, Ms. Pitcher and Ms. Dollan, who are alleged to have mishandled the Ayong Complaint and to have acted in bad faith. Further details of the allegations against Pitcher and Dollan are set out below.

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The Cancellation Decision

[36] By way of a letter dated September 1, 2015, the Agency served the plaintiffs with notice that FVCC's registration would be cancelled effective September 11, 2015, unless it was, prior to that date, able to show just cause that cancellation was inappropriate.

[37] In reply to that notice, the Agency received from FVCC approximately 1,700 page of material. The Agency's decision was delayed while those materials were reviewed.

[38] Ultimately, the registration of FVCC was cancelled effective October 26, 2015.

[39] Subsequent to the hearing of the present application on November 25-27, 2015, FVCC filed a petition on December 24, 2015, under Vancouver Registry file S-1510739. The substance of this Petition – the Cancellation Petition – appears to consist in part of a claim for judicial review in respect of the Cancellation Decision. The allegations in the Cancellation Petition are confusing and difficult to follow. They are described, in general terms, later in these Reasons. Again, these allegations have no direct bearing on the present application, but they give context to the proceedings as a whole.

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The Pleadings in Issue – Specific Allegations

The Suspension Action

[40] The Amended Notice of Civil Claim in Action 172005 is particularly prolix, the "Statement of Facts" in Part 1 constituting 62 paragraphs that are a mix of fact, evidence, speculation and argument. The essential nature of the claim appears to be set out in three of the first five paragraphs of the Amended Notice of Civil Claim:

> 1. That the defendants between Jan 2014 and Nov 2014 made various acts of Negligence, Acts of bad Faith, Acts of Falsifying True facts of the Case, Willfully and Knowingly causing Damage, Public humiliation and Continuous Abuse of Process, position and Power to Deny Natural Justice and a Fair Process that directly caused Irreparable damage to the image and Business of the Plaintiffs.
>
> …
>
> 3. On June 13, 2014 a Letter sent by the defendant Monica Lust set the stage of a predetermined decision of the Defendant to strategically cause "Suspension" of the Plaintiffs by series of actions planned to damage and intentional harm to the businesses and images of the plaintiffs. The Letter dated June 13, 2014 which set 7 Conditions were created with Full intention to cause Suspension.
>
> …
>
> 5. After June 13, 2014 various acts of Bad Faith, Acts of Negligence, Intentional acts of Improper use of Power and Process by the Defendants directly caused the +18 weeks of Open ended Suspension of the Plaintiffs business and Caused irreparable harm to the reputation, Image, credibility and worthiness of the Plaintiffs Business and caused Financial loss of a great magnitude to the plaintiffs.

[41] The balance of the Statement of Facts consists of a confused narrative, in which Lust, Pitcher and Reid are alleged to have acted in bad faith or committed wrongful acts in relation to the 2014 suspension of FVCC's registration. The allegations appear to relate to failure to carry out a proper audit until November 2014, failure to disclose all correspondence between the Agency and students of FVCC, and failure to respond to enquiries made by FVCC as to FVCC's attempts to comply with the Bylaws.

[42] Under Part 2 of the Amended Notice of Civil Claim, "Relief Sought", the plaintiffs ask that the Employee Defendants Lust, Pitcher and Reid be held liable for

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acts of bad faith and intention to cause irreparable harm to the business and image of the plaintiffs; that they be held liable for financial loss due to negligent acts, improper practices, acts of bad faith and abusive use of their office; that they be held accountable for falsifying material facts, for non-disclosure of material facts to the plaintiffs – thereby denying the plaintiffs fair opportunity to defend their position – and for improper practices and abusive use of their office; and that they be held liable and directly responsible for harassment, humiliation, stress and financial loss.

[43] It may be inferred that the plaintiffs intend to claim damages against those Employee Defendants, but that form of relief is not specifically stated.

[44] Notwithstanding the fact that the Agency is named as a defendant, no relief is claimed as against the Agency.

The Conteh Action

[45] The allegations against the Agency Defendants in the Amended Notice of Civil Claim in Action 171964 are relatively concise. The plaintiffs allege as follows:

> 22. Even after substantiating that the claims made by defendant Saidu Conteh against the Plaintiffs were false the other defendant Emily pitcher continued to act as the counsel of the Defendant Saidu Conteh and suggested in her email to the Plaintiff that "Claimant Saidu Conteh has been advised of your determination and asked whether he wishes to proceed with the Complaint on the basis that the Institution failed to fulfill its obligations to the student in the period between enrollment and withdrawal."
>
> 23. On April 17, 2015 the Defendant Claire Dollan Wrote to the plaintiff FVCC about the new evidence of Phone calls Claimed to have been made by the defendant Saidu Conteh to the Plaintiffs and demanded the plaintiffs for additional response of the original claim now using a new tactic to falsely frame the Plaintiffs of any wrong doing.
>
> …
>
> 25. On May 9,2015 the Defendant Saidu Conteh continued to make false allegations against the Plaintiffs and the other defendants Claire Dollan, Emily Pitcher continue to use the power of their office by actively pursuing the denial of any response opportunity for the plaintiffs to respond to this matter and the damage of their actions still need to be quantified.

[46] The “Relief Sought” in Part 2 of the Amended Notice of Civil Claim, as against the Agency Defendants, is more extensive than the Statement of Facts. The plaintiffs plead:

> 4. That The Defendant PCTIA and Their Staff members Monica Lust be held accountable for intention for purposely not taking any action in this matter after FVCC filed their response and presented their facts on September 3, 2014 causing further damage to the Image, reputation of the businesses of the plaintiffs and causing irreparable harm.
>
> 5. That The Defendant Monica Lust be held accountable for intention for purposely not taking any action in this matter after FVCC filed their response and presented their facts on Sept 3, 2014 causing further damage to the Image, reputation of the businesses of the plaintiffs and causing irreparable harm and financial loss.
>
> 6. The Defendant Monica Lust and other Staff members Emily Pitcher, Joanna Cheng and Claire Dollan be held accountable for actively withholding the material facts of this matter and be held accountable for non disclosure without proper cause from the plaintiffs and thereby denying the Plaintiff an opportunity to defend these false claims made against them by defendant Saidu Conteh.
>
> 7. That The Defendant PCTIA and Their Staff Members Monica Lust, Emily Pitcher, Joanna Cheng and Claire Dollan be held accountable for “Non disclosure of Material facts” to the Plaintiffs thereby denying the Plaintiffs an opportunity to defend their position and be required to provide all email correspondence exchanged between them and Defendant Saidu Conteh which will further substantiate that the defendants acted in bad faith and intentionally caused damage to the business of the Plaintiffs.
>
> 8. That the defendant Emily pitcher be held accountable for improper practices for denying the response sought in the refund calculations requested by FVCC in their meeting held at the Defendant PCTIA offices on June 13, 2014 where defendant Emily Pitcher directed the accounts staff “Alice Chua” for not giving answer to the specific query of the refund calculations which were requested by FVCC in this matter during the meeting held with Alice Chua on June 13, 2014.
>
> 9. That the defendant Emily pitcher and Claire Dollan be held accountable for improper practices and abusive use of their office and positon and for assisting and acting as a counsel for the defendant Saidu Conteh to make the false claim against the Plaintiffs causing [continuous] damage to the business of the plaintiffs.
>
> 10. That the defendant Emily pitcher and Claire Dollan be held accountable for improper practices and abusive use of their office and positon and for assisting and acting as a counsel for the defendant Saidu Conteh to make the false claim against the Plaintiffs causing continuous damage to the business of the plaintiffs.

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[47] The plaintiffs specifically seek general, aggravated and special damages, and also punitive damages:

> … for the Defendant's Persistent, Intentional and Continuing interference with the Plaintiffs Rights, True Facts and Constant attempt to damage the image and Business of the Plaintiffs inter alia the loss of Goodwill and Plaintiffs Economic Relations.

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The Ayong Action

[48] The Statement of Facts in the Notice of Civil Claim in Action 172166 is also excessively detailed. The bulk of the allegations are directed against other defendants, against whom various wrongful acts are alleged. The allegations against the Employee Defendants Pitcher and Dollan appear to relate solely to the Ayong Complaint. The nature of the allegations, generally are that:

(a) Ms. Dollan provided advice to students of FVCC with respect to complaints, acting as counsel and not as an independent adjudicator;

(b) that Ms. Dollan and Ms. Pitcher counselled the defendants Yvette Ayong and Elias Ayong and acted in a manner to conspire jointly with them to damage and harm the image of Ms. Kikla and the business of FVCC;

(c) that Ms. Pitcher treated FVCC in a humiliating and biased manner; and

(d) that Ms. Dollan and Ms. Pitcher intentionally interfered with FVCC's own internal dispute resolution policy, and acted in bad faith, outside their role with the Agency and in an abuse of their power, to intentionally cause damage to the plaintiffs.

[49] The relief sought against Ms. Dollan and Ms. Pitcher includes pleas similar to those in the other two impugned actions, i.e. that they be held liable for abuse of power, intentional acts and acts of bad faith, and that they be held accountable for non-disclosure of material facts, giving rise to intentionally caused damage.

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Law

[50] The conventional remedy for breach of statutory duty by a public authority is judicial review for invalidity: see *Holland v. Saskatchewan*, 2008 SCC 42, at para. 9. No action for damages may be maintained against a regulatory authority exercising its statutory powers, either in relation to the fairness of the authority's processes, or to the basis for its decisions. Such claims constitute collateral attacks upon the authority's decision-making powers, and may be struck as an abuse of process under sub-rule 9-5(1)(d).

[51] Recent decisions of this court have applied this general statement of the law to claims brought against the Agency. In *Willow v. Chong*, 2013 BCSC 1083 [*Willow*], Madam Justice Fisher dealt with the doctrine of collateral attack in the following terms:

> [40] Neither Shanghai College nor the other plaintiffs pursued this matter by launching an appeal to the board or seeking judicial review. To the extent that the plaintiffs' claims relate to the fairness of the process and the basis for the decisions and actions taken by the registrar and PCTIA, they ought to have pursued the remedies available to them under the legislation. In my opinion, it is improper to pursue such claims in an action for damages. …

[52] It was further held by Fisher J. that, on the facts of the case before her, the unavailability of a damages remedy in judicial review was not sufficient grounds to allow the action to proceed:

> [47] It is well known that damages are not available in applications for judicial review [citations omitted]. However, that principal alone is not sufficient to ground an action for damages where the essential complaint stems from dissatisfaction with the conduct and the decisions of an administrative agency. The plaintiffs must have viable causes of action in and of themselves.

[53] A similar result was obtained more recently in *Honborg v. Private Career Training Institutions Agency*, 2015 BCSC 965. Madam Justice Sharma said, at para. 36:

> [36] I agree with the Agency that the claim must be struck as constituting both an abuse of process and as disclosing no reasonable claim. On behalf of the plaintiffs, Mr. Honborg freely admitted that he chose not to pursue any mechanism for internal review because, in his submission, no process

> conducted by the Agency could be fair. His pleadings and the statements he made in court allege bias, prejudice and discriminatory attitude against Agency officials. Other than his suspicion, there is no evidence on the record to give an air of reality to those accusations. Mr. Honborg admitted in court that his main complaint is that he believes the decision to suspend the College's registration was wrong; he wants the court to overturn it. He alleges many other things, but I am satisfied that, in substance, the civil claim is a challenge to the impending (at the time) suspension of the College. …
>
> [37] There can be no doubt that the claim is nothing more than a collateral attack on the Agency's statement of its intent to suspend the College and, ultimately, the suspension. ...

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[54] In respect of the Employee Defendants, the personal liability protection afforded by s. 21 of the *Act* will be germane. It provides:

> 21 (1) Subject to subsection (2), no legal proceeding for damages lies or may be commenced or maintained against a board member or an officer or employee of the agency because of anything done or omitted
>
> > (a) in the performance or intended performance of any duty under this Act, or
> >
> > (b) in the exercise or intended exercise of any power under this Act.
>
> (2) Subsection (1) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

[55] Actions taken by an employee in bad faith will therefore not benefit from the protection afforded by the *Act*. However, a litigant will not be permitted to subvert the principles of judicial review, including deference to the decision-making authority, through making unfounded allegations against an employee. The pleadings and evidence will still be subject to being scrutinized to determine whether there is any plausible basis for a claim of bad faith, engaging subsection 21(2) of the *Act*: see *Willow*, at para. 51. If the pleadings and the evidence do not disclose a reasonable basis for claims being made personally against the employee, it will be open to the court to conclude that the action, in substance, is nothing more than a collateral attack.

[56] Further, in addition to the doctrine of collateral attack, pleadings may be struck as an abuse of process where they essentially duplicate claims being advanced in another extant proceeding. In such circumstances, the principle of

judicial economy is engaged; the court is compelled in such circumstances to determine if it is in the public interest to allocate scarce judicial resources to essentially duplicative proceedings. There is the related principle that allowing duplicative proceedings is an affront to the integrity of the judicial system, given the burden that unnecessary litigation imposes on the parties. In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, Madam Justice Arbour, in the majority judgment, stated:

> [37] … the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" … Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

[57] In addition, as noted above, Rule 9-5(1)(a) provides that a pleading may be struck where it discloses no reasonable claim. The test for striking a pleading on this basis, as set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 42, is whether, assuming the facts pleaded are true, it is "plain and obvious" that a claim discloses no reasonable cause of action, has no reasonable prospect of success, or is certain to fail. Although Rule 9-5(2) provides that no evidence is admissible in respect of an application brought under subrule (1)(a), the pleadings may be subject to a "skeptical analysis" that accounts for the circumstances and the litigation history, as well as the bare allegations made in the pleadings: *Young v. Borzoni*, 2007 BCCA 16, at para. 31.

[58] The applicants herein also rely on subrule 9-5(1)(b). Generally, a pleading may be struck as unnecessary or vexatious when, among other things, it is obvious that the action cannot succeed, where it would serve no useful purpose or would be a waste of public resources, and may be struck as unnecessary, frivolous or vexatious when it is difficult to understand what is pleaded: *Willow*, at para. 20. In regard to the latter, in the words of Mr. Justice Voith in *Sahyoun v. Ho*, 2013 BCSC 1143, at para 54:

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> Neither a defendant nor a trier of fact should have to parse through a notice of civil claim and either cobble together or speculate about what cause of action is being advanced against which defendant.

[59] Applications under sub-rules 9-5(1)(b) and (d) may be supported by evidence.

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Discussion

[60] The claims advanced against the Agency Defendants in the Notices of Civil Claim concern the Agency's exercise of its statutory responsibilities in respect of regulating FVCC's compliance with the Bylaws, and administering the claims against the Fund. The proper channel for the hearing of the plaintiffs' grievances against the Agency is a judicial review by way of petition proceeding, to be determined under the principals of administrative law. The claims against the Agency constitute an impermissible collateral attack on the Agency's process and decisions, and must be struck as an abuse of process.

[61] The claims are not saved through the allegations of bad faith, abuse of process, etc. on the part of the employees. There is no substance to these allegations. There are no material facts pleaded in support, only bald assertions of wrongdoing. Furthermore, the extensive evidence – hundreds of pages of affidavit exhibits – relied upon by Ms. Kikla does not demonstrate any bad faith, malice, or abuse of power by individual officers of the Agency; to the contrary, the evidence cited by Ms. Kikla demonstrates a transparent decision-making process.

[62] In the course of her oral submissions, Ms. Kikla offered a new theory: that the sheer number of errors made by the Agency, and the nature of those errors, are so extreme that they are only explicable on the basis of there having been a pre-determined result, motivated by racial bias, or by some other form of bias unknown to her.

[63] There are two answers to this theory, in the context of the present application. The first is that Ms. Kikla's apprehension of bias appears to be only a matter of her own subjective impressions or beliefs. Even taking her claim that she apprehends bias at face value, it is not founded on the evidence, only on her own speculation.

Indeed, in the course of her submissions she acknowledged the subjective aspect of her allegations. Arguing that evidence concerning interactions between Mr. Conteh and the Agency's investigative staff was suspicious, Ms. Kikla acknowledged the court's difficulty in seeing the evidence in that light. She stated:

> I agree with your point of view, My Lord, because when you are not involved in the facts, you tend to see them as non-relevant. But when you know that the complaints are false, and you know that they are tailor-made, you tend to think differently than I do. Because I am part of it.

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[64] The second answer to this theory is that even if Ms. Kikla is able to demonstrate bias, the allegation of bias may be pursued through judicial review.

[65] The claims made against the Agency Defendants are an abuse of process by reasons of the doctrine of collateral attack. The pleadings against the Agency Defendants are struck, and the three actions dismissed as against them.

[66] The actions are also an abuse of process by way of being duplicative of the allegations made in each of the parallel petition proceedings. Ms. Kikla acknowledged the duplicative nature of the Suspension Petition and the Suspension Action in her written submission (made in the form of her 6th Affidavit filed in Action 172005), in which she said:

> 273. If Justice Saunders Did not allow these matters to be dealt with now it is only a matter of time when I will bring these to light when I deal with Judicial petitions as the evidenced already exists and once its surfaced these cases will come up again and no court will deny me justice as the Prima facea evidence is already in place [sic].

[67] In her oral submissions, Ms. Kikla acknowledged that the claims made against the Employee Defendants in the Conteh Action mirror those in the Conteh Petition. The same can be said of the allegations made in the two proceedings respecting the Ayong Complaint.

[68] These duplicative proceedings are an affront to the principal of judicial economy, and necessitate the actions against these defendants being dismissed by reason of abuse of process.

[69] Further, I would find the Notices of Civil Claim deficient by way of their failure to plead the essential elements of the torts alleged. Given my conclusions regarding abuse of process, it is not necessary to catalogue these deficiencies. Suffice it to say that the Notices of Civil Claim do not plead the essential elements of conspiracy, deceit, defamation, injurious falsehood or misfeasance in public office. The allegations of negligence cannot succeed, as the Agency clearly owes a duty to the public to ensure that the Bylaws are complied with, and can owe no duty of care to an institution. I would find the pleadings made against the Agency Defendants to meet the test of being frivolous and vexatious on those grounds. Whether the actions should be struck on those grounds or simply stayed pending amendment is something I need not consider in the circumstances, having found the claims to be an abuse of process on other grounds.

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Conclusion

[70] The application of the defendants Private Career Training Institutions Agency, Monica Lust, Emily Pitcher, Joanna Cheng, Claire Dollan and Jennifer Reid is allowed, and Action Nos. 172005, 171964 and 172166 are dismissed as against them.

Claims Against the Defendant Saidu Conteh

[71] Mr. Conteh filed an application response to the present application to strike the Notice of Civil Claim in the Suspension Action (172005) and striking the Amended Notice of Civil Claim in the Conteh Action (171964). Mr. Conteh consented to the granting of the orders set out in Part 1 of the Notice of Application.

[72] Mr. Conteh did not file his own Notice of Application seeking to have the claim against him dismissed.

[73] Mr. Conteh is represented by counsel. Counsel was given leave to make written submissions on the present application, and did so. The written submissions set out arguments in favour of dismissing the claims against Mr. Conteh. The written submissions also asked that the plaintiffs be declared vexatious litigants.

[74] The present Notices of Application were framed as applications for orders seeking dismissal of the actions in their entirety. However, the substance of the Notices of Application dealt only with the dismissal of the actions as against the Agency Defendants, and the applicants proceeded on that basis when the application was heard. The plaintiffs' application responses, and the plaintiffs' written arguments (presented in the form of affidavits), addressed only those claims brought against the applicants.

[75] In the circumstances, no separate application having been made by Mr. Conteh, it would clearly be inappropriate to address the validity of the present actions as regards Mr. Conteh.

[76] Should Mr. Conteh wish to proceed with his own Notice of Application to have pleadings against him struck under Rule 9-5, leave will be granted to have the application made and responded to by way of written submissions.

Costs

[77] Having succeeded on this application, the Agency Defendants are entitled to their costs in the actions.

[78] Rule 9-5(1) specifically provides that upon ordering a proceeding stayed or dismissed under the Rule, the court may order the costs of the application (though not of the action as a whole) to be paid as special costs.

[79] Rule 14-1(15) provides the court with discretion in awarding costs of a proceeding to fix the amount of costs.

[80] The Agency Defendants seek fixed costs. They have tendered as evidence three draft bills of costs – one in each of the three actions – with the costs and disbursements totalling $17,081.05. They seek a lump sum award limited to $10,000.

[81] The Agency Defendants submit that this is an appropriate case for the court to exercise its discretion in favour of lump sum costs, given the disproportionate time

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expended by court staff on these matters to date, and the possibility of further time and expense that could result from a prolonged assessment and a potential appeal.

[82] Given my familiarity with these proceedings as the case management judge, I believe this is an appropriate case for the positive exercise of my discretion. The costs sought represent a very significant discount over the amount the Agency Defendants would likely obtain in an assessment of costs at Scale B. I note that the draft bills of costs were prepared only at Scale B and did not incorporate a potential award of special costs in respect of the present application, as allowed for in Rule 9-5(1).

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[83] The Agency Defendants will have their costs of the three actions in the fixed amount of $10,000.

Vexatious Litigant Declaration

[84] Ms. Kikla has commenced several other actions relating to the Agency, in addition to the duplicative proceedings referred to above in these Reasons.

[85] First, as noted above, Ms. Kikla commenced the Cancellation Petition on December 24, 2015 under the style of cause:

> Between
>
> FRASER VALLEY COMMUNITY COLLEGE INC
>
> Petitioner
>
> And
>
> Monica Lust, PRIVATE CAREER TRAINING INSTITUTIONS AGENCY, Sandra Carroll-Public Administrator, Minister of Advanced Education, ATTORNEY GENERAL OF BRITISH COLUMBIA
>
> Respondents

[86] The body of the Cancellation Petition refers to Ms. Kikla as a Petitioner, though she is not named as such in the style of cause.

[87] The Cancellation Petition appears to seek, *inter alia*, judicial review of several matters: the July 2014 Suspension; the plaintiff's subsequent attempts to obtain, first, a reconsideration, and second, an appeal of the Suspension Decision; and the

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October 26, 2015 Cancellation Decision. There are also, as far as can be determined, claims for declarations and mandatory injunctive relief in respect of various matters concerning the respondent Minister. The petition makes numerous claims and seeks numerous forms of relief regarding the July 22, 2014 Suspension Decision, including a declaration that one of the forms of relief sought in the Suspension Petition – file 163009 – be considered moot. Furthermore, despite this proceeding being commenced as a petition, not as an action, there are also claims for damages advanced against Ms. Lust and Ms. Carroll.

[88] In this Cancellation Petition's List of Material to be Relied On, the petitioners list all affidavit materials made by Ms. Kikla in the three petitions and three actions referred to herein, and also all affidavit materials made by Ms. Kikla in two other actions commenced by Ms. Kikla in B.C. Supreme Court. Those other two actions are *Kikla and FVCC v. Carine Dzuo*, New Westminster Action No. 172242; and *Kikla and FVCC v. Saihou Kinteh, Mbinki Jarjue, Isatou Jarju*, New Westminster Action No. 172291. None of the Agency Defendants are named as parties in these actions, but in both actions the relief sought includes demands that Emily Pitcher and Claire Dollan be discovered under oath.

[89] Second, although it was not part of the application record before me – my understanding from comments made by counsel during a recent case conference is that Ms. Kikla had not given notice of the action – Ms. Kikla as plaintiff commenced an action on October 22, 2015 under New Westminster Registry No. 174934 against Sandra Carroll as defendant, alleging obstruction of justice, defamation, bias and abuse of power by Ms. Carroll in her role as Public Administrator of PCTIA, in respect of a decision made in a complaint by a former student, Carine Dzuo (the defendant in Action 172242) – a decision, apparently, that went in favour of FVCC.

[90] Third, although it was not part of the application record before me, I take judicial notice of the existence of yet another action commenced by FVCC, on November 30, 2015 under New Westminster Action No. 175888. This action, the "Ebot Action", names Elias Ayong as one of the nine defendants – the same

individual named in the Ayong Action. The claims made against Mr. Ayong in the Ebot Action are allegations of making false complaints to the Agency, making defamatory statements against FVCC, and engaging in conspiratorial conduct. Those allegations, while they may be "new" in that they are not advanced in the same terms in the Ayong Action and the Ayong Petition, clearly overlap allegations made in those other two proceedings. Further, to the extent that the allegations in the Ebot Action with respect to the Ayong Complaint challenge the accuracy of findings made by the Agency, the allegations appear on their face to be a collateral attack and would thus stand to be dismissed as an abuse of process.

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[91] Likewise, the Ebot Action also names as defendants Samuel Oben Ebot, Manyi Ebot Etchi, and Dominic Gatsivi, whose complaints against FVCC are the subject matter of allegations in the Suspension Petition. In that respect, these allegations in the Ebot Action would also appear on their face to be an abuse of process by reason of collateral attack.

[92] Fourth, I take judicial notice of a recent development, in which 17 separate Small Claims Court actions commenced in the Provincial Court of B.C. by FVCC have been ordered consolidated and transferred into Supreme Court, by way of an order made by Judge E. Gordon on January 20, 2016. At least one of those actions, commenced under Surrey Registry No. 77516 under the style of cause *FVCC v. Chi*, has been assigned a Supreme Court file number, New Westminster Registry No. 177197. One of those 17 actions appears to name defendant Elias Ayong, the same defendant named in the Ayong Action and referred to in the Ayong Petition, again giving rise to concern as to duplicative proceedings and collateral attack.

[93] In addition to concerns arising out of the abusive nature of many of the proceedings instituted by Ms. Kikla, there is a concern as to demands she has placed, or has announced an intention to place, on the court system and on the parties to these actions through interlocutory applications. Since I was assigned case management of these matters in mid-October 2015, and prior to the hearing of the present applications toward the end of November, one full day of court time was

devoted to a related application brought by Ms. Kikla that, as I found, was completely without merit; see the reasons for judgment indexed at 2015 BCSC 2067. Other Notices of Application have been filed by Ms. Kikla, and further applications are contemplated.

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[94] In one such application, filed September 23, 2015, FVCC will be seeking to add “Sandra Carroll – Public Administrator” as a respondent to the Suspension Petition, the Conteh Petition and the Ayong Petition, and to add both the “Ministry of Advanced Education” and the Lieutenant Governor in Council as respondents in the Ayong Petition. Other forms of relief are also being sought. The application is scheduled to be heard over two days, March 31 and April 1, 2016.

[95] By way of an order I made in a judicial management conference on January 4, 2016, that application is to be heard and determined prior to further applications filed by FVCC on June 11th in the Conteh Petition and the Ayong Petition, and on July 20, 2015 in the Suspension Petition.

[96] Ms. Kikla is and has been self-represented in these proceedings. She has not demonstrated a sound grasp of procedure. Her Notices of Application, her Petitions and her Notices of Civil Claim are prolix, confused and duplicative. It is clear that Ms. Kikla is in need of some form of judicial restraint. If only for the sake of efficiency, some mechanism is necessary in order to screen Ms. Kikla’s applications and ensure that the public’s resources are only spent on matters which usefully advance the litigation and have at least some *prima face* merit.

[97] As noted by Mr. Justice Hall in *S. v. S.* (1998), 60 B.C.L.R. (3d) 232 (C.A.), leave to appeal ref’d [1999] S.C.C.A. No. 11, the deeply enshrined democratic right of unfettered access to the courts is subject to the corollary that continuing abuse of this right must be dealt with.

[98] Ms. Kikla has abused the court’s processes. I am therefore, on the court’s own motion and without a hearing, declaring Fraser Valley Community College and Ms. Sunanda Kikla to be vexatious litigants.

[99] In addition, as corollaries to that declaration, I order as follows:

1. No civil legal proceeding may be instituted in the Supreme Court of British Columbia or the Provincial Court of British Columbia by or on behalf of Sunanda Kikla or Fraser Valley Community College Inc., either by way of notice of civil claim, petition or requisition in the Supreme Court, or by way of notice of claim in Provincial Court, without leave of such court;

2. No notice of application, notice of hearing or notice of trial may be filed by or on behalf of Sunanda Kikla or Fraser Valley Community College Inc. in any civil legal proceeding extant before the Supreme Court of British Columbia as of the date of this order, including, but not limited to, proceedings under the following File numbers:

    a. In the New Westminster Registry, Action Nos. 163009, 171800, 171801, 172005, 172166, 172242, 172291, 174934, 171964, 175888, 177197; and

    b. In the Vancouver Registry, Action No. 1510739;

    without leave of the court;

3. Any civil legal proceeding and any notice of application, notice of hearing or notice of trial filed in contravention of this Order is a nullity, and no party named as a defendant or respondent need respond;

4. No notice of application or notice of hearing currently filed in the Supreme Court of British Columbia by or on behalf of Sunanda Kikla or Fraser Valley Community College Inc. in any extant civil legal proceeding may be heard before this court without leave, save and except for the applications referred to in paragraphs 1 and 4 of the Case Plan attached to the Case Plan Order made January 4, 2016 in File No. 171800, New Westminster Registry;

5. Sunanda Kikla and Fraser Valley Community College Inc. may apply to vary the terms of this order on 7 days' notice but may only make such application if

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represented by a member in good standing of the Law Society of British Columbia;

6. This Vexatious Litigant order is to be entered in each of the proceedings listed in paragraph 2 above; and,

7. The Supreme Court Registry of New Westminster shall advise all Supreme Court and Provincial Court Registries within the province of British Columbia of the terms of this order.

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Forms of Order

[100] The forms of order resulting from these Reasons are to be drawn by counsel for the Agency Defendants, and endorsed by counsel for Mr. Conteh prior to entry. The requirement for endorsement by Ms. Kikla and Fraser Valley Community College is waived.

"A. Saunders J."

COURT OF APPEAL FOR ONTARIO

CITATION: McCreight v. Canada (Attorney General), 2013 ONCA 483
DATE: 20130716
DOCKET: C55540

2013 ONCA 483 (CanLII)

Epstein, Pepall and Tulloch JJ.A.

BETWEEN

Michael McCreight, Kim McCreight, John Gregory Skinner, Joan Skinner and BDO Dunwoody LLP

Plaintiffs (Appellants)

and

The Attorney General of Canada Representing Her Majesty the Queen in Right of Canada, Canada Revenue Agency, formerly The Canada Customs and Revenue Agency, Henry George Kehl, William Carter a.k.a. Bill Carter, Gregory Mee a.k.a. Greg Mee, Ed Hooft, Anne Kamp, Ian McGuffin, Rod Mercer, Stephane Marinier, Morris Pistyner, Elaine Krivel, Bruck Easton, Stephen Harvey and Damien Frost

Defendants (Respondents)

Paul J. Pape and Nicolas M. Rouleau, for the appellants

Wendy J. Linden and P. Tamara Sugunasiri, for the respondents

Heard: January 23, 2013

On appeal from the order of Justice Terrence L.J. Patterson of the Superior Court of Justice, dated April 27, 2012, with reasons reported at 2012 ONSC 1983.

Pepall J.A.:

A. INTRODUCTION

[1] The motion judge struck out all of the causes of action in the appellants' amended statement of claim, except for the claim of misfeasance in public office, for failing to disclose a reasonable cause of action pursuant to rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. He also denied the appellants leave to amend their amended statement of claim.

[2] The appellants appeal from this decision and ask this court to set aside the order and dismiss the respondents' motion to strike the causes of action of malicious prosecution, abuse of process, negligence, and derivative claims made pursuant to s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*").

B. BACKGROUND FACTS

(1) The CRA Investigation

[3] In 1998, the audit department of the respondent, Canada Revenue Agency, (the "CRA"), conducted an investigation into the use of research and development tax credits by several corporate taxpayers. The CRA's investigation extended to a team of tax advisors at the national accounting firm BDO Dunwoody LLP ("BDO"), which included the appellants, Michael McCreight ("McCreight") and John Gregory Skinner ("Skinner"). McCreight was a chartered accountant and a BDO partner, and Skinner was a senior R&D consultant and claims preparer at BDO. The CRA's concern was that, with the help of BDO, the

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corporate taxpayers were applying for fraudulent preferential research and development tax credits in the 1996, 1997, and 1998 tax years.

[4] The respondent, Anne Kamp, was the lead CRA investigator. Between July 1998 and May 1999, she applied for and obtained three search warrants to search the homes and businesses of the corporate taxpayers, as well as those of their lawyers and accountants, including McCreight. Pursuant to these search warrants, approximately 60 boxes of materials and at least three hard drives were seized. The CRA was authorized to retain these materials until July 1999.

[5] The CRA had not completed its investigation by July 1999. It applied to the Superior Court of Justice and requested a nine-month extension to complete its investigation. This extension would also have given the suspects an opportunity to make exculpatory representations, in accordance with the provisions of CRA's Tax Operations Manual. On October 27, 1999, Daudlin J. rejected the CRA's application for an extension of time to complete its investigation. Recognizing the volume of materials and the potential need to copy at least some of them, Daudlin J. implicitly authorized the CRA to copy the materials seized but ordered it to return the original documents by 4:30 p.m. on November 9, 1999.

(2) The Charges and Their Resolution

[6] On November 3, 1999, Kamp sought formal approval from the Windsor CRA office and the Department of Justice (the "DOJ") to lay an information charging

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various taxpayers and tax advisors, including McCreight and Skinner, with fraud and conspiracy under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), and the *Criminal Code*, R.S.C. 1985, c. C-46. The DOJ provided its approval and on November 9, 1999, charges were laid. As a result, the CRA was entitled to retain all of the seized materials. Neither McCreight nor Skinner had had the opportunity to make any exculpatory submissions to the CRA. In subsequent court proceedings, Quinn J. found that Kamp had sworn the information in support of the charges "primarily to retain possession of the seized documents."

[7] On October 23, 2000, Kamp swore another information that alleged 23 additional offences. On November 16, 2000, all counts against McCreight that were contained in the first information were withdrawn at the Crown's request.

[8] The preliminary inquiry commenced in 2001 and ended in 2005. In 2006, Momotiuk J. discharged both McCreight and Skinner. Quinn J. subsequently stayed the charges against the corporate taxpayers on the basis of unreasonable delay pursuant to s. 11(b) of the *Canadian Charter of Rights and Freedoms*.

(3) Appellants' Lawsuit

[9] The appellants then commenced proceedings against the Attorney General of Canada, the CRA, and ten employees or agents of the DOJ or the CRA. In their statement of claim, the appellants pleaded that the CRA investigation had been mishandled and had resulted in the laying of false charges against McCreight

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and Skinner. They alleged that they were charged so that the CRA could keep the seized documents. McCreight and Skinner pleaded conspiracy, fraudulent and negligent misrepresentation, negligence, malicious prosecution, misfeasance in public office, breach of fiduciary duty and abuse of process, as well as breaches of the *Charter*. Their spouses, Kim McCreight and Joan Skinner, advanced claims under s. 61(1) of the *FLA*.

(4) Respondents' Motion to Strike

[10] The respondents moved to strike all of the appellants' causes of action, except misfeasance in public office, pursuant to rule 21.01(1)(b) of the *Rules of Civil Procedure*.

(a) Documents

[11] The parties disagreed as to the documents that could be relied upon at the hearing of the motion to strike.

[12] The body of the statement of claim referred to: the October 27, 1999 order of Daudlin J. (at paras. 13 and 187); the discharge of McCreight and Skinner by Momotiuk J. and his finding that there was no evidence to support a conviction or inference of guilt (at paras. 16 and 196); the February 12, 2007 order of Quinn J. staying all of the remaining charges that were committed to trial based on a breach of s. 11(b) of the *Charter* and the adoption by the plaintiffs of the reasons

in support of the ruling (at paras. 17 and 201); and the 75-page decision of Momotiuk J. discharging both McCreight and Skinner (at para. 226).

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[13] At the end of their 110-page statement of claim, the appellants also listed numerous documents that they "plead[ed] and rel[ied] upon".

[14] Prior to the return of the motion to strike before the motion judge, counsel attended before Cusinato J. and asked him to address their documentary dispute. He released his reasons on May 19, 2010 and released supplementary reasons on June 17, 2011. He noted that the respondents objected to an examination of the documents that did not form an integral part of the pleading. He concluded that the listed documents did not form an integral part of the pleading. He wrote as follows, at paras. 22 and 23 of his reasons:

> [T]he listing of the Statutes, Code of Professional Conduct Report, Manuals, Guidelines, and Federal Prosecutions Service Desk books for the most part do not appear to comply with the essence of rule 25.06(7) [of the *Rules of Civil Procedure*]. …
>
> Save for those paragraphs which specifically incorporate the document in reference to the material facts within the pleading, they should be excluded from examination by the court on a motion to strike the pleading.

[15] In his supplementary reasons, at para. 17, Cusinato J. wrote that "documents properly referenced to the material facts pleaded on which the party relies in its statement of claim may be viewed by the court, otherwise they are to be excluded from examination." It is clear from paras. 6 and 7 of his first reasons

that Cusinato J. focused on the documents listed by the appellants at the end of their statement of claim. He decided that it was for the motion judge to determine what documents, if any, were sufficiently incorporated into the pleading as material facts and could therefore be relied upon for the purposes of the motion to strike.

[16] Following the release of Cusinato J.'s first reasons, the appellants amended their pleading to refer to specific paragraphs of the CRA's Tax Operations Manual (at paras. 284 and 292).

(b) The Motion Judge's Decision

[17] The motion judge treated the amended statement of claim that resulted from Cusinato J.'s order as the pleading in issue. He commenced by correctly identifying the test to be applied on a rule 21.01(1)(b) motion as that set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980: assuming that the facts as stated in the statement of claim can be proved, is it plain and obvious that the statement of claim discloses no reasonable cause of action.

[18] As the appellants only seek to reinstate certain causes of action struck by the motion judge from the statement of claim, I shall only summarize the portions of the motion judge's reasons pertaining to those causes of action.

[19] With regards to malicious prosecution, the motion judge addressed the requirements for such a claim in some detail; he particularly focused on the

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fourth element of the cause of action, malice. The motion judge noted that an improper collateral purpose must be identified in the pleading, together with supporting material facts, in order to maintain the cause of action. He determined that, in essence, the pleading amounted to an allegation that the respondents wanted to injure McCreight and Skinner for the purpose of obtaining a conviction. He determined that this pleading was a bald allegation and insufficient to support a claim of malicious prosecution.

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[20] He further struck the plaintiffs' claim for damages for abuse of process on the basis that it is not a stand-alone cause of action.

[21] The motion judge also found the claims of negligence against the CRA investigators to consist of bald allegations. He further determined that CRA officers do not owe a duty of care to the subjects of an investigation; and, in any event, policy considerations would negate any private law duty of care. Accordingly, he struck this claim from the amended statement of claim.

[22] He also struck out the appellant spouses' s. 61(1) *FLA* claims because the type of injury alleged here – namely, anxiety surrounding involvement in a criminal investigation and prosecution – was not the type of injury contemplated by that statute. He further struck Ms. McCreight and Ms. Skinner as plaintiffs.

[23] The motion judge did not grant the appellants leave to amend their pleading. The statement of claim had been issued for three years and had

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already been amended on three occasions. He concluded that the appellants had had ample opportunity to amend their pleading to address any deficiencies. A further opportunity was not justified.

[24] The motion judge did not make any express ruling as to which documents were incorporated into the pleading by reference but in his reasons, he referred to the orders of Justices Daudlin, Momotiuk, and Quinn and to the CRA's Tax Operations Manual. He therefore implicitly considered these documents to have been properly incorporated into the appellants' pleading.

C. GROUNDS OF APPEAL

[25] The appellants appeal the motion judge's decision to strike the causes of action of malicious prosecution, abuse of process, negligence, the *FLA* claims, and his refusal to grant leave to amend the statement of claim. They do not challenge the striking of numerous other elements of the statement of claim. These include the pleading of negligence against the Attorney General and the Crown prosecutors, the claim for breach of fiduciary duty by the Crown prosecutors and the CRA investigators, the *Charter* claims, the claims of fraudulent and negligent misrepresentation, the claim for conspiracy, and the personal claims asserted against the section head of the criminal litigation branch at the Toronto Regional Office of the DOJ, the regional director of the Public

Prosecution Service of Canada, and the senior counsel of criminal prosecutions assigned to the Ontario Regional Office of the DOJ, all of which were struck out.

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D. ISSUES

[26] The issues to be addressed are as follows:

(1) What documents are properly considered as being incorporated into the amended statement of claim for the purposes of this appeal?

(2) Did the motion judge err in striking out the claims for malicious prosecution, abuse of process, negligence, and the s. 61(1) *FLA* claims?

(3) Did the motion judge err in refusing to grant the appellants leave to amend their pleading?

E. ANALYSIS

(1) Documents Referred to in the Pleading

[27] On this appeal, the appellants seek to rely on five documents. They submit that these documents form part of their pleading. The documents consist of: a transcript from the criminal proceedings; the three decisions of Justices Daudlin, Momotiuk, and Quinn; and the CRA's Tax Operations Manual. The appellants do not seek to rely on the other documents listed at the end of their pleading.

[28] The respondents argue that these five documents should be disregarded because they were not included in the motion record before the motion judge;

there was no argument before the motion judge that they formed part of the appellants' pleading; the documents were not considered by the motion judge, who made no ruling on this issue; and, based on the authority of *Montreal Trust Co. of Canada v. Toronto Dominion Bank* (1992), 40 C.P.C. (3d) 389 (Ont. C.J. (Gen. Div.)), *Leadbeater v. Ontario* (2001), 16 C.P.C. (5th) 119 (Ont. S.C.), and *Bird v. Public Guardian and Trustee*, [2002] O.J. No. 408 (S.C.), they ought not to form part of the amended statement of claim.

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[29] No evidence is admissible on a rule 21.01(1)(b) motion to strike out a pleading on the basis that it discloses no reasonable cause of action. On such a motion, the allegations in the statement of claim are taken as being proven, unless they are patently ridiculous or incapable of proof: *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.), at p. 6. Therefore, no evidence is either necessary or permissible on such a motion.

[30] Rule 25.06(7) of the *Rules of Civil Procedure* provides that:

> The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material.

[31] The issue is whether the documents the appellants seek to rely upon are sufficiently pleaded and therefore form part of the amended statement of claim upon which the motion judge could make his decision.

[32] As noted by Borins J. (as he then was) in *Montreal Trust Co.,* at para. 4, a statement of claim is deemed to include any documents incorporated by reference into the pleading and that form an integral part of the plaintiff's claim. Among other things, this enables the court to assess the substantive adequacy of the claim. In contrast, the inclusion of evidence necessary to prove a fact pleaded is impermissible. A motion to strike is unlike a motion for summary judgment, where the aim is to ascertain whether there is a genuine issue requiring a trial. On a motion to strike, a judge simply examines the pleading; as mentioned, evidence is neither necessary nor allowed. If the document is incorporated by reference into the pleading and forms an integral part of the factual matrix of the statement of claim, it may properly be considered as forming part of the pleading and a judge may refer to it on a motion to strike.

[33] Turning to the application of these principles to this case, the motion judge made no express ruling on the issue of documents incorporated into the pleading but in my view, very little turns on this issue on this appeal.

[34] Firstly, while the documents were not referred to in the record before the motion judge, this is unsurprising given that the motion record was that of the respondents. The appellants did provide the motion judge with a 'Document Book' that contained the documents in issue.

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[35] Secondly, the three orders of Justices Daudlin, Momotiuk, and Quinn are expressly pleaded in the amended statement of claim. In my view, these documents have been incorporated into the appellants' pleading and the motion judge appropriately relied upon them in deciding the rule 21 motion. In contrast, the entire reasons for decision of the three judges and a transcript of the criminal proceeding constitute evidence and are not properly considered as forming an integral part of the amended statement of claim. That said, for the most part, the requisite facts that emanated from these documents have been pleaded and the motion judge was therefore at liberty to rely on those elements of the pleading in reaching his decision.

[36] On two occasions, the motion judge did refer to the contents of certain documents that had not been incorporated into the amended statement of claim. At para. 59 of his reasons, the motion judge referred to Daudlin J.'s statement that under s. 490(2) of the *Criminal Code*, the government has a right to keep items seized when proceedings are instituted in which the thing detained may be required. This was not mentioned in the amended statement of claim. That said, the appellants take no issue with the motion judge's reliance on this element of Daudlin J.'s reasons and it only accrued to the respondents' benefit. That said, nothing in this appeal turns on the admission of the statement by the motion judge.

[37] Also at para. 59 of his reasons, the motion judge referred to the Tax Operations Manual of the CRA in considering whether a duty of care was owed to McCreight and Skinner. Specifically, the Manual provides that a taxpayer would be given an opportunity to make exculpatory submissions. Such an opportunity had not been accorded to McCreight and Skinner. The underlying facts associated with this allegation were included in the amended statement of claim and the Manual could be relied upon by the motion judge for that purpose. In contrast, at para. 69 of his reasons, the motion judge reviewed the contents of the Manual to ascertain whether a fiduciary relationship was created between the CRA and the appellants. This constituted an improper use of the Manual because the appellants had not pleaded the factual underpinning for such reference. That said, in my view this error is immaterial in the context of this appeal as the motion judge struck out the appellants' claim for damages for a breach of fiduciary duty and they have not appealed that element of the motion judge's order.

(2) Causes of Action

[38] The standard of review on a rule 21.01(1)(b) motion to strike is correctness: *Attis v. Canada (Minister of Health)*, 2008 ONCA 660, 93 O.R. (3d) 35, at para. 23, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 491.

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[39] As mentioned, on a rule 21.01(1)(b) motion, a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17. The principles that may be extracted from this and other cases, some of which I have already mentioned, are as follows:

- In the interests of efficiency and correct results, there is a need to weed out hopeless claims – this housekeeping dimension underlies rule 21: *Imperial Tobacco*, at paras. 19-20.

- If the cause of action pleaded has been recognized, all of its essential elements must be pleaded: *Aristocrat Restaurants Ltd. (c.o.b. Tony's East) v. Ontario,* [2003] O.J. No. 5331 (S.C.), at para. 19.

- If the cause of action has not been recognized, this is not necessarily fatal. One must ask whether there is a reasonable prospect that the claim will succeed: *Imperial Tobacco*, at para. 21.

- The claim should not be struck merely because it is novel: *Imperial Tobacco*, at para. 21.

- Unless manifestly incapable of being proven, the facts pleaded are accepted as being true for the purposes of the motion: *Imperial Tobacco*, at para. 22.

- The pleading forms the basis of the motion; possible future facts that have not been pleaded may not supplement the pleading: *Imperial Tobacco*, at para. 23.

- No evidence is admissible on such a motion: *Imperial Tobacco*, at para. 22.

- The pleading must be read generously in favour of the plaintiff, with allowances for drafting deficiencies: *Wellington v. Ontario*, 2011 ONCA 274, 105 O.R. (3d) 81, at para. 14, leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 258.

- A motion to strike should not be confused with a summary judgment motion which has a different test, a different purpose, and different rules relating to evidence: *Leadbeater*, at para. 14.

[40] Having considered the applicable principles, I will now turn to the causes of action in issue on this appeal.

(a) Malicious Prosecution

[41] The appellants submit that the cause of action of malicious prosecution asserted against the Attorney General, the CRA, the CRA investigators Anne Kamp and Ian McGuffin, as well as the agents of the DOJ Bruck Easton and Damien Frost, ought not to have been struck. They submit that the motion judge erred in concluding that the material facts pleaded in support of the fourth

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element of the test for malicious prosecution, namely, that the respondents were actuated by malice, were bald and insufficient. The appellants argue that they pleaded as follows: the prosecution was launched for the purpose of retaining documents belonging to the appellants that were otherwise to be returned pursuant to statute and a court order. This purpose was improper and therefore malicious. As such, the appellants submit that it was not plain and obvious that a claim for malicious prosecution would not succeed at trial.

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[42] In my view, the motion judge was correct in striking out this claim.

[43] Firstly, in *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, at paras. 53ff., the Supreme Court stated that in order to succeed in an action for malicious prosecution, a plaintiff must prove that the prosecution was: (i) initiated by the defendant; (ii) terminated in favour of the plaintiff; (iii) commenced or continued without reasonable and probable cause, and; (iv) motivated by malice or a primary purpose other than that of carrying the law into effect. In this case, the fourth element of the claim is in issue.

[44] In my view, the pleading does not identify a collateral or improper purpose that motivated the respondents. Retention of the appellants' seized documents was in furtherance of the prosecution, not collateral to it. Although the charges may have been laid in order to retain the documents, those documents were sought to be kept to pursue a prosecution of *ITA* and *Criminal Code* offences.

Even read generously, a claim of mishandling a prosecution does not amount to a plea of malice.

[45] Secondly, rule 25.06(8) provides that where malice is alleged, the pleading shall contain full particulars. Here, the motion judge correctly concluded that the pleading contained merely bald allegations.

[46] In my view, the claim for malicious prosecution was properly struck.

(b) Abuse of Process

[47] The appellants argue that para. 293 of the amended statement of claim, which claims among other things, damages for abuse of process, ought not to have been struck by the motion judge. They assert that the respondents did not request such relief in their notice of motion and the motion judge did not address it. Furthermore, the test for abuse of process is similar to that for malicious prosecution and the appropriate factual basis for each claim was pleaded.

[48] The respondents submit that abuse of process was not expressly pleaded in the amended statement of claim, nor were the requisite elements or material facts in support of such a claim. Furthermore, the CRA officers are not "parties to a proceeding", and therefore such a claim does not lie against them. They argue that the motion judge was correct in striking this claim.

[49] The reference to abuse of process in the amended statement of claim is scant. Page 100 of the claim contains the heading "Fiduciary Duty, Legitimate

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Expectation and Abuse of Process", and para. 293 of the pleading also refers to a claim for damages for abuse of process. As noted by the motion judge, both references to abuse of process were made within the section of the pleading that claimed damages for breach of fiduciary duty. As noted above, the motion judge struck out the appellants' claim for damages for abuse of process on the basis that it is not a stand-alone cause of action for civil damages.

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[50] That said, even though the respondents served and filed an extremely detailed notice of motion in support of their motion to strike, they did not seek to strike the claim for abuse of process. In keeping with principles of practice and fairness, they should have done so. I am of the view that in the circumstances, it was inappropriate for the motion judge to strike that claim when such relief was not requested.

[51] I would allow the appeal on this ground.

(c) Negligence

[52] The appellants do not contest the motion judge's finding that negligence is not a recognized cause of action against Crown prosecutors.

[53] However, the appellants do submit that the motion judge erred in law by finding that it was plain and obvious that CRA investigators do not owe a duty of care to suspects under investigation. It was on this basis that the motion judge struck the appellants' pleading. The appellants pleaded that the CRA and its

investigators, Kamp and McGuffin, owed a duty of care to McCreight and Skinner and that they breached that duty by failing to investigate the matter properly, failing to comply with Daudlin J.'s order, rushing to lay charges against the appellants before the investigation was complete, and by particularly targeting McCreight and Skinner for criminal prosecution without cause.

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[54] The appellants argue that Canadian case law supports the recognition of a duty of care towards suspects on the part of CRA investigators. Firstly, they assert that the relationship between a CRA investigator and his or her suspect is analogous to that between a police officer and the subject of his or her investigation. In *Hill v. Hamilton-Wentworth Regional Police Services Board,* 2007 SCC 41, [2007] 3 S.C.R. 129, the Supreme Court confirmed that the police may owe a duty of care to a suspect under investigation. Secondly, they also argue that in *Neumann v. Canada (Attorney General)*, 2011 BCCA 313, 338 D.L.R. (4th) 348, leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 422, the British Columbia Court of Appeal was prepared to assume that the CRA owed a duty of care to a third party whose documents they seized during an investigation. The appellants say that there is greater proximity between the CRA and the subjects of its investigations than third parties. Thirdly, in *Leroux v. Canada Revenue Agency*, 2012 BCCA 63, 347 D.L.R. (4th) 122, that same court refused to strike a negligence claim against the CRA and recognized that it is at least arguable that the CRA owes a duty of care to individual taxpayers in the

administration or enforcement of taxing statutes. The appellants therefore argue that this cause of action should not have been struck as plainly and obviously having no reasonable prospect of success. They also ask this court to establish the existence of such a duty of care on the part of the CRA, thus obviating the need for a trial of the issue.

[55] The respondents answer by submitting that such a duty of care has not been previously recognized and the CRA investigator-suspect relationship is not analogous to the police-suspect relationship from which the decision in *Hamilton-Wentworth* arose. The motion judge was correct in finding no proximity between the parties. Proximity between the Crown and an individual member of the public may arise from a statutory scheme or from specific interactions. Neither gave rise to proximity in this case. Even if proximity were established, the motion judge was correct in determining that it was negated for policy reasons, specifically the *ITA*'s statutory scheme, the availability of alternative remedies, and the fact that CRA investigators owe a duty to the public and the Crown, rather than to individuals.

[56] To ground a claim in negligence, CRA investigators must be found to owe a duty of care to suspects. As no precedent for such a duty was advanced, one must therefore consider whether this duty of care could be recognized.

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[57] As described by McLachlin C.J. in *Hamilton-Wentworth*, at para. 20, the test for determining whether a person owes a duty of care involves two questions:

(i) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and

(ii) If so, are there any residual policy considerations which ought to negate or limit that duty of care?

This is a reformulation of the *Cooper-Anns* test that originated in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, and *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.).

[58] Foreseeability is conceded by the respondents in this case.

[59] The factors to be considered in an analysis of whether the plaintiff and defendant are in a relationship of proximity are diverse and depend on the circumstances of the case. The categories of proximate relationships are not closed. In looking at the relationship between the parties, the focus is on whether the acts of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed: *Hamilton-Wentworth*, at para. 29.

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[60] In my view, in this case, the motion judge erred in concluding that it was plain and obvious that the respondent CRA investigators did not owe a duty of care to McCreight and Skinner, policy considerations would foreclose such a duty in any event and, therefore, the negligence claim had no reasonable prospect of success and should be struck.

[61] Firstly, given the Supreme Court's ruling in *Hamilton-Wentworth* that, in certain circumstances, police officers may owe a duty of care to their suspects, surely it is not plain and obvious that a CRA investigator owes no such duty when operating under *ITA* provisions that attract criminal sanction and under the *Criminal Code*. The same analogical reasoning applies to any residual policy rationale that could negate such a duty.

[62] Secondly, I see no relevant distinction between the above-cited case of *Leroux* and this case. That case that involved a claim of negligence against CRA employees as well and the British Columbia Court of Appeal dismissed an appeal of an order permitting the cause of action to proceed to trial. The Court was not persuaded that the claim should be struck because it was at least arguable that such a cause of action could succeed and the issue was to be considered at trial.

[63] The action for negligence against the CRA investigators should be permitted to proceed to trial along with the causes of action for misfeasance in public office and abuse of process, and thereby benefit from a full factual record.

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(d) Section 61(1) of the *Family Law Act*

[64] The appellants further submit that their s. 61(1) *FLA* claims should not have been struck, as their claims were arguable. Contrary to what the motion judge found, McCreight and Skinner pleaded that they suffered from post-traumatic stress disorder, which is a recognized psychiatric illness.

[65] The respondents answer that under s. 61(1) *FLA*, in the absence of a physical injury to McCreight and Skinner, the spousal appellants must show that McCreight and Skinner suffer or have suffered from a recognizable psychiatric illness that was caused by the respondents' negligence. Furthermore, that psychiatric illness must have been reasonably foreseeable to the respondents. The respondents note that the injuries alleged in this case by the appellants arose solely from having been subjected to the legal process, which was not foreseeable and is not recoverable in law even by a primary plaintiff. This application of s. 61(1) of the *FLA* would far expand its intended reach. In addition, the *FLA* claim is derivative of the negligence claim and, consistent with the respondents' position on that assertion, this claim should also fail.

[66] Section 61(1) of the *FLA* states:

> If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the

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> person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

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[67] In my view, the spousal claims brought by the appellants pursuant to this section were properly struck out.

[68] Paragraph 304 of the amended statement of claim pleads that McCreight's and Skinner's physical, emotional, and psychological well-being have been damaged and that they suffer from post-traumatic stress. Paragraphs 311, 312, and 313 address the *FLA* claims of their spouses, Kim McCreight and Joan Skinner. Those paragraphs allege that the two spouses suffered loss and damage and were without the care and companionship of their husbands due to their injuries.

[69] Firstly, as held by this court in *Healey v. Lakeridge Health Corp.*, 2011 ONCA 55, 103 O.R. (3d) 401, at paras. 60-66, in the absence of physical injury, plaintiffs must establish that they have suffered a recognized psychiatric illness caused by the negligence of the defendants in order to recover. As Ms. McCreight's and Ms. Skinner's claims for damages pursuant to s. 61 *FLA* are derivative of their husbands' primary claims, such an illness – caused by the respondents' negligence – must have been pleaded in the amended statement of claim in order for those paragraphs not to be struck. Post-traumatic stress was

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the injury alleged in the appellants' pleading and this does not qualify as a recognized psychiatric illness. While a pleading should be read generously for the purposes of a rule 21.01(1)(b) motion, no mention is made of any disorder or syndrome that would constitute a recognized psychiatric illness.

[70] Secondly, even if one were to accept that on a generous reading of the amended statement of claim, a recognized psychiatric illness had been pleaded, the stress alleged arises from being subject to a tax investigation and the criminal process. In *Healey,* at para. 40, this court stated that "the plaintiff must satisfy the court that the psychological injury was caused by the negligence of the defendant. This involves asking whether psychological damage was a reasonably foreseeable consequence of the defendant's negligence." There is no pleading of the requirement of foreseeability. Moreover, the expected type of stress or upset caused by participation in the criminal process does not attract any recoverable damages: *Scott v. Ontario*, [2002] O.J. No. 4111 (S.C.), at para. 31, aff'd [2003] O.J. No. 4407 (C.A.); see also *Healey*, at para. 65.

[71] As a result, I would not give effect to this ground of appeal.

(3) Leave to Amend

[72] The appellants ask this court to strike the existing amended statement of claim and grant them leave to file the fresh statement of claim appended to their factum. The fresh pleading is premised on the appellants' being fully successful

on their appeal. As they have only been successful with respect to the claims of abuse of process and negligence against the CRA investigators, it would be inappropriate to grant leave to file the appended pleading. Furthermore, the statement of claim has already been amended on three prior occasions. Absent consent, a further amendment cannot be justified.

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F. COSTS

[73] Counsel agreed that $33,100 should be awarded to the successful party on the appeal. The appellants were only partially successful. In my view, in the circumstances, an award of $17,500, inclusive of disbursements and applicable taxes, in favour of the appellants is fair and reasonable. In addition, I would order the respondents to pay the appellants $5,000, inclusive of disbursements and applicable taxes, on account of costs below.

G. DISPOSITION

[74] Accordingly, I would allow the appeal in part and both reinstate the claim for abuse of process and set aside para. 4 of the order under appeal, insofar as it strikes the appellants' claims in negligence against the CRA respondents.

"S. E. Pepall J.A."

"I agree Gloria Epstein J.A."

Released: July 16, 2013 "MT"

"I agree M. Tulloch J.A."

CITATION: *O'Mara v. Air Canada*, 2013 ONSC 2931
COURT FILE NO.: 12-CV-453025-00 CP
DATE: May 21, 2013

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
ASHLYN O'MARA	)	*Stephen Birman* for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
AIR CANADA, JOHN DOE #1 and JOHN DOE #2	)	*Clay S. Hunter* for the Defendant Air Canada
Defendants	)	
	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD:** May 8, 2013

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] In this proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. C6, Ashlyn O'Mara sues for damages on behalf of 95 persons who were passengers on Air Canada Flight AC878. She alleges that the passengers suffered physical injury or psychological injury or both from a harrowing experience during a flight from Toronto to Zurich. In addition to compensatory damages, she claims punitive or exemplary damages.

[2] Pursuant to rule 21.01(1)(b) and rule 25.11 of the *Rules of Civil Procedure* and s.5(1)(a) of the *Class Proceedings Act, 1992*, the Defendant, Air Canada, brings a motion and seeks an order, striking out Ms. O'Mara's claims for punitive, aggravated, and exemplary damages on the grounds that her pleading fails to disclose a reasonable cause of action for these claims. Air Canada also seeks a declaration pursuant to rule 21.01(1)(a) that the *Montreal Convention, 1999* and the *Warsaw Convention*, incorporated into the laws of Canada by *the Carriage by Air Act*, R.S.C. 1985, c. C-26 exclude recovery for damages for purely psychological injuries not caused directly by Article 17 "bodily injury."

[3] For the reasons that follow, I grant Air Canada's motion.

B. FACTUAL AND PROCEDURAL BACKGROUND

[4] On January 14, 2011, Ms. O'Hara was a passenger on Air Canada Flight AC878 scheduled to fly from Toronto to Zurich Switzerland. The events of Flight AC 878 and some of the aftermath of those events are pleaded in paragraphs 8 to 19 of her Statement of Claim as follows:

> 8. On the evening of January 13, 2011, at approximately 9:38 p.m. eastern standard time, AC878 departed Lester B. Pearson International Airport, in Toronto, Ontario, en route to Zurich, Switzerland with 95 passengers, 6 flight attendants and two flight crew on board.
>
> 9. At or around 12:40 a.m. on the morning of January 14, 2011, the First Officer expressed to the Captain a need for rest and went to sleep.
>
> 10. At or around 1:55 a.m. on January 14, 2011, the Captain made a mandatory position report with Shanwick Oceanic Control with respect to the aircraft's positioning which awoke the First Officer from his sleep of approximately 75 minutes. At the same time, a United States Air Force Boeing C-17 flying westbound at 34,000 feet appeared as a traffic alert and collision avoidance system target on AC878's navigational display. The Captain apprised the First Officer of this traffic.
>
> 11. Over the next minute or so, the Captain adjusted the map scale on the navigational display in order to view the traffic alert and collision avoidance system target and occasionally looked out the forward windscreen to acquire the aircraft visually. At or around the same time, the First Officer mistook the planet Venus on the forward windscreen for an aircraft despite the Captain advising the First Officer that the aircraft of concern was at the 12 o'clock position and 1,000 feet below AC878.
>
> 12. The First Officer continued to erroneously interpret the oncoming aircraft's position as being above and descending towards AC878. Without warning he violently forced the aircraft control column forward causing AC878 to enter a sudden and steep divie into the path of the oncoming aircraft. The Captain was forced to execute an emergency manoeuvre to restore the aircraft to straight and level as its assigned altitude. This entire terrifying episode lasted approximately 46 seconds (the "Terrifying Episode").
>
> 13. As a result of the Terrifying Episode, passengers aboard AC878 were violently shaken and thrown. Many passengers were catapulted into the aircraft's ceiling and interior. Objects were dangerously projected throughout the interior of the aircraft. As described below, Class Members suffered serious physical and psychological injuries.
>
> 14. During the remaining three hours of AC878, passengers were terrified and feared for their lives. They were not provided with any explanation for the Terrifying Episode by the Flight Crew.
>
> 15. Following the landing of AC878 on January 14, 2011, Air Canada spokesperson Peter Fitzpatrick claimed that the Terrifying Episode occurred when AC878 hit some unexpected turbulence.
>
> 16. No further explanation for the Terrifying Episode was ever offered to any Class Member or to the public by Air Canada.

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> 17. Following AC878 and prior to April 16, 2012, in response to complaints made by passengers, the defendant Air Canada, sought and obtained releases from some Class Members in exchange for modest compensation. The release demanded by Air Canada included an indemnity provision purporting to make the claimant an insurer of Air Canada for any additional claims brought. At no time prior to the releases being executed did Air Canada disclose the true cause of the Terrifying Episode of which it was aware. Furthermore, Air Canada failed to correct the misleading statement made by its spokesperson on January 14, 2011.
>
> 18. On April 16, 2012, the Transportation and Safety Board of Canada published a report (the "Report") finding that the Terrifying Episode was not caused by turbulence but was in fact caused by the inappropriate actions of the First Officer.
>
> 19. The Plaintiff and Class Members suffered damages which were a direct result of the Terrifying Episode and the negligence/tortuous conduct of the Defendants, the particulars of which are set out below.

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[5] On May 7, 2012, Ms. O'Hara commenced a proposed class action under the *Class Proceedings Act, 1992*. In her Statement of Claim, on behalf of a putative class of fellow passengers, she claims damages resulting from the events of the flight. Ms. O'Mara's Statement of Claim sets out the legal basis for her claims in paragraphs 20 to 24, which state:

> 20. Air Canada entered into contracts of international carriage with each of the passengers on AC878 including the Plaintiff, Ashlyn O'Mara.
>
> 21. The contracts of international carriage and the liability of Air Canada and its employees are governed in part by the provisions of the *Carriage by Air Act*, R.S. 1985, c. C-26, as amended.
>
> 22. The Plaintiff pleads and relies upon the provisions of the *Carriage by Air Act*, R.S.1985, c. C-26, as amended including, in particular, Articles 17 and 21 of the *Montreal Convention* and articles 17, 22, and 25 of the *Warsaw Convention*.
>
> 23. The events of AC878 as described above, constitute an accident within the meaning of Article 17 of the *Montreal Convention* and Article 17 of the *Warsaw Convention* and accordingly the defendant, Air Canada, is liable to its passengers for damage sustained in case of bodily injury upon the condition only that the incident which caused the injury took place on board AC878 or in the course of any of the operations of embarking or disembarking.
>
> 24. In the event that bodily injury of any passenger`s claims governed by the *Montreal Convention* exceeds $100,000 Special Drawing Rights, the Plaintiff states that the Terrifying Episode was caused by the negligence of Air Canada and its employees including the First Officer and the Captain, and accordingly, Air Canada cannot avail itself of any of the limits on liability under Article 21 of the *Montreal Convention*.

[6] It is to be noted that the Statement of Claim pleads that the events of Flight AC878 constitute an "accident" within the meaning of the *Montreal Convention* and the *Warsaw Convention* and that the Statement of Claim does not plead that Air Canada's servants or agents were acting outside the scope of their employment.

[7] Paragraph 25 of the Statement of Claim sets out the particulars of the Defendant`s alleged negligence. For the purposes of this motion, the relevant parts of the paragraph are the following:

> 25, The Plaintiff pleads that the Defendants were negligent and in breach of their contractual duties to the Class as set out below:
>
> A. As against the Defendant, Air Canada: …
>
> > (o) negligently, recklessly and/or improperly failing to advise Class Members of the true cause of the Terrifying Episode,
>
> B. As against the First Officer and the Captain, for whose negligence the Defendant Air Canada is vicariously responsible: …
>
> > (u) negligently, recklessly and/or improperly failing to advise Class Members of the true reason for the Terrifying Episode.

[8] Paragraphs 26 and 35 advance a claim for "punitive and/or aggravated and/or exemplary damages." Paragraphs 26 and 35 state:

> 26. The Plaintiff further pleads that the Defendants conduct in the circumstances departed to a marked degree from the ordinary standards of behaviour in the circumstances and warrants punitive and/or aggravated and/or exemplary damages. In particular, the Plaintiff alleges that:
>
> > (a) the Defendants inappropriately and wrongly told Class Members and the public that the Terrifying Episode was caused by turbulence when they knew that was not the case;
> >
> > (b) the Defendants inappropriately and wrongly failed to correct their report to Class Members and the public that the Terrifying Episode was caused by turbulence once they knew or ought to have known it was not caused by turbulence;
> >
> > (c) the Defendants, or any of them, actively covered up the true cause of the Terrifying Episode, of which the Defendants, or any one of them had exclusive knowledge, until the circumstances of the Terrifying Episode were investigated by and publically disclosed by the Transportation and Safety Board of Canada;
> >
> > (d) they wrongly and inappropriately allowed Class Members to accept compensation and sign releases and indemnity agreements, knowing the Class Members were told and believed the Terrifying Episode was a result of turbulence and were not aware of the true cause of the Terrifying Episode, while the Defendants at all times were well aware of the true cause of the Terrifying Episode; and
> >
> > (e) they sought and obtained releases from Class Members prior to April 16, 2012 with respect to injuries and damages sustained from the Terrifying Episode, without disclosing the true cause of the Terrifying Episode to Class Members when the true cause of the Terrifying Episode was known only to the Defendants.
>
> 35. The Plaintiff claims that the conduct of the Defendants, as set out herein warrants an award of punitive, aggravated and/or exemplary damages and claims damages as set out herein in an amount necessary to punish and deter such inappropriate conduct.

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[9] Paragraphs 27 to 34 of the Statement of Claim particularize the damages claims with respect to bodily injuries. For present purposes, of these paragraphs, the following are relevant:

> 29. As a result of the Terrifying Episode, the Plaintiff, Ashlyn O'Mara and Class Members sustained permanent and serious personal, physical and psychological injuries.
>
> 30. The Plaintiff, Ashyln O'Mara, sustained damages to her musculoskeletal system including …. In addition, the Plaintiff Ashyln O'Mara suffered from and continues to suffer from psychological injury, increased anxiety flying.
>
> 31. Class Members sustained permanent and serious personal, physical and psychological injuries as a result of the Terrifying Episode including, but not limited to musculoskeletal system injuries, anxiety, depression, post traumatic stress disorder, fear of flying, fatigue nightmares and insomnia. There injuries and impairments have been accompanied by pain, suffering and a loss of enjoyment of life.
>
> ….
>
> 33. The damages sustained by the Plaintiffs and Class Members include but are not limited to special and general damages for pain and suffering physical and emotional losses, as well as loss of earnings and earning capacity, monetary damages and medical and other bills and expenses.

[10] Paragraph 36 plead the statutes relied on. Paragraphs 37 to 39 concern the court's jurisdiction and the place for trial. For the purpose of this motion, it is not necessary to set out the details of these paragraphs.

[11] Ms. O'Hara's claim for relief is set out in paragraph 1 of the Statement of Claim as follows:

> 1. The PLAINTIFF, ASHLYN O'MARA, claims on behalf of herself and on behalf of the Class:
>
> > (a) general damages and special damages in the amount of $10,000,000,00;
> >
> > (b) punitive, aggravated and exemplary damages in the amount of $10,000,000.00;
> >
> > (c) a declaration that any settlement and/or release entered into or signed by any member of the Class with Air Canada prior to April 16. 2012 is invalid and void *ab initio*;

[12] As may be noted, Ms. O'Hara seeks to set aside any releases signed as a part of any settlement between any passengers and Air Canada. During the argument of the motion, Air Canada revealed that three passengers had signed releases.

[13] Air Canada has not yet delivered a Statement of Defence

[14] At a case conference on March 1, 2013, Air Canada asked permission to bring a motion to determine whether Ms. O'Mara's pleading of aggravated, punitive and exemplary damages disclosed a reasonable cause of action. At the case conference, I made the following direction:

> This is a case conference. Upon hearing from the parties, I am varying my direction dated September 27, 2012 as follows: (1) There shall be a Rule 21/s. 5(1)(a) *Class Proceedings Act, 1992* motion before the Defendant delivers its statement of defence. … No affidavit evidence is to be filed for this motion. (2) Following my decision on the motion, there shall be a case conference to schedule the delivery of the statement of defence and to fix a timetable for the completion of the certification motion.

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C. AIR CANADA'S POSITION

[15] Air Canada submits that Ms. O'Mara's claim is pleaded as an "accident" within the meaning of the *Warsaw Convention* and the *Montreal Convention*, and, therefore, her claim and the claims of the putative class members are exclusively and comprehensively governed by the *Conventions*. Air Canada then submits that under the *Conventions*, there is no recovery for punitive or exemplary or any other non-compensatory damages. Air Canada, therefore, submits that it is plain and obvious there is no reasonable cause of action for punitive, exemplary, or any other non-compensatory damages and any such claim should be struck from the pleading.

[16] Further, Air Canada submits that although a claim for aggravated damages is not prohibited by the *Conventions*, in the case at bar, the claim for aggravated damages is a claim for punitive damages, and, therefore, it too should be struck.

[17] Further still, Air Canada submits it is plain and obvious that the *Warsaw Convention* and the *Montreal Convention* exclude recovery for damages for any purely psychological injury not caused directly by "bodily injury," and, therefore, Ms. O'Hara's claim and the claims of the putative class members' claim for purely psychological injury should also be struck.

D. THE PLAINTIFF'S POSITION

[18] Ms. O'Mara's position is that the claims for aggravated damages are claims for compensatory damages permitted under the *Conventions* and the common law and these claims should not be struck from the Statement of Claim.

[19] She submits that the claims for punitive and exemplary damages claims are not governed by the *Conventions*, because the *Conventions* apply only to damages sustained by passengers that took place on board the aircraft or in the course of any of the operations of embarking or disembarking, but Air Canada's actions of cover-up support a negligence claim for events after and long after the events of flight AC 878. She says this common law negligence claim with respect to the cover-up is not governed by the *Conventions*.

[20] Further, she submits that declaratory relief sought by Air Canada is inappropriate because the scope of the motion was limited to the issue of whether the aggravated, punitive and exemplary damages claims disclose a reasonable cause of action and the relief is premature because Air Canada has not filed its Statement of Defence and the common issues have not been defined.

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E. DISCUSSION AND ANALYSIS

1. Introduction

[21] The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada,* [1990] 2 S.C.R. 959 is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5 (1)(a) of the *Class Proceedings Act, 1992*: *Anderson v. Wilson* (1999), 44 O.R. (3rd) 673 (C.A.) at p. 679, leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476.

[22] Where a defendant submits that the plaintiff's pleading does not disclose a reasonable cause of action, to succeed in having the action dismissed, the defendant must show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim: *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.). Matters of law that are not fully settled should not be disposed of on a motion to strike: *Dawson v. Rexcraft Storage & Warehouse Inc.*, *supra*, and the court's power to strike a claim is exercised only in the clearest cases: *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).

[23] In assessing the cause of action or the defence, no evidence is admissible and the court accepts the pleaded allegations of fact as proven, unless they are patently ridiculous or incapable of proof; *A-G. Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Canada v. Operation Dismantle Inc*., [1985] 1 S.C.R. 441; *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.); *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (C.A.); *Canadian Pacific International Freight Services Ltd. v. Starber International Inc.* (1992), 44 C.P.R. (3d) 17 (Ont. Gen. Div.) at para. 9.

[24] Ms. O'Mara as a representative of the passengers of Flight AC878 relies on the *Warsaw Convention* and the *Montreal Convention*, international treaties that are part of Canadian law, and also on Canadian common law to assert claims for purely psychological injuries, aggravated damages, and punitive or exemplary damages.

[25] Air Canada challenges these claims as not showing a reasonable cause of action. It submits that these claims should be struck from Ms. O'Mara's Statement of Claim. With the qualification that a genuine claim for aggravated damages is not precluded, for the reasons that follow, I agree with Air Canada's submission.

[26] Before beginning my analysis of the merits of the competing arguments, I note that I disagree with Ms. O'Mara's submission that the declaratory relief sought by Air Canada about pure psychological injury is inappropriate or premature on this motion. The purpose of this motion was to adjudicate the cause of action criterion of the test for a class action, and the relief sought by Air Canada is consistent with that purpose. The availability of a claim for purely psychological injury is a mature not a premature issue, and there will be nothing to gain by delaying its resolution. The issue about the availability of a claim for psychological injury can be resolved now based on the pleadings before the court without any affidavit evidence.

[27] My analysis will proceed in two stages. In the first stage, I will assume that only the *Warsaw Convention* or the *Montreal Convention* applies to Ms. O'Mara's claims. Based on that assumption, I conclude from the case law that: (a) there is no claim for pure psychological injuries under the *Conventions*; (b) a claim for punitive or exemplary damages is not available under the *Conventions*; but (c) a genuine claim for aggravated damages is available under the *Conventions*.

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[28] In the second stage, I will examine whether Ms. O'Mara's negligence claim based on the cover-up is available at common law and outside of the *Conventions*. My conclusion is that her claim based upon the cover-up is precluded by the *Conventions* because this claim is either: (a) a claim already covered by the *Convention*; or (b) a claim arising out of the international carriage of air for which common law claims are precluded. It follows from that conclusion that she cannot rely on a common law claim to advance claims for psychological injuries or for punitive or exemplary damages.

2. Application of the *Carriage by Air Act*

[29] Turning to the first stage of the analysis, an international treaty system governs the legal rights of passengers, cargo owners, and airlines involved in international commercial air travel. In Canada, liability of an air carrier for passenger claims arising out of international carriage by air is governed by these international treaties, which are incorporated into the laws of Canada by the *Carriage by Air Act*.

[30] In 1929, several nations assembled in Warsaw, Poland and signed a treaty described as the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* (the "*Warsaw Convention*"). Canada was a High Contracting Party to the *Warsaw Convention*. A major purpose of the treaty was to regulate in a uniform manner, the conditions of international carriage by air.

[31] The *Warsaw Convention* was amended, first at the Hague in 1955, at Guadalajara in 1961, at Guatemala in 1971, at Montreal in 1975, and at Montreal in 1999 as the *Convention for the Unification of Certain Rules for International Carriage by Air* (the "*Montreal Convention*").

[32] The *Montreal Convention* became operational on November 4. 2003. However, not all parties to the *Warsaw Convention* agreed to some or all of the amending treaties.

[33] The Conventions address three areas of liability of air carriers; namely: (a) damages sustained by a passenger arising from death, wounding or other bodily injury (Article 17); for damage or loss of baggage or cargo (Article 18); and (c) for damage occasioned by delay in the carriage by air of passengers, baggage, or cargo (Article 19).

[34] Under the *Warsaw Convention* the monetary limit of a carrier's liability for personal injury damages was set at 125,000 francs (around US $8,300) and this was amended to in the 1955 *Hague Protocol*. Limits on liability are, however, removed by the *Montreal Convention*.

[35] Under Article 21 of the *Montreal Convention,* there is now a two-tier scheme, based on the International Monetary Fund's Special Drawing Right ("SDR"). The first tier is strict liability, a no-fault tier for damages not exceeding 100,000 SDRs. The second tier is without monetary limit, but the carrier is permitted to defend itself for claims about the first tier. Article 21(2) provides that the carrier shall not be liable if it proves either that the damage was not due to the negligence or other wrongful act or omission of the carrier, or that the damage was solely due to the negligence or wrongful act of a third party.

[36] Article 17 (1) of the *Montreal Convention* governs liability for damage sustained in case of death or bodily injury. It states:

> 17. (1) The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

[37] Article 17 (1) of the *Montreal Convention* should be read with Article 29, which provides as follows:

> 29. In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

[38] Article 17 (1) of the *Montreal Convention* is not significantly different than its predecessor, Article 17 of the *Warsaw Convention* as amended, which states:

> 17. The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damages so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

[39] Article 17 of the *Warsaw Convention* should be read with Article 24, which provides as follows:

> 24. (1) In the cases covered by Articles 18 [damage or loss of baggage or cargo] and 19 [delay of baggage or cargo] any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
>
> (2) In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are persons who have the right to bring suit and what are their respective rights.

[40] Under Article 17 of the *Warsaw Convention* or Article 17 (1) of the *Montreal Convention*, the damage must be caused by an "accident," and the injury must be "bodily" and nothing else. As noted above, under the first stage of my analysis, I assume that all of Ms. O'Hara's claims are covered by these Articles.

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[41] Given that a major purpose of the *Conventions* was to introduce consistency and uniformity in the international law applicable to air carriage, in interpreting the Conventions, it is important that there be consistency in interpretation from one country to another, and, thus, there must be a very sound reason to depart from the precedents established from around the world: *Connaught Laboratories Ltd. v. British Airways* (2002), 61 O.R. (3d) 204 (S.C.J.) at para. 50, aff'd [2005] O.J. No. 3019 (C.A.); *Chau v. Delta Airlines Inc*. (2003), 67 O.R. (3d) 108 (S.C.J.) at para. 9; *Ace Aviation Holding Inc. v. Holden*, [2008] O.J. No. 3134 (Div. Ct.) at para. 19; *Gontcharov v. Canjet*, 2012 ONSC 2279 at paras. 18-21; *Plourde c. Service Aérien F.B.O. Inc.*, 2007 QCCA 739 at para. 55, leave to appeal refused [2007] S.C.C.A. No. 400.

3. Purely Psychological Injuries under the *Conventions*

[42] The term bodily injury as used in the *Montreal Convention* is intended to have the same meaning as in the *Warsaw Convention*, and the case law from around the world about the *Warsaw Convention* and about the *Montreal Convention* holds that compensation for purely psychological injuries that do not manifest physical injury or an injury to the body are not recoverable under the *Conventions*. See: *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991) (United States); *Sidhu v. British Airways*, [1997] 2 Lloyd's Rep 76 (H.L.) (England); *Kotsambasis v. Singapore Airlines,* (1997) 42 N.S.W.L.R. 110 (C.A.) (Australia); *Morris v. KLM Royal Dutch Airlines*, [2002] A.C. 628 (H.L.) (England); *Chau v. Delta Airlines Inc*. (2003), 67 O.R. (3d) 108 (S.C.J.) (Canada); *Walton v. MyTravel Canada Holdings Inc.*, 2006 SKQB 231 (Saskatchewan); *Plourde c. Service Aérien F.B.O. Inc.*, 2007 QCCA 739, leave to appeal refused [2007] S.C.C.A. No. 400 (Quebéc); *Simard c. Air Canada*, 2007 QCCS 4452 (Quebéc); *Lukacs v. United Airlines Inc.*, 2009 MBQB 29, affd. 2009 MBCA 111 (Manitoba); *Ehrlich v. American Eagle Airlines Inc*., 360 F. 3d 366 (2004) (United States); *Lee v American Airlines Inc.*, 28 Avi 16,552, (ND Tex 2002) affirmed, 29 Avi 18,426 (5th Cir 2004) (United States) *Gontcharov v. Canjet*, 2012 ONSC 2279 (Canada).

[43] In *Morris v. KLM Royal Dutch Airlines, supra,* Lord Hobhouse said bodily injury means:

> a change in some part or parts of the body of the passenger which is sufficiently serious to be described as an injury. It does not include mere emotional upset such as fear, distress, grief or mental anguish.... A psychiatric illness may often be evidence of a *bodily injury* or the description of a condition which includes *bodily injury.* But the passenger must be prepared to prove this, not just prove a psychiatric illness without evidence of its significance for the existence of a *bodily injury*

[44] In my opinion, it is plain and obvious that Ms. O'Mara's claim under the *Conventions* for pure psychological injury is legally untenable. It follows that the various references to psychological and emotional injuries should be deleted from the Statement of Claim. Class Members should not be under any misapprehension that there may be compensation for purely psychological injuries.

4. Aggravated Damages under the *Conventions*

[45] Turning to Ms. O'Mara's claim for aggravated damages under the *Conventions*, in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, Justice La Forest described the nature of aggravated damages and of punitive damages. He stated in paragraph 53 of his judgment:

> Aggravated damages may be awarded if the battery has occurred in humiliating or undignified circumstances. These damages are not awarded in addition to general damages. Rather, general damages are assessed "taking into account any aggravating features of the case and to that extent increasing the amount awarded": see *N. (J.L.) v. L. (A.M.)* (1988), 47 C.C.L.T. 65 (Man. Q.B.), at p. 71, per Lockwood J. These must be distinguished from punitive or exemplary damages. The latter are awarded to punish the defendant and to make an example of him or her in order to deter others from committing the same tort.

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[46] Air Canada does not dispute that Ms. O'Mara and the putative class members have a claim for aggravated damages. Further, it does not dispute that the case law establishes that aggravated damages are compensatory. However, it asserts that aggravated damages are an augmentation of general damages and not a separate category of calculable damages.

[47] Air Canada's point is not to challenge a claim for aggravated damages; rather, its point is that paragraphs 26 and 35 of the Statement of Claim, which purport to include a claim for aggravated damages, are a claim for punitive and non-compensatory damages and, therefore, the claim for aggravated damages should be struck out along with the rest of these impugned paragraphs. I understand Air Canada to also make the point that aggravated damages cannot be separately claimed but rather are a part of the claim for general damages and this means that paragraph 1 (b) should also be struck.

[48] This last point is confirmed by the Court of Appeal's decision in *McIntryr v. Grigg* (2006), 83 O.R. (3d) 161 (C.A.), where the Court held that a court may separately identify what aggravates damages, but in principle, aggravated damages are not assessed separately from general damages.

[49] In other words, Air Canada submits that paragraphs 1 (b), 26, and 35 should be struck as being an improper pleading of aggravated, punitive, or exemplary damages. In particular, the claim for aggravated damages should not be inserted into the material facts that might be material to a claim for punitive or exemplary damages.

[50] I agree with Air Canada's argument and assuming that Ms. O'Mara's claims are covered by the *Conventions*, these paragraphs should be struck from the Statement of Claim.

5. Punitive or Exemplary Damages under the *Conventions*

[51] I turn now to the issue of whether a claim for punitive or exemplary damages is available under the *Convention*.

[52] As noted above, punitive damages serve a different purpose than compensation. They are meant to condemn and deter wrongful civil misconduct. About punitive damages generally, see *Whiten v. Pilot Insurance Co.*, 2002 SCC 18.

[53] Although the *Warsaw Convention* does not specifically refer to punitive, exemplary or any other non-compensatory damages, Article 17, which provides recovery for "damage sustained," has been interpreted to limit recovery to compensable damages only.

[54] Punitive, exemplary or any other non-compensatory damages are not recoverable for claims under the *Warsaw Convention*. In *Naval-Torres v. Northwest Airlines Inc.* (1998), 159 D.L.R. (4th) 67 (Ont. Gen. Div.), the court held that the *Conventio*n permits only the recovery of compensatory damages and the *Conventions* preclude claims for punitive damages. See also: *Chau v. Delta Airlines Inc*. (2003), 67 O.R. (3d) 108 (S.C.J.) at para. 22; *Re: Korean Airlines Disaster of September 1, 1983*, 23 Avi 17,505 (DC Cir, 1991) cert den 112 S. Ct. 616 (1991); *In Re: Air Disaster at Lockerbie, Scotland on December 21, 1988*, 23 Avi 17,714 (2nd Cir, 1991) *certiorari* denied *sub nom Rein v. Pan American World Airways* 112 S Ct 331 (1991).

[55] Under the *Montreal Convention,* Article 29, set out above, expressly excludes recovery for punitive, exemplary or any other non-compensatory damages for claims that fall within its scope.

[56] In my opinion, it is plain and obvious that Ms. O'Mara's claim under the *Conventions* for pure psychological injury is legally untenable.

6. The Availability of Common Law Claims

[57] A conclusion from the above analysis is that under the *Conventions,* the passengers of Flight AC878 do not have claims for purely psychological injuries or for punitive or exemplary damages.

[58] Although there is no doubt that Ms. O'Mara is relying on the *Conventions* in advancing her claims for damages as a consequence of what occurred during the flight of AC878, nevertheless, she submits that her claim for punitive and exemplary damages also are outside of the *Conventions*. In other words, she submits that these claims are available to her at common law under the shelter of the negligence claim set out in paragraphs 25-A (o) and 25-B (u) of paragraph 25 of the Statement of Claim, where she pleads that Air Canada negligently failed to advise Class Members of the true cause of the Terrifying Episode.

[59] Ms. O'Mara's argument is that this negligence claim did not occur on board the aircraft or in the course of any of the operations of embarking or disembarking and thus is a claim independent of the *Conventions*. Air Canada's first counterargument is that the negligence claim associated with the so-called cover-up is covered by the *Conventions* and if the *Convention* applies, then it exclusively applies, and it precludes the application of domestic law, including the common law negligence claim. Air Canada's second counterargument is that the *Conventions* are a complete code for

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claims for damages arising from the international carriage by air of passengers and cargo and if there is no claim under the *Conventions*, there is nevertheless no common law claim either.

[60] In my opinion, Air Canada's argument is the correct one, and Ms. O'Mara does not have a common law negligence claim arising from the so-called cover-up. In my opinion, the common law claim is precluded by the *Conventions*.

[61] The case law from around the world holds that where the liability of an airline for international carriage is in issue, the provisions of the *Warsaw Convention* are exclusive and they preclude the application of domestic law.

[62] In *Sidhu v. British Airways plc*, [1997] 1 All E.R. 193 (H.L.), while the passengers on a flight from London to Kuala Lumpur were in the Kuwait airport waiting while their plane was being refuelled, they were captured and taken prisoner by Iraqi forces invading Kuwait. The passengers did not make a claim under the *Convention*, but they alleged that the airline was negligent under the common law in landing to refuel in Kuwait when the threat of an Iraqi invasion was imminent. In *Sidhu*, the House of Lords concluded that there was no common law claim. Lord Hope, who delivered the judgment for the Law Lords, stated:

> Thus the purpose is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the *Convention* which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. …
>
> The language used and the subject matter with which [the *Convention*] deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all the High Contracting Parties without reference to the rules of their own domestic law. The *Convention* does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals - and the liability of the carrier is one of them - the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law.

[63] *Sidhu v. British Airways plc* is thus authority that the *Convention* is the exhaustive source of remedies for damages sustained as a result of international carriage by air. It is to be noted and emphasized that the House of Lords was not dealing with a situation where a claim was being made under the *Convention*. Had that been the case, the court's holding might have been narrower and limited to saying that where the *Convention* applies the common law did not. However, the House of Lord's decision was broader to the effect that in matters of airline liability resort to the *Convention* was a code and resort could not be made to the common law.

[64] The point that the circumstances of airline liability is determined exclusively by the *Conventions* and not the common law was also a major point in the United States Supreme Court decision in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999). In this case, Ms. Tseng suffered psychological injury when her body was searched before she embarked on a flight to Israel. She did not allege that the incident was an accident covered by the *Convention*.

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[65] In *El Al Israel Airlines, Ltd. v. Tseng* Justice Ginsburg of the United States Supreme Court addressed the exclusivity of the *Conventions* and stated:

> The cardinal purpose of the *Warsaw Convention*, we have observed, is to "achieve uniformity of rules governing claims arising from international air transportation." The *Convention* signatories, in the treaty's preamble, specifically "recognized the advantage of regulating in a uniform manner the conditions of … the liability of the carrier." To provide the desired uniformity, Chapter III of the *Convention* sets out an array of liability rules which, the treaty declares, "apply to all international transportation of persons, baggage, or goods performed by aircraft." In that Chapter, the *Convention* describes and defines the three areas of air carrier liability (personal injuries in Article 17, baggage or goods loss, destruction, or damage in Article 18, and damage occasioned by delay in Article 19), the conditions exempting air carriers from liability (Article 20), the monetary limits of liability (Article 22), and the circumstances in which air carriers may not limit liability (Articles 23 and 25). Given the Convention's comprehensive scheme of liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, non-uniform liability rules of the individual signatory nations. [citations omitted]

[66] In Canada, in *Gal v. Northern Mountain Helicopters Inc.*, [1998] B.C.J. No. 1857 (S.C.), aff'd [1999] B.C.J. No. 1914 (C.A.), the court held that the *Warsaw Convention* is exclusive and extends to all claims made by a passenger against a carrier arising out of international carriage by air. See also: *Clarke v. Royal Aviation Group Inc./Groupe Royal Aviation Inc.*, [1997] O.J. No. 2311 (Gen. Div.); *Walton v. Mytravel Canada Holdings Inc.*, [2006] S.J. No. 373 (Q.B.); *Plourde c. Service Aérien F.B.O. Inc.*, 2007 QCCA 739, leave to appeal refused [2007] S.C.C.A. No. 400; *Lukacs v. United Airlines Inc.*, 2009 MBQB 29, affd. 2009 MBCA 111; *Sakka (Litigation guardian of) v. Societe Air France*, 2011 ONSC 1995; *Gontcharov v. Canjet*, 2012 ONSC 2279.

[67] Recently, in *Air Canada v. Thibodeau*, 2012 FCA 246, at para. 33, the Federal Court of Appeal confirmed that the *Warsaw Conventions* and the *Montreal Convention* apply exclusively to all circumstances that involve the air carrier's liability for damages arising from international carriage by air. The Court stated with my emphasis added:

> 33. In conclusion, in light of the Canadian and international case law cited above, as relevant to Article 24 of the *Warsaw Convention* as it is to Article 29 of the *Montreal Convention*, I find that the latter precludes the award of damages for causes of action not specifically provided for therein, even when the cause of action does not arise out of a risk inherent in air carriage (for example, an invasive body search before embarking (*Tseng*) or discrimination based on race (*King v. American Airlines*, 284 F. 3rd 352 (2nd Cir. 2002)) or on physical disability (*Stott*)). Thus, although the *Montreal Convention*, like that of *Warsaw*, does not address all aspects of international air carriage, it constitutes a complete code as concerns the aspects of international air carriage that it expressly regulates, such as the air carrier's liability for damages, regardless of the source of this liability. The purpose of the *Montreal Convention*, following the example of the one preceding it (the *Warsaw Convention*), is to provide for consistency of certain rules regarding the liability incurred during international air carriage. The doctrine propounded by *Sidhu, Tseng* and *Stott* promotes this goal.

[68] In *Air Canada v. Thibodeau*, the Thibodeaus sued Air Canada for damages for violating the *Official Languages Act* R.S.C. 1985, c. 31 (4th Supp.) because Air Canada had not provided services in French at various occasions, at the Atlanta, Ottawa and Toronto airports and aboard three flights between Canada and the United States. The Federal Court of Appeal reversed the decision of the trial judge who had ordered Air Canada to pay $6,000 in damages ($1,500 for each incident). The Thibodeau's were not asserting any claim for damages under the *Conventions*, but the Federal Court of Appeal ruled that Article 29 of the *Montreal Convention* precluded their action for damages incurred during or arising out of international air carriage even if the *Montreal Convention* did not provide for a remedy for the loss suffered

[69] Thus, the case law establishes that passengers do not have recourse to domestic law, in advancing a claim for damages arising in connection with international carriage by air.

[70] There are also cases where passengers that have a claim under the *Conventions* have been held to not have any claim under the common law. See: *Naval-Torres v. Northwest Airlines Inc.* (1998), 159 D.L.R. (4th) 67 (Ont. Gen. Div.); *Roberts v. Guyana Airways Corp.*, [1998] O.J. No. 3779 (Gen. Div.); *McDonald v. Korean Air*, [2002] O.J. No. 3655 (S.C.J.), aff'd 171 O.A.C. 368 (C.A.), leave to appeal to S.C.C. ref'd 191 O.A.C. 398; *Connaught Laboratories Ltd. v. British Airways*, (2002) 61 O.R. (3d) 204, aff'd [2005] O.J. No. 3019 (C.A.).

[71] The above analysis suggests that there are three kinds of cases against airlines. First, there are cases where the *Warsaw Convention or the Montreal Convention* apply and provide a remedy, and when the *Conventions* apply, they apply exclusively. Second, there are cases where, notwithstanding that no claims are available under the *Warsaw Convention or the Montreal Convention*, common law claims are precluded. Third, there are cases where the *Conventions* do not apply to preclude other causes of action and common law claims.

[72] It needs to be appreciated that based on the case law about the exclusivity of the *Conventions*, Ms. O'Mara's arguments that the misrepresentation claim is not precluded because the negligence occurred after the passengers disembarked from the aircraft does not help her. If the cover-up was an accident that occurred during the phase from embarking to disembarking the flight, then Ms. O'Mara would have only a claim under the *Convention* and not a common law claim. However, if the cover-up did not occur during the phase from embarking to disembarking the flight, then she would not have a claim under the *Convention* and the *Convention* being a complete code, she would also have no common law claim either.

[73] The *Conventions* were enacted to provide certainty, predictability, uniformity, and consistency about the liability of carriers engaged in the international carriage by air: *Ace Aviation Holding Inc. v. Holden*, [2008] O.J. No. 3134 (S.C.J) at para. 19; *El Al Israel Airlines Ltd. v. Tseng*, 525 U.S. 155 (1999). Therefore, it follows that courts have given a robust interpretation to the scope of the *Conventions* and to the meaning of the word "accident", and if the alleged wrongdoing is a causally connected with conduct

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that took place on board the airline, then it is regarded as within the ambit of the *Conventions*. As noted by the Federal Court of Appeal in *Air Canada v. Thibodeau*, *supra*, the *Conventions* are meant to be a complete code as concerns the air carrier's liability for damages, regardless of the source of this liability.

[74] To determine the scope of the *Conventions*, Courts use a chain of causation analysis, and if the alleged wrongdoing is connected to the flight then it is covered by the *Conventions*.

[75] The chain of causation analysis was recently used by Justice Wilson in *Gontcharov v. Canjet*, 2012 ONSC 2279, where after Mr. Gontcharov had complained about the temperature of the passenger compartment, upon the aircraft landing in Toronto, he was escorted off the aircraft by police officers carrying sub-machine guns. He was then detained for three hours after which he was released by the officers with an apology. Justice Wilson dismissed Mr. Gontcharov's claims for punitive damages based on the tort of false imprisonment. She held that his claim under the *Convention* precluded a claim for punitive damages.

[76] Justice Wilson concluded that the events of Mr. Gontcharov's pleaded injury began while he was on board the aircraft and concluded with the detention by the police. She noted that her conclusion was consistent with the recent decision in the United States, *Eid v. Alaska Airlines Inc.* 621 F. 3rd 858 (9th Circuit 2010), where the plaintiffs brought an action for defamation against the crew for statements by the flight crew to police about the plaintiffs' conduct during the flight. In *Eid,* the reporting of the incident to the police was held to be covered by the *Convention* but the subsequent announcements made about the the plaintiffs' conduct during the continuation of the flight by other passengers were outside the Convention having occurred after the plaintiffs had disembarked.

[77] Justice Wilson distinguished four cases where courts had held that false imprisonment claims by passengers who shortly after disembarking from a flight were strip searched or detained by police, airport security, secret service, or immigration officials were not covered by the *Convention*. She held that the cases were distinguishable because the wrongdoing was by police or other authorities and the wrongdoing was not connected to events beginning during the flight and disembarkation.

[78] In *Balani v. Lufthansa,* 2010 ONSC 3003, a flight attendant refused to provide a wheelchair during disembarkation, and the passenger was injured later in the terminal. Justice Pattillo concluded that the incident was an accident within the meaning of the *Convention* using a chain of causation analysis.

[79] In *El Al Israel Airlines Ltd. v. Tseng*, *supra*, it was not disputed that when a passenger is subjected to a security body search before boarding an international flight, the search occurred in the course of embarking. In this case, the passenger, who allegedly suffered psychological injury as a result of the search, did not have a claim for psychological injuries under the *Convention*, and given the exclusivity of the *Convention*, she did not have a claim under domestic law.

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[80] In *Naval-Torres v. Northwest Airlines Inc.* (1998), 159 D.L.R. (4th) 67 (Ont. Gen. Div.), the plaintiff brought a proposed class action alleging that she and others had been injured by exposure to second-hand smoke while on board an international flight operated by the defendant. The plaintiff alleged that she was induced to purchase a ticket by the carrier's false advertising that the aircraft would be free from smoke and that her damages for the misrepresentation including a claim for punitive damages were outside the *Warsaw Convention*. Justice Sharpe, however, held that regardless of the particular causes of action asserted, the essence of her claim was a bodily injury that resulted from exposure to second-hand smoke during an international flight. The source of harm was the alleged bodily injury sustained during the flight, which was covered by the *Warsaw Convention*. Therefore, he struck out the punitive damages claims as not recoverable under the *Convention*.

[81] In the case at bar, a cover-up of the cause of the Terrifying Episode is causally connected to the Terrifying Episode and indeed could not have occurred but for the Terrifying Episode. In my opinion, the *Convention*s apply to this case, and Ms. O'Mara's common law negligence claim based on the cover-up is precluded.

[82] However, if this conclusion is incorrect and she does not have a claim under the *Conventions*, then her negligence claim is a common law claim against an airline for damages arising from the international carriage by air, and common law claims are precluded because the *Conventions* are a complete code of what claims are available in the circumstances of this case.

F. CONCLUSION

[83] For the above reasons, I grant Air Canada's motion. The references to psychological and emotional injuries throughout the Statement of Claim and paragraphs 1(b), 26, and 35 of the Statement of Claim should be struck.

[84] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Air Canada's submissions within 20 days of the release of these Reasons for Decision, followed by Ms. O'Mara's submissions within a further 20 days.

Perell, J.

Released: May 21, 2013

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CITATION: *O'Mara v. Air Canada*, 2013 ONSC 2931
COURT FILE NO.: 12-CV-453025-00 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ASHLYN O'MARA

Plaintiff

- and -

AIR CANADA, JOHN DOE #1 and JOHN DOE #2

Defendants

REASONS FOR DECISION

Perell, J.

Released: May 21, 2013

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Ontario Supreme Court
Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.
Date: 2001-08-09

PricewaterhouseCoopers Inc., in its Capacity as Trustee of Olympia & York Developments Limited, a Bankrupt, Plaintiff

and

Olympia & York Realty Corp. and Olympia & York SF Holdings Corporation, Defendants

Ontario Superior Court of Justice [Commercial List] Farley J.

Heard: September 11-14 and 18, 2000, April 3-5, 9 and 10, 2001

Judgment: August 9, 2001

Docket: 93-CQ-38609, 98-CL-1034

F.J.C. Newbould, Q.C., Aaron A. Blumenfeld, for Plaintiff

Peter F.C. Howard, Ashley John Taylor, for Defendants

***Farley J.*:**

[1] This action is, I understand, the last piece of litigation arising out of the 1992 demise of the Olympia & York empire. As is usual in this saga, the contestants have put forward their positions with skill, vigour and dexterity. Each side has presented a convincing case. At dispute is some $22 million U.S. plus interest. The plaintiff trustee in bankruptcy ("Trustee") did not pursue its fraudulent preference claim, but rather relied on its (a) s. 100 *Bankruptcy and Insolvency Act* ("BIA") claim and (b) an oppression claim pursuant to s. 248 (Ontario) *Business Corporations Act* ("OBCA"). It was noted that since this litigation commenced, the various relevant participants have changed their corporate citizenship from Ontario to New Brunswick; however I do not see that change as affecting the jurisdiction of the oppression claim since that cause of action arose whilst they were still Ontario corporations. See also Agreed Statement of Facts.

[2] On September 15, 2000, I ruled that Patricia Caldwell who had been tendered as an expert witness by the plaintiff was not so qualified to give an opinion concerning fair market

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value (“fmv”) for the purposes of s. 100 BIA (see *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2000), 20 *C.B.R.* (4th) 277 (Ont. S.C.J. [Commercial List]). At the resumption of this trial in April, 2001, I was asked by counsel jointly not to rule as to the acceptability of their respective expert witnesses (Susan Glass and Judy Mencher for the plaintiff and Stephen Cole for the defendants) until after closing argument. Aside from these witnesses, Gary Wilson (a Vice-President of the HongKong Bank of Canada), John Bottomley (now an executive of Citibank, a U.S. bank, but who then was at Citibank Canada, a subsidiary of Citibank, and who was involved in real estate investments), James Wright (who was the Managing Director, Real Estate of Citibank Canada) and Robert Lowe (the senior officer of the Trustee and called by the defendants) testified.

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[3] Lowe confirmed that, in the Trustee’s 1994 report to creditors of OYDL, it was indicated that the equity of OYDL in the U.S. operations was an extremely important asset. However in my view this evidence is of rather negligible importance given that it is evidence of “value” some two years after the time in question—namely March 16, 1992—and given at a time when Lowe was actively attempting to parlay that asset into something of value, salvageable for the benefit of the OYDL creditors and thus one would reasonably assume that the upside would be emphasized to readers (who would include the outside world).

[4] While Citibank and Citibank Canada were not direct participants in this litigation, it should be noted that Citibank ended up with a 25% interest in OYRC in the ultimate restructuring of OYDL’s U.S. real estate interests. (It should be noted that Citibank was a significant creditor of OYRC at the relevant time, the size and percentage of such debt capital being sufficient to support the claim that Citibank was a privy of OYRC/OYDL: see *Halsbury Laws of England* 4th edition (Butterworths, 1976) at Vol. 17, pp. 53-4; Sopinka, Lederman & Bryant, the *Law of Evidence in Canada* 2nd ed. (Butterworths) p. 302.) While either side could have called Citibank executives as witnesses, only the plaintiff, the Trustee of OYDL, chose to. Neither Bottomley nor Wright were evasive; rather they gave their evidence in a straightforward neutral way. The Citibank interests had loaned OYRC $250 million U.S. This was classified as a substandard loan in March 31, 1991 with the first Classified Loan Management Report (“CLMR”), with the New York office (real estate department) to do a review of OYRC s U.S. real estate holdings. This real estate department had considerable interests and experience in U.S. real estate through its loan portfolios and otherwise; the New York office department was very familiar with the New York market where OYDL’s (OYRC’s) U.S. holdings were

concentrated. In August 1991, i had reached the view that with the downturn, the New York office market was very soft. Citibank was concerned that if the OYRC real estate had to be sold (attempt to realize upon the loan), the properties would not fetch their appraised (by Landauer) values. Bottomley recognized that the New York department was more familiar (in the sense of having expertise) with the New York market than anyone at Citibank Canada. Further CLMRs on a monthly basis indicated a recognition that Citibank's exposure was becoming more and more serious. The November 30, 1991 CLMR indicated that the New York department had completed a detailed analysis of the U.S. real estate portfolio. It was indicated in that report (of Citibank Canada) that there was no value over the debt load of the properties (Bottomley indicated that it was in his handwritten notation on this conclusion that it was "as determined by CRENY", that is, the New York office) and that there was estimated to be a negative net worth of $90 million.

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[5] Bottomley indicated that the New York department had started with the Landauer appraisals and adjusted such with Citibank's views as to capitalization rates (looking at a range of such rates), the space expected to be available for lease over the next several years, the cost of inducements to lease out OYRC space and appropriate discount rates. While it is true that no one from Citibank testified as an expert as to the value of the U.S. real estate holdings at the relevant time, it seems to me that it would be inappropriate to dismiss Citibank's recorded view, given Citibank's in depth interest in and experience in the U.S. (including New York) real estate market in conjunction with its privy relationship as above. It also seems to me that, given Citibank's views intervening between the Landauer appraisals and the March 16, 1992 date, then the Landauer view of values must be reconsidered and negatively adjusted to take into account the deterioration thus evidenced.

[6] Wright, aside from observing that Paul Reichmann did not keep his word as to securing the $250 million U.S. loan, acknowledged that if the OYRC properties were sold, then the realizations would be less than the Landauer appraisals.

[7] It seems to me reasonable to conclude that as of March 16, 1992, the OYRC real estate interests (and thereby OYRC itself) had a negative value (that is, it is probable that the debt load would exceed realizations) by a large dollar absolute amount and a considerable percentage.

[8] Wilson indicated that he had requested a s. 20 OBCA solvency certificate in February 1992 to support the further grant of credit involved in the $25 million facility. This request was ignored until March 13, 1992. Ken Leung the Chief Financial Officer of OYDL in his letter of March 13th did not raise the question of the necessity of a solvency certificate when he was requesting that Wilson authorize the advance of a few million dollars to bring the credit up to the $25 million limit. Neither did OYDL's lawyers (Davies, Ward & Beck) question the necessity of such a solvency certificate when they forwarded the documentation on March 16, 1992 including the solvency certificate. Wilson testified that he requested the solvency certificate in following a standard checklist used when getting a guarantee from a third party. He noted that s. 20 OBCA provided for certain exceptions as to the necessity of a solvency certificate (specifically one which would apply here, namely that wholly owned subsidiary exception) and that the bank would be told (generally by borrower's counsel in his experience) as to whether a solvency certificate were required. No explanation was advanced in these proceedings as to why Wilson was not advised that a solvency certificate was not required because the wholly owned subsidiary exception applied (with the proffering of such a wholly owned subsidiary certificate or equivalent documentation); rather it appears that for some (unexplained) reason, the more convoluted "reorganization" path was followed. Neither side shed any light on this by calling witnesses in this regard.

[9] The Transactions (see para. 69 of Agreed Statement of Facts and defendants' Memorandum of Argument para. 9) in question as to the s. 100 BIA and s. 248 OBCA issues are described in Ex. 25 Cole report on the Valuation of Consideration Given and Received in the Transactions dated March 16, 1992 (and specifically at Appendices 4 and 5 of that report). S. 100 BIA provides:

> s. 100(1) Where a bankrupt sold, purchased, leased, hired, supplied or received property or services in a reviewable transaction within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into whether the bankrupt gave or received, as the case may be, fair market value in consideration for the property or services concerned in the transaction.
>
> (2) Where the court in proceedings under this section finds that the consideration given or received by the bankrupt in the reviewable transaction was conspicuously greater or less than the fair market value of the property or services concerned in the transaction, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons, for the difference between the actual consideration given or received by

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> the bankrupt and the fair market value, as determined by the court, of the property or services concerned in the transaction.
>
> (3) In making an application under this section, the trustee shall state what in his opinion was the fair market value of the property or services concerned in the transaction and what in his opinion was the value of the actual consideration given or received by the bankrupt in the transaction, and the values on which the court makes any finding pursuant to this section shall be the values so stated by the trustee unless other values are proven.

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[10] Cole in his March 27, 2001 report opines that the fmv of the consideration given by OYDL was in the range of $0 to $10 million whereas the fmv attributable to the OYRC shares received was in the range of $0 to $100 million. Cole had difficulty in distinguishing between the notional seller in the classical definition (who is not burdened with the difficulties which a real seller may face) and OYDL which did have some of these "Veal" difficulties. Cole's classical definition at p. 3 of his report was:

> Fair market value is defined as the highest price available in an open and unrestricted market between informed, prudent parties acting at arm's length and under no compulsion to act, expressed in terms of money or money's worth.

[11] It appears that Cole and defendants' counsel discussed the scope of Cole's work sometime prior to Cole delivering his report since the formal letter of instructions is dated March 27, 2001 as well. The concluding paragraph of that instruction letter instructed Cole to "bear[ing] in mind the fundamental caveat that it is not a transaction that OYDL as vendor in its circumstances would have entered into." Cole indicated that he had ignored this (in my view valid) fundamental caveat and justified that decision by stating that he was merely observing his independence. I did not find that explanation very convincing.

[12] Cole placed great value (as opposed to fmv) on the economic benefit of not having a fairly immediate bankruptcy of OYDL. However that seems to ignore that OYDL was reorganized by the market place leading into the spring of 1992 as being in perilous financial shape—teetering on the brink. Even if the Transactions could be said to have bought OYDL time until it actually did seek insolvency protection pursuant to its May 1992 CCAA filing, this time at a maximum was only a scant two months, at the maximum if one assumes that this was the only factor of this relief. There was no evidence presented which would lead one to believe that either (a) the time bought by virtue of the Transactions did (or was reasonably expected) to provide OYDL breathing space for either a rescue or an orderly insolvency proceeding which would reduce costs and preserve value for the sake of the OYDL estate and its creditors or (b) there was a reasonable expectation that the values underlying the

OYRC shares would rebound. As indicated above, it seems a reasonable conclusion that OYRC had a significant negative net worth. Further not only did the Transactions not affect that net worth, but the defendants give no recognition to the fact that two fundamental and independent facts are ignored. Firstly OYDL need not have entered the Transactions in order to obtain the balance of the $25 million credit from the HongKong Bank of Canada since that process was ostensibly entered into (solely) for the purpose of providing the bank an (unnecessary) solvency certificate; rather the money could have been obtained on the basis of the wholly owned subsidiary exception. Secondly, OYRC was a wholly owned "private" subsidiary of OYDL. Before the Transactions, OYDL owned 100% of OYRC and after the Transactions, it owned the same 100%. There was no value created which OYDL could have utilized; if OYDL had wished to sell (or pledge) the 30% of OYRC shares (which is recovered by virtue of the Transactions), then it could have done so by utilizing that same percentage out of its existing 100% ownership it had of OYRC prior to the Transactions. This is a fmv in a notional market question—but in this notional market, the hypothetical seller already has 100% of the shares of the company—and it is being paid for the Note with more shares of its wholly owned subsidiary. Even in a hypothetical or notional market the fmv of these extra shares would be zero or "nothing".

[13] While Cole correctly stated the definition of fmv, he was reluctant to use it as required by s. 100 BIA. Rather he wandered away from the notional market to deal with the aspect of "economic value" when considering fmv. In this he came close to the line which Patricia Caldwell had strayed over in *PricewaterhouseCoopers, supra.* It would seem to me that this aspect of consideration should be left to the court once the calculations have been made to determine if there were a conspicuous difference; then to factor that into its discretion.

[14] All of Cole, Mencher and Glass had no particular expertise in real estate valuation, and specifically U.S. offices buildings, particularly in New York City. Thus we should not place any weight of significance to their views of these values. However I think it noteworthy to observe that Cole (who indicates that he has some U.S. real estate experience but is no expert as to values) assumed a possibility of a 20% increase in values in the N.Y. market—at a time when a respected professional survey (Korpaz) was indicating that that market would remain particularly soft for the foreseeable future. When pressed on that, he fenced rather than acknowledging his difficulty (eg. where he said several times that he agreed with what his cross-examiner was reading—but in the sense that the cross-examiner was accurately

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reading what was printed and when he inaccurately defended his position by speculating that the survey referred to old construction and not to new construction).

[15] Cole then indicated that in real terms the Transactions saved OYDL (or the OYDL estate and its creditors) approximately $660 million (3% of $22 billion) in staving off the insolvency to allow for a more planned and stable reorganization. He then speculated that these savings could be increased by a factor of two, plus or minus. In this regard he was relying on a general observation in a valuation book which dealt with essentially manufacturing and service industries—as opposed to the rather stand alone real estate buildings involved in OYDL. Further he did not take into consideration that it does not appear that the intervening two months before OYDL filed were productively spent.

[16] Cole had no expertise in the distress value trading market in either Canada or the U.S. Mencher had some experience in the U.S. market and appeared to me to have a reasonable handle and appreciation for it. As a side note I would observe that it was rather common knowledge, even to the court, that U.S. vulture funds were eager for opportunities to put chunks of their cash mountains (or at least cash hills) into at this time. Frequently it appears that the demand for product was such (and the experienced rewards great enough) that minimal due diligence was not uncommon (eg. Cadillac Fairview). It would seem to me that an OYDL entree would be of interest to the debt-trading vulture funds.

[17] It was difficult to understand Cole's insistence on the point of a note purchaser being concerned about being accused of "sharp practice" or its equivalence as to the bankruptcy of OYRC changing the relationship with the EIB. In my view this would have been regarded as "smart practice" by the industry.

[18] In contrast Glass and Mencher were fairly understated. I was more impressed with their neutrality (to the degree that we see expert witnesses these days) and objectivity. To the degree to which they relied on the Fasken Campbell Godfrey opinion of December 7, 1998 (Ronald N. Robertson, Q.C.), their reliance appears reasonable in the circumstances. I agree with Mr. Robertson's analysis of the change in legislation not affecting the law as expressed in *Hillstead Ltd., Re* (1979), 26 O.R. (2d) 289 (Ont. Bktcy.) particularly from a *Pepper (Inspector of Taxes) v. Hart* (1992), [1993] 1 All E.R. 42 (U.K. H.L.) analysis. See also *Plante, Re* (1996), 38 C.B.R. (3d) 165 (Ont. C.A.) per Houlden J.A. at pp. 170-2. Certainly there do not appear to have been any formal Notices of Default (either through an Attachment Event or

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Event of Default) registered with OYDL and thus Robertson's assumption on that point appears reasonable as well. Thus I would think that the vulture market would appreciate the potential that the EIB pledge was not perfected vis-à-vis a trustee in bankruptcy and that any purchaser would have done the level of due diligence with which it would have been satisfied to confirm that potential as a business opportunity. Mencher mentioned a purchaser possibly requesting a certificate of non-default and of net worth after making enquiries of OYDL. Mencher testified that she as a representative of the market would pay $40 million for the Note, with the potential of getting within a fairly short period of time an aggregate of $100 million. She described this as a fabulous return. A return of such relative magnitude (actual dollars and percentage) would be an attractive proposition for a large proportion of the vulture fund market—so attractive in my view that some leeway for slippage in time or dollars would not be a great distraction. The vulture fund managers are number crunchers based on their best estimates of what is likely to come about. I think it a fair observation based on experience that these managers are aggressive; they are not conservative banker types. While they will rely on advice of legal counsel and others in coming to their estimates, they tend not to let legal caution kill a business deal. To survive (and attract new capital), the vulture fund managers must get their money out and working. I agreed with Mencher's observation, when taken in that context, that in her view lawyers do not make good "investors". In her view if there was a higher risk observed by the manager, then it would not be a questions of not doing the deal (purchase), but rather that the purchase would be transacted at a lower price.

[19] It appeared to me that Glass in looking at the underlying Santa Fe Pacific, Santa Fe Energy and Catellus shares proceeded appropriately to consider whether there were any material downside (she also looked at upside potential) over the foreseeable future. Mencher's reliance on Glass in this respect is appropriate, given that Mencher takes the more conservative non-enhanced value figures.

[20] In the overall balance of matters, to the extent necessary to rely on any of the proffered experts, I was more comfortable with the basis of analysis and conclusions of Glass/Mencher than I was with Cole. While I have no doubt that they were all sincere in their effort to assist the court I would note that Cole was stretching to achieve his conclusions while Glass/Mencher were fairly understated and readily acknowledged some elements of criticism, but which I found in the overall result were not of material significance.

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[21] In the end result with respect to the initial determination pursuant to s. 100 BIA, it seems to me that there was a conspicuous difference in fmv between what OYDL got for the Note and what the Note was worth (on a fmv analysis)—namely OYDL got more shares of OYRC but it already had 100% of this wholly owned subsidiary, no further value was put into OYRC and the 30% of OYRC shares that it received in addition carried with them no value in the sense that the original 100% of the shares were worth exactly the same as the 100% original shares plus the 30%, but in return for this "nothing", OYDL gave up a Note which had a fmv of some tens of millions of dollars and likely in the neighbourhood of some $30 - $50 million. This range takes into account the slippages and contingencies raised. To my mind in this particular case, the value of what OYDL got in the form of the extra shares of OYRC was exactly the same, whether it be "fair value" which takes into consideration the factors then prevailing or "fmv" which is a notional market concept; that same was namely "nothing". Compounding this was the factor that, it appears, OYDL did not have to engage in the Transactions to allow it to obtain the balance of the $25 million credit from HongKong Bank of Canada since it could have relied on the wholly owned subsidiary exception, as opposed to engaging in the Transactions to support a solvency certificate compliance with s. 20 OBCA.

[22] Weiler J.A. for the majority in *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1995), 26 O.R. (3d) 1 (Ont. C.A.) stated at p. 24:

> …The willing purchaser in a fair market value situation is not concerned with the expectation of the parties but only with the value of the assets. If the regulatory context is to be considered, and in my opinion, a reasonable and just outcome requires that it be considered, it should be at the stage when the court is deciding whether to grant judgment to the trustee. At that stage the court will know that there is a conspicuous difference in the fair market value of the property given and received by the bankrupt. In deciding whether to exercise its discretion to grant judgment to the trustee it would then be appropriate for the court to consider the good faith of the parties, their intention, and whether fair value has been given for the property.
>
> The wording of s. 100 strongly suggests that ordinarily fair market value is to be used to determine whether judgment should be granted to the trustee. That is as it should be. I am, however, of the view that the court is left with a
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> residual discretion to decide whether or not to grant judgment based on equitable principles such as the ones I have mentioned. Clearly the onus of raising those equitable considerations and proving that they apply to the particular case must be borne by the party asserting them. In my opinion Farley J. erred in his interpretation of s. 100(2) of the Act by not recognizing that s. 100(2) confers a discretion on the courts which is to be exercised on the basis of equitable considerations.

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[23] Allow me to now turn to the equities. HongKong Bank of Canada made a technical request—*a month before* the Transactions. At that stage there was no response from OYDL of any kind, but specifically none which indicated the simple solution to the solvency certificate request—namely it was not required as OYDL could rely on the wholly owned subsidiary exception contained in s. 20 OBCA. I should note that once we are out of the conspicuous difference analysis, we are out of the notional market—and there is no need to assume the sale of the Note to a third party purchaser. The sale of the Note (which event, I have no doubt "would have brought the house of cards down") was truly never in actual question. As Weiler J.A. observed at p. 24 *supra:* "Clearly the onus of raising those equitable considerations and proving that they apply to the particular case must be borne by the party asserting them". The defendants here, to my view, have offered no reasonable explanation why the wholly owned subsidiary exemption was not put to HongKong Bank as a complete and absolute answer—nor why nothing was done for a month.

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[24] The defendants do assert that OYDL was at best owed $390 million by OYSF but that OYDL and its creditors took $611 million of OYSF's assets as security for OYDL's indebtedness, both direct and through its guarantees. However this was a historical or in place situation and to my view it does not impact on the equities which must take what is in place as a given factor, before applying equity.

[25] In the result I am not persuaded that the defendants have done anything more than raise the issue of applying the equities envisaged by s. 100(2) BIA as discussed (without specific limitation) by Weiler J.A. in the *Standard Trustco* case, *supra.* They have not put forward anything specific subject to some general comments concerning setoff which may also be directed here, nor have they, in my view, provided any proof of facts to support any equitable relief. The court needs more than vague allegations in this regard.

[26] The defendants also briefly raised the issue of whether equitable setoff was sufficiently, if at all, addressed. In their Memorandum of Argument at p. 54 before citing *Telford v. Holt* (1987), 21 C.P.C. (2d) 1 (S.C.C.) they assert:

> (d) However, by reason of the enforcement of the security over the shares owned by OYSF, OYSF is entitled to assert a right of subrogation and indemnity. According to paragraph 96 of the Agreed Statement of Facts, the amount paid by OYSF on account of obligations of OYDL, whether incurred as a principal debtor or a guarantor, is approximately $612,000,000. Accord-

> ing to paragraph 97 no payment was made in respect of this amount by OYDL to OYSF. While this entitlement likely does not give rise to a right of legal set-off in that it was not liquidated at the relevant time and also due to want of mutuality, equitable set-off is not subject to either of these limitations.

Wilson J. at p. 13 of *Holt* stated: “And second, an individual may set-off against the assignee a money sum which arose out of the same contract or scries of events which gave rise to the assigned money sum or was closely connected with that contract or series of events.”

[27] However it seems to me that the question of setoff is sufficiently dealt with in the *Mitchell, Houghton Ltd. v. Mitchell, Houghton (Que.) Ltd.* (1970), 14 C.B.R. (N.S.) 301 (Ont. *S.C.*), at pp. 305-6, cited with approval by Kelly Palmer, *The Law of Set-Off in Canada* (1994, Canada Law Book) at p. 187 and in Holden & Morawetz, *Bankruptcy and Insolvency Law of Canada* (3rd ed. loose-leaf, Carswell) at p. 4-93. In our case, OYDL was owed $391 million by OYSF but OYDL did not owe OYSF anything. The escrow pot only arose after the bankruptcy.

[28] See also *Northland Bank, Re* (1994), 25 C.B.R. (3d) 166 (Man. Q.B.), at pp. 176-7 for the question of equitable setoff under the *Holt* doctrine and the question of timing. Vis-à-vis the question of equitable setoff affecting fmv of the Note in a hypothetical or notional market, at the time of the assumed sale, OYSF would have no claim against OYDL. Further it is a third party purchaser for value (here fmv) who would acquire the Note. It would seem to me that if a claim were ever made, it would have to be against OYDL, not the purchaser of the Note. The claim against OYDL would not exist at the time of the bankruptcy of OYDL since it was only after that event that the financial institutions sold the underlying shares. I do not see that the defendants have made out a valid case in setoff, nor would it seem that it would be considered a particularly thorny issue in a fmv sale so as to materially affect the saleability of the Note.

[29] The plaintiff Trustee asserts that it is the proper person to bring an oppression claim pursuant to ss. 245-248 OBCA. It relies on the court-sanctioned unopposed *Companies' Creditors Arrangement Act* (“CCAA”) Plan of Arrangement pursuant to the CCAA proceedings as to which these parties were all applicants and further that all the rights of the Administrator under the CCAA Plan were transferred to the Trustee upon the December 1994 bankruptcy. In any event it assets that it is a proper person as per the s. 245 definition of “complainant” at clause (c). However the Trustee must get around the views of Houlden J.A. sitting as a

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General Division judge in *Canada (Attorney General) v. Standard Trust Co.* (1991), 5 O.R. (3d) 660 (Ont. Gen. Div.) at p. 666 where he stated:

> If the trustee in bankruptcy were permitted to bring the application under s. 247, it would be attacking as oppressive a transaction which was unanimously approved by the board of directors of the bankrupt corporation. In
>
> argument, Mr. Robertson, counsel for CDIC, posed this question: if Trustco were not insolvent, could it have attacked the transaction as oppressive? Clearly, in my opinion, it could not. The remedy given by s. 247 of the *Business Corporations Act, 1982* is a personal remedy; it belongs to the person who has been oppressed by the actions of the corporation or its affiliates: *Skorchid v. Edgewater Marine Ltd.,* an unreported decision of Carter L.J.S.C. released March 31, 1988 [summarized at 9 A.C.W.S. (3d) 247]. The trustee in bankruptcy, as I have said, has no higher rights than the bankrupt corporation, and consequently, it cannot bring the application under s. 247.

Counsel for the Trustee submits that Houlden J.A. was wrong in his conclusion and that it is contrary to a previous Court of Appeal decision, *Margaritis, Re* (1977), 23 C.B.R. (N.S.) 150 (Ont. C.A.). Houlden J.A. gave the lead judgment (concurred in by MacKinnon J.A.) in *Margaritis* and he stated at pp. 156-7:

> Even if the appellant is right and s. 1(b) of *The Bills of Sale and Chattel Mortgages Act* is not broad enough to include a trustee in bankruptcy appointed after the repeal of the Act, I think that the respondent by virtue of his appointment as trustee in bankruptcy has the necessary status to bring these proceedings in order that the chattel mortgage may be set aside, the mortgaged assets disposed of, and the proceeds distributed rateably among the creditors of the bankrupt estate. A somewhat similar point arose in *Re Rinn,* 3 C.B.R. 828, [1923] 1 W.W.R. 1190, 33 Man. R. 153, [1923] 3 D.L.R. 986. In that case a trustee in bankruptcy brought an application to set aside a chattel mortgage because of its failure to comply with the Manitoba *Bills of Sale and Chattel Mortgage Act,* R.S.M. 1913, c. 17. The Manitoba Act, which had been passed prior to the enactment of the *Bankruptcy Act,* 1919 (Can.), c. 36, did not define “creditors” to include a trustee in bankruptcy. The Manitoba Court of Appeal held that, although the *Bankruptcy Act* did not confer the power on a trustee in bankruptcy to impeach transactions that are not impeachable by the bankrupt (and the bankrupt could not have impeached the chattel mortgage), the trustee in bankruptcy, as representative of the creditors, had the necessary status to bring proceedings to set aside the chattel mortgage. I would refer also to the comments of Tweedie J. in *Re Cohen and Mahlin; Can. Credit Men’s Trust Assn. v. Spivak,* 7 C.B.R. 655 at 673, [1926] 3 W.W.R. 34, [1926] 3 D.L.R. 942, reversed on other grounds 8 C.B.R. 23, [1927] 1 W.W.R. 162, 22 Alta. L.R. 487, [1927] 1 D.L.R. 577, as to the authority of a trustee in bankruptcy to take the necessary proceedings to gather in all the property which is or may be made available to satisfy the claims of creditors. Similarly, in this case, if it were necessary, I would hold that the respondent, by virtue of his appointment as trustee in bankruptcy, represents creditors and has the necessary status to maintain these proceedings to have the appellant’s chattel mortgage declared null and void.

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[30] It seems to me that while the bankrupt's trustee takes the property of the bankrupt as he finds it and that the trustee stands in the shoes of the bankrupt, the trustee has, as his primary obligation, the protection of the creditors of the estate of the bankrupt. While oppression cases should not be used by creditors to facilitate ordinary debt collections, where there is superadded to the equation allegations/facts to support one of the three claims of either (a) "oppression", (b) "unfairly prejudicial" or (c) "unfairly disregards", then creditors have been permitted to be complainants pursuant to s. 245(c) as a "proper person". It should be noted that s. 248(2) talks of act or omission "that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, *Creditor,* director or officer of the corporation or any of its affiliates…" (emphasis added). Since it would seem that a creditor could bring such an oppression action, then it would seem to me that the *Margaritis* characterization of the trustee in bankruptcy as the creditors representative should be recognized as allowing the trustee in bankruptcy to bring a "representative" oppression action on behalf of the creditors in a proper case. Certainly the bankruptcy legislation generally encourages such a collective action on the part of the trustee as being the effective and efficient way of proceeding. The resort to s. 38 BIA with a creditor getting leave to institute a collective (by invitation) action is usually only resorted to where the trustee in bankruptcy does not have sufficient funds to initiate such an action. Therefore with respect and trepidation I decline to follow Houlden J.A.'s reasoning in *Standard Trust.* I note that McDonald J. in *Gainer Inc. v. Pocklington* (1992), 7 B.L.R. (2d) 87 (Alta. Q.B.), at pp. 89-90 stated:

> It does not necessarily follow that the corporation cannot itself be a "proper person" to make an application for a remedy under s. 234. When the acts complained of are those of a director, a corporation will seldom consider seeking a s. 234 remedy because the director will be the controlling director or one of a group of controlling directors. But in the present case the creditor (the Crown) has, by exercising its contractual rights, taken ownership and control of the corporation. That is an exceptional situation, not expressly contemplated by the definition of "complainant" in s. 231(b), but I cannot say that in those circumstances the corporation cannot be a "proper person" to make application under s. 234. I have read what I said about the scope of the discretion granted by s. 231 (b)(iii), in *First Edmonton Place Ltd. v. 31588 Alberta Ltd.* (1988), 40 B.L.R. 28, 60 Alta. L.R. (2d) 122 (Q.B.) at p. 150 [Alta. L.R.]. Nothing said there is inconsistent with the possibility that in special circumstances the corporation itself might be a "proper person" to bring a complaint under s. 234.

McDonald J. went on to distinguish *Canada (Attorney General) v. Standard Trust Co.* when he further observed at p. 90: "I do not question the correctness of that decision, which concerned proceedings against another party which had contracted with the corporation. The

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corporation itself could not complain that another contracting party's conduct had been oppressive." What McDonald J. does not appear to have picked up on is that Standard Trust Co. was a subsidiary affiliate of Standard Trustco Corp. (as represented by its creditor, the Crown). Clearly one can complain of the actions of an affiliate pursuant to s. 248(2) OBCA. Here, that is precisely what the plaintiff Trustee is complaining of—that what the affiliate OYRC paid OYDL in return for the Note was in substance worth nothing on a fair value basis and that in doing so OYRC unfairly disregarded the interests of the creditors of OYDL.

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[31] I would be of the view that what occurred was that, while OYRC/OYSF did not as affiliates of OYRC oppress the creditors of OYDL, I think it reasonable to conclude that they as affiliates participated in at least unfairly disregarding the interests of those creditors. I would observe that OYRC/OYSF participated in the Transactions with—and at the behest of OYDL. Perhaps a better way of looking at the oppression side of this case (as opposed to the s. 100 BIA side) would be to visualize the creditors of OYDL suing not only OYRC and OYSF, but also OYDL. As a result of the Transactions, the OYDL creditors were inappropriately deprived of the value of some $22 million U.S. to which they would otherwise have been entitled—and which the creditors of OYRC/OYSF would not have been entitled to. It would seem to me that the appropriate remedy in such a case would be to put the participants back in the same position as they would have been but for the wrongful act: see *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.), affirmed (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.). Thus the escrowed pot of $22 million U.S. plus interest should be given up to the plaintiff Trustee.

[32] In the end result under either the s. 100 BIA claim or the oppression (in reality, unfairly disregards the interests) claim, it appears to me that the appropriate result, which is indeed just and equitable, is that the plaintiff be given the funds held in escrow of some $22 million U.S. plus interest.

[33] Each side of this contest had valid and sympathetic reasons as to why the losses which each (or rather their respective creditors) have suffered should not be further exacerbated by a loss in this case. As indicated at the beginning of these reasons their counsel worked extremely hard on their behalves. They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in s. 100 BIA, a section which is difficult to administer when fmv in a notional or hypothetical market involves ignoring what would often

be regarded as self evidence truths but at the same time appreciating that this notional or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized. Counsel may speak to me if they are not able to agree on costs.

Action allowed.

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Court of Queen's Bench of Alberta

Citation: Piikani Investment Corporation v. Piikani First Nation, 2008 ABQB 775

2008 ABQB 775 (CanLII)

Date: 20081217
Docket: 0801 07171
Registry: Calgary

Between:

Piikani Investment Corporation and Dale McMullen

Applicants

\- and -

Chief and Council of the Piikani First Nation and Chief Reg Crow Shoe

Respondents

Memorandum of Decision
of the
Honourable Mr. Justice P.J. McIntyre

I. Introduction

[1] This is an application by originating notice dealing with various corporate governance issues. The Applicants are the Piikani Investment Corporation and one of its directors, Dale McMullen. The Respondents are the Council of the Piikani First Nation and the current Chief, Reg Crow Shoe. The history behind the formation of the Corporation is of importance, and I will review it in detail.

II. History

[2] The Piikani First Nation (the "Nation") has a Reserve in southern Alberta, on the Oldman River. The Chief and Council act as the Nation's elected government. On July 16, 2002, the Nation entered an agreement with Canada and the Province of Alberta to settle various land and water claims (the "Settlement Agreement"). The Settlement Agreement defines Council as "the elected Chief and Council of the Piikani".

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[3] Under the terms of the Settlement Agreement, the Nation received $64.3 million, payable in installments as discussed below (the "Settlement Funds"). As a condition precedent to the receipt of the Settlement Funds, the Settlement Agreement stated the Nation was to sign a trust agreement establishing the Piikani Trust (the "Trust Agreement"). The Trust Agreement provides at Paragraph 6.2 that:

> Prior to the expenditure of any funds in the Investment Account ... the Council shall advise the Trustee in writing that the Piikani Investment Corporation has been established in accordance with Schedule "2".

[4] The Trust Agreement was signed October 30, 2002, between CIBC Trust Corporation as the Trustee, and the Nation as beneficiary (Schedule L to the Settlement Agreement). Both the settlement funds and annual payments made each year to the Nation are transferred to the Trustee for the Nation according to the Settlement Agreement. The Settlement Agreement and the Trust Agreement were approved by vote held by the Nation in September 2002.

[5] The Settlement Funds consisted of seven payments paid in installments under Paragraph 3 of the Settlement Agreement. The last installment payment was made on May 1, 2008. In addition, the Province of Alberta makes annual payments to the Piikani Trust, under Paragraph 5 of the Settlement Agreement (the "Annual Payments").

[6] The Trust Agreement set up several accounts created for the benefit of the Nation, including an "Investment Account". Funds paid into the Investment Account may be used by the Trustee for a limited number of purposes, as set out in Paragraph 6 of the Trust Agreement. One purpose is to loan funds to a "Piikani Business Entity", another being to loan funds to the Nation to buy shares or a controlling interest in a Piikani Business Entity.

[7] The Piikani Business Entities are defined under Paragraph 1.2.16 of the Trust Agreement. They are those businesses in which the majority interest is held for the benefit of the Nation and are "intended to engage in commercial activities to generate profits and revenues for the benefit of the Piikani Nation or acquire lands...and whose financing by the Piikani Nation as beneficiary is one of the specific purposes for which this Trust has been formed".

[8] The Piikani Investment Corporation ("PIC") was incorporated under the terms of the Trust Agreement. Under Paragraph 6.3 of the Trust Agreement, the Trustee is to receive both a Band Council Resolution (a "BCR") and a resolution approved by PIC before loaning funds to a Piikani Business Entity or to the Nation. Any loan agreement or loan guarantee must be prepared and approved by PIC before presentation to the Trustee.

[9] PIC's mandate is set out under Schedule 2 to the Trust Agreement. While PIC's mandate will be discussed in greater detail, below, it is charged with providing prudent business and management advice to Council about investment, loans, and loan guarantees to Piikani Business

Entities. As well, it develops and approves business plans and financial arrangements for Piikani Business Entities.

[10] According to Schedule 2, the shares of PIC are to held in trust for the Nation by "person(s) appointed as shareholder-trustees by Council from time to time". These shares are to be exercised in accordance with a trust agreement between the shareholder-trustee and the Nation, as represented by Chief and Council. The current shareholder-trustee is Chief Crow Shoe. The shareholder-trustee agreement between Chief Crow Shoe (as trustee) and the Nation (as shareholder) is found at Tab 11 of the Applicants' materials and authorities (the "shareholder-trustee agreement").

[11] The relationship between PIC and Chief and Council has not always been an easy one, resulting in several applications before this Court.

[12] In November of 2005, the former Chief of the Nation, Peter Strikes With A Gun, attempted to terminate the board of directors of PIC, including Dale McMullen. These terminations, and Strikes With A Gun's concurrent instructions to the Bank of Montreal to "freeze" the accounts of PIC, were held invalid by court order dated January 6, 2005 granted by Kent, J. A new Chief and Council was elected on January 8, 2007. None of the current Council were members of the previous Council.

[13] An attempt was later made to remove McMullen by the current Chief and Council. By order dated June 30, 2008, McMahon J. directed the hearing of the issue on the expiry of McMullen's term as director, and enjoined the Chief and Council from diverting or using the funds of PIC outside transactions in the ordinary course of business. Yet another order dated July 24, 2008 by McDonald J., provided McMullen's term as director of PIC continue until November 30, 2008, without prejudice to the right to reargue this issue. On August 5, 2008, PIC issued a Statement of Claim against several defendants, including Chief Crow Shoe. The Claim involves an outstanding loan made by PIC to one of the corporate defendants, Oldman Irrigation Limited, a Piikani Business Entity.

[14] In addition, a debate has arisen over a $500,000 loan advance made by PIC to the Piikani Land Holdings Corporation ("Landco"). As security for the loan, Landco assigned PIC the annual income payable to Landco. The loan then went into default. Apparently, following the default, Council intercepted $471,000 from Alberta's Annual Payment owed to the Trust and used it to pay the Nation's electricity bills. When the Trust requested these funds be returned, Council then repaid these funds by intercepting Landco's annual income, although these funds had been assigned to PIC as security for the loan. The Chief approved the BCR effecting this interception. While this transaction is discussed in greater detail below, in addressing allegations of conflict of interest, I mention it now to show the uneasy relationship between the parties and to provide some history why the current application has been brought.

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[15] The Applicants assert that these actions, as well as those actions which have given rise to these proceedings, will disable PIC from functioning properly. They state that such actions are in contravention of the Trust Agreement.

[16] Counsel for the Respondents asserts that the board of PIC, under the leadership of McMullen, has engaged in many acts of oppression against PIC's shareholder-trustee. The Respondents say that such acts of oppression include the board's refusal to provide financial information (of both PIC and its subsidiary, the Piikani Energy Corporation, or "PEC"), the failure to disclose contracts in which members of the board had an interest, as well as the board's refusal to accept direction from Council as required under Schedule 2 to the Trust Agreement.

[17] It is in part given the concerns about these alleged acts of oppression, that the shareholder-trustee issued a Shareholder Proposal on May 27, 2008, under s. 137 of the *Canadian Business Corporations Act*, R.S.C. 1985, c. C-44 (the "CBCA"), notice of which was provided to the Applicants. The Shareholder Proposal was issued before the Annual General Meeting ("AGM") held on June 18, 2008. A copy of the Proposal is found at Tab 6 of the Applicants' materials and authorities. It proposes, as special business, many amendments to PIC's current articles and by-laws and a resolution to set up a formula and method for determining the remuneration to be paid by PIC to the shareholder-trustee for the "indispensable services" provided to PIC by the shareholder-trustee ("Resolution No. 5").

[18] The shareholder-trustee, acting on instructions of Council, passed these resolutions at the AGM. In their pleadings the Applicants seek, among other things, a declaration that many of the amended by-laws and articles are contrary to PIC's constitution and are invalid, although I note that they modified this position somewhat during argument. In summary, the Applicants take the position that PIC is to function independently from Council and that any amendments to PIC's by-laws and articles are subject to the Trust Agreement. The Applicants view the amendments as an attempt to limit the board's powers, increase the Chief's powers as shareholder-trustee, and increase Council's authority over PIC. The Applicants have raised these and other issues in the amended amended originating notice.

III. Issues

[19] On request, counsel provided me with an agreed list of outstanding issues. I thank them. As noted above, this matter was brought by originating notice and proceeded by chambers application. Section 248 of the CBCA provides that applications to the court may be made in a summary manner. Subject to my comments on the "cleans hands" issue, the issues, although complex, are capable of resolution on the facts. In holding that I may decide the issues before me in chambers, I adopt Forsyth J.'s comment in ***Suncor Inc. v. Canada Wire and Cable Ltd.***, [1993] 3 W.W.R. 630 at 633-634. In ***Suncor***, the plaintiff opposed an application for summary judgment. Forsyth J. found:

> A Plaintiff cannot defend this type of application simply by arguing that the matter is complex and therefore should not be decided on a Chambers application if, in fact, there

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> is no dispute on the relevant evidence and the issues are capable of only one resolution, no matter how complex. On the other hand, if there are triable issues of fact or law, the matter should go to trial. On those issues see: *Hotte v. Royal Insurance Co. of Canada* (1991), 82 Alta L.R. (2d) 14; *Progressive Construction v. Newton* (1981), 117 D.L.R. (3d) 591.

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[20] I now turn to the agreed list of issues, which I have modified. I have classified issues one and two as "overarching" issues, as my findings on these particular points will direct my approach to the remaining questions.

A. Issue One: is the Trust Agreement a Unanimous Shareholder Agreement within the meaning of s. 146 of the Canada Business Corporations Act?

[21] The Applicants refer to the Trust Agreement, and specifically to Schedule 2 of the Trust Agreement, as PIC's "Constitution". They seek a declaration that the Corporation's articles and by-laws are "subject to the Constitution and the trust declaration". To simplify the terminology used, I will continue to refer to these documents simply as Schedule 2 and the shareholder-trustee agreement, or together as the Trust Agreement. The Respondents submit that before deciding whether the articles and by-laws are subject to the Trust Agreement, it must be shown that the Trust Agreement is a constating document. They argue that if the Trust Agreement is not a constating document, no such declaration can be made. The parties agree that if it is a constating document, further analysis is required to decide if it is of a nature that "supercedes" the articles of incorporation.

[22] Therefore, the first task before this Court is to decide whether the Trust Agreement is a constating document. The Respondents say that the only way the Trust Agreement can be recognized under the CBCA is if it is a unanimous shareholder agreement ("USA"). During oral submissions, the Applicants acknowledged the Trust Agreement was, in fact, a USA as defined by the Act.

[23] The Respondents lay out the test for deciding whether an agreement is a USA in their supplemental brief. USA's are defined at s. 146 of the CBCA, which states, in part, that:

> (1) an otherwise lawful agreement among all the shareholders of a corporation, or among all the shareholders and one or more persons who are not shareholders, that restricts, in whole or in part, the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation is valid.

[24] I now turn to the Trust Agreement, inclusive of both Schedule 2 and the shareholder-trustee agreement. It is clear the Trust Agreement is "an otherwise lawful agreement". It is also clear the Trust Agreement "restricts in whole or in part the powers of the directors" to manage the corporation. I agree with the Respondents that Paragraph I(c) of Schedule 2 restricts the powers of directors by providing that PIC's board is to take the direction of Council when making decisions that would otherwise be within the purview of the board. Paragraphs III(b) and

(c) also limit the ability of the directors to fill vacancies on the board. The relevant paragraphs in Schedule 2 which limit the board's powers are as follows:

> I Purposes
>
> (c) Where directed by Council to:
>
> (i) hold share in a Piikani Business Entity and appoint directors;
> (ii) safeguard investments, loans and loan guarantees from the PIC by monitoring the management, operations and financial administration of Piikani Business Entities;
> (iii) provide managerial, administrative and financial services to Piikani Business Entities;
> (iv) report to the Council on a quarterly basis on the operation, management and financial status of Piikani Business Entities;
> (v) provide a written report to Members on the operation and financial status on Piikani Business Entities on an annual basis;
> (vi) undertake other directly related or ancillary tasks as directed by the Council from time to time.
>
> III Appointment and Removal of Directors
>
> (b) All Directors shall be appointed by the Council for a period of four (4) years based on the [sic] their qualifications, experience and abilities to manage and direct investments and businesses.
>
> (c) Directors may only be removed by the Council during their tenure in office only for breach of their duties and obligations as Directors.

[25] However, the question of whether the Trust Agreement is an agreement "among all the shareholders and one or more persons who are not shareholders" is more difficult. The parties to the Trust Agreement are the Trustee and the Piikani Nation as represented by its Council. The Respondents submit that by contrast, the shareholder is the shareholder-trustee, who holds the shares in trust for the benefit of the Nation, but who is not a party to the Trust Agreement. The Respondents say that for s. 146 of the CBCA, it must be determined whether the shareholders are the registered holders of the shares or the beneficial owners, the argument being if the shareholders are registered holders, then the party to the Trust Agreement is not a shareholder and the Trust Agreement is not a USA.

[26] As I view the documents in question, the party to the Trust Agreement is the "Piikani Nation as represented by its Council". The shareholder-trustee agreement attached to Schedule 2 defines the Shareholder as the "Piikani Nation as represented by the Chief and Council". Although the shares are held in trust by the shareholder-trustee, the holding structure is best defined as one of beneficial ownership through the shareholder-trustee. I therefore find that the

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Trust Agreement is an agreement among all the shareholders (being the Piikani Nation), and one or more persons who are not shareholders. Therefore, the Trust Agreement fulfills the technical requirements of s.146 of the Act and is therefore a USA.

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1. Conclusion

[27] For the reasons given above, I find the Trust Agreement fulfils the technical requirements of a USA according to s. 146 of the CBCA. However, it is not an easy fit and may be better described as a foundational document, as discussed below.

B. Issue Two: what is the status of the Trust Agreement in the context of the corporate governance of PIC?

[28] Although I have found that the Trust Agreement seemingly fulfills the technical requirements of a USA, it does not easily fit within this definition. Notably, it is difficult to ascertain from the construction of the documents that the Nation intended to create a USA. This being so, it may be preferable to take the alternative view, as proposed by the Applicants, that the Trust Agreement is better regarded as a "foundational document" whether technically termed a USA or not.

[29] I note, to start, that Paragraph 18.3 of the Trust Agreement states that "the terms of this Trust Agreement will have priority over any conflicting term in any other agreement in regard to the Trust Property". Trust Property is defined as:

> all property which the Piikani Nation or any other person may pay, donate, sell or otherwise transfer, cause to be transferred to, vest or cause to be vested in the Piikani Trust and includes any substituted or additional property, together with all accretions thereto and all income derived therefrom, and including loans made by the Trust and [sic] but excluding all amounts which have been paid or disbursed therefrom (whether out of capital or income) in the normal course of the administration of or pursuant to the provisions of this Trust Agreement. For greater clarity, it does not include funds once paid out of the Trust, as directed to [sic] by the Piikani Nation, pursuant to the provision of this Trust Agreement.

[30] A finding that the Trust Agreement either meets the definition of a USA or is otherwise a foundational document does not end the matter. The status of the Trust Agreement must be determined vis-a-vis the ability of the shareholder-trustee, as directed by Chief and Council, to amend PIC's articles and by-laws. This status must be resolved before deciding whether a declaration can be made that PIC's articles and by-laws are subject to the Trust Agreement.

[31] As discussed above, the Respondents argue that the Trust Agreement is, at best, a USA. They have argued that even if the Trust Agreement fits the definition of a USA, which I find that it does, there is nothing to suggest that when the articles and a USA are in conflict, either one has

any priority over the other. Thus, the Respondents submit that the preferred approach is for PIC to comply with both constating documents.

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[32] I will deal first with the status of a USA vis-a-vis the articles of incorporation. The Respondents argue that a USA has no greater constitutional status than a corporation's articles. I agree. The Supreme Court of Canada discussed the nature of constating documents in ***Duha Printers (Western) Ltd. v. Canada***, [1998] 1 S.C.R. 795. While ***Duha Printers*** dealt with the question of control over a company for taxation purposes, it examined whether a USA could be considered a constating document for the purposes of the inquiry into who had control of the company. In finding that it could, the Court then went on to discuss the relationship between constating documents, starting at para. 66-68:

> In other words, the USA is a corporate law hybrid, part contractual and part constitutional in nature. The contractual element is immediately apparent from a reading of s. 140(2): to be valid, a USA must be an "otherwise lawful written agreement among all the shareholders of a corporation, or among all the shareholders and a person who is not a shareholder". It seems to me that this indicates not only that the USA must take the form of a written contract, but also that it must accord with the other, general requirements for a lawful and valid contract. More generally, the USA is by its nature able to govern both the procedure for running the corporation and the personal or individual rights of the shareholders: see Iacobucci, supra.
>
> *The constitutional element of the USA is even more potent than its contractual features*. Numerous provisions of the Corporations Act that govern fundamental aspects of the running of the corporation, including the management of its business and affairs (s. 97(1)), the issuing of shares (s. 25(1)), the passing of by-laws (s. 98(1)), the appointment of officers (s. 116), and the situations in which a dissenting shareholder can request dissolution of the company (s. 207(1)(b)), are expressly made subject to the USA. More generally, s. 6(3) reads as follows:
>
> > 6(3) Subject to subsection (4), if the articles or a unanimous shareholder agreement require a greater number of votes of directors or shareholders than that required by this Act to effect any action, the provisions of the articles or of the unanimous shareholder agreement prevail.
>
> Subsection (4) stipulates only that the articles may not require a greater number of votes to remove a director than that required elsewhere in the Act, but does not place any such limitation on a USA. *This denotes the equivalent constitutional status of the USA vis-à-vis the articles of incorporation*.
>
> This status is greatly reinforced by s. 20(1) of the Corporations Act, which requires that a copy of any USA, along with the articles and by-laws of the corporation, be contained in the corporate records required by that section to be maintained at the registered office of the corporation. *This is cogent evidence that the legislator has treated*

> *the corporation's constating documents and the USA in pari materia.* It is also significant that s. 240 of the Corporations Act includes USAs along with the Act, the regulations promulgated thereunder, and the articles and by-laws of a corporation as documents the breach of which entitle a complainant or a creditor to seek a compliance order or other remedy deemed appropriate by the court. As well, the provisions of a USA may be enforced against the corporation and its officers and directors although they need not be parties to the agreement. This stands as a further indication of the constitutional character of the USA. [emphasis added in italics]

[33] Based on the above, I have no difficulty in finding that a USA has equivalent status to the articles of a corporation. It forms part of the constitution of the corporation to which it relates.

[34] While the Respondents did not argue that a USA has equal status to a by-law in their brief, in oral argument counsel submitted that there was "no authority for the proposition that a USA has greater status as a constating document than either of the articles or the by-laws". I do not agree with this submission.

[35] In *Canadian Business Corporations Law*, 2d ed. (Markham: LexisNexis, 2007) Kevin P. McGuinness writes, at 1213:

> Under the present law, a unanimous shareholder agreement enjoys a status vastly superior to that of a by-law of the corporation or a simple contract. It is binding upon the corporation irrespective of whether it is a party to it [the USA].

[36] Generally, if there is an inconsistency between the articles of a corporation and its by-laws, the articles will prevail. It cannot be said that all three documents, being a corporation's USA, its articles and its by-laws are of equal status. While by-laws play an important role in prescribing the rights and duties of a corporation's members and regulating the governing conduct within the corporation's articles, they are nonetheless restricted by the operation of the articles.

[37] If the Trust Agreement is best described as a USA, it would have a status equal to that of the articles of incorporation. The Respondents did not directly address the status of a corporation's USA in relation to its by-laws, although the above analysis suggests that a USA enjoys a superior status in the context of foundational documents. I note, further, there is nothing in the wording of either the Trust Agreement or the by-laws themselves to evidence any agreed priority of one over the other.

[38] This said, finding the Trust Agreement is best described as a USA supports the Respondents' submission that the Trust Agreement does not supercede the articles and that wherever possible, both constating documents should be complied with, in that this Court can either try to find an interpretation that reconciles the conflict or it can use its powers to amend one or the other of the constating documents.

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[39] However, even if the Trust Agreement is not best described as a USA, I disagree with the Respondents' submission that it must therefore "have no impact on the articles of incorporation". During oral argument counsel for the Applicants submitted that while he had originally classified Schedule 2 to the Trust Agreement as a "constitution", he subsequently agreed that it was, in effect, a USA under s. 146(1) of the CBCA.

[40] However, counsel went on to argue that whether the document was best classified as a USA or as a constating document, that:

> ...what we have here is a little bit more than just a simple constating document, because the very existence of PIC is a result of the Trust Agreement that was a condition precedent to the settlement...that makes eminent sense because the whole reason why we have this company, before there are even articles and continuations we have this agreement...a condition precedent, the Trust Agreement, in which these things are to be done for specific purposes - generally to develop long term economic opportunities for the Nations and to govern...the expenditures of the settlement money...
>
> So what we have is a corporation. I submit that the constitution, while it is a USA in the context of the Business Corporations Act of Canada...I submit it is something more than that. And that it is like the founding document. It is a super constating document. It is from which everything else flows.

[41] While I do not accept the terminology of the Trust Agreement as a "super constating document" or a "super USA", I am persuaded the Trust Agreement is best classified as a foundational document. As a foundational document, it enjoys a unique status.

[42] The formation of PIC occurred against an important and unique background. Its mandate is provided in Schedule 2 to the Trust Agreement. Of course, the Trust Agreement itself was a condition precedent to the Settlement Agreement. The Settlement Agreement represents a contract between three entities; the Federal Government, the Provincial Government and the Piikani Nation. In signing the Settlement Agreement, Chief and Council represented the entire Nation. The importance of the Settlement Agreement must be underscored. It represents the will and chosen direction of the Nation. Indeed, given the effect the Agreement would have on the Nation, it had to be adopted through referendum. It is noteworthy that subject to a limited number of exceptions, establishing PIC was a condition precedent to expending any funds in the Investment Account, according to Paragraph 6.2 of the Trust Agreement.

[43] The fundamental objective of the Trust is to provide economic and other benefits to the Piikani people both now and for future generations. The Settlement Agreement and the Trust Agreement were thoughtfully and specifically drafted to achieve this goal. Clearly PIC was established to further this aim. A review of the Corporation's mandate shows that it was created to assist in effectively meeting the unique needs of the Piikani Nation.

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[44] PIC is owned by the Nation. A review of the Trust Agreement reveals that PIC is an essential element of the operation of that Agreement. This is obvious on a review of Paragraph 1.2.17 of the Trust Agreement, which defines PIC as follows:

> "Piikani Investment Corporation" means a Corporation established by the Council, the mandate, purposes, ownership and directors of which are established in accordance with Schedule "2". The formation and development of this Corporation by the Piikani Nation, as the beneficiary of this Trust is one of the specific purposes for which this Trust has been formed. [emphasis added]

[45] As noted above, PIC's mandate is to provide prudent business and management advice to Council on investment, loans, and loan guarantees to Piikani Business Entities and to develop and approve business plans and financial arrangements for Piikani Business Entities. It plays an essential role in ensuring that funds from the Investment Account are properly distributed through the Trust. The Trustee is not to loan funds directly to a Piikani Business Entity unless it recieves a resolution approved by PIC stating, among other things, that the borrower's business plan has been approved by PIC. PIC also directs the amount, terms and conditions of the loan: see Paragraphs 6.3 and 6.4 of the Trust Agreement. As well, distribution of funds must be done in accordance with the Financial Administrative Code, which was established to assist in ensuring financial accountability.

[46] The Trust Agreement is the product of careful negotiation resulting in a structure that reflects the agreement of the Piikani people. It, by definition, represents the best interest of an entire Band. Thus, it is not meant to be easily changed. This is made clear on review of Paragraph 14 of the Trust Agreement which specifically states there shall be no amendments to the Agreement for eight years from its signing. Even following this eight year period, amendments to Schedule 2 must be approved by referendum.

[47] A debate arose on the precise relationship between PIC and the Nation. The Respondents submit that PIC was created to serve the needs of Council, the Piikani Business Entities and the Piikani Nation, as opposed to the converse of this proposition. The Applicants submit the Settlement Agreement and the Trust Agreement show an intention for PIC to operate independently or autonomously from Chief and Council.

[48] I cannot accept the Applicants' proposition that PIC was intended to operate wholly independently from Chief and Council. Paragraph I(c) of Schedule 2 clearly states that PIC is required to accept direction from Council on many issues, including: holding shares in a Piikani Business Entity and appointing directors; safeguarding investments from PIC by monitoring Piikani Business Entities; providing managerial and financial services to Piikani Business Entities; reporting to Council quarterly on the operation, management and financial status of Piikani Business Entities; providing an annual written report on the operational and financial status of Piikani Business Entities; and providing directly related or ancillary tasks as directed from Council from time to time. Paragraph I(c) has been reproduced at para. 24 of this Judgment.

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[49] While the above clearly shows that PIC is to take direction from Council on many issues, this finding alone is not determinative of whether Council may amend PIC's articles and by-laws. While I agree with the Respondents that PIC was formed, in part, to meet the needs of Council, the Piikani Business Entities and the Piikani Nation, it must do so within the spirit and intent of the Trust Agreement.

[50] Based on the above, I find that while the Trust Agreement (inclusive of Schedule 2) may be classified as a USA, it is more aptly described as a foundational document. In so finding, I note that in making her Order of January 6, 2006, reinstating the board of directors following their termination by the former Chief Strikes With A Gun, Justice Kent referred to the Trust Agreement as "essentially the founding document for PIC".

[51] Given the unique status of the Trust Agreement, the question to be answered is whether the amendments to PIC's articles and by-laws violate the terms or the spirit of the Trust Agreement. This question is relevant whether the Trust Agreement is best classified as a USA or otherwise as a foundational document.

[52] Respondents' counsel argues that I should be leery of what he describes as "creating new forms of constating documents". He cautions the Court against inflating the value of the Trust Agreement so it gains a greater significance than other forms of constating documents. This, he suggests, would have an impact on both Aboriginal law and in corporate law generally.

[53] While I acknowledge counsel's concerns over an apparent widening of the scope or definition of what makes up a constating document, I must stress that my findings are particular to the unique history behind, and the carefully measured structure of, both the Settlement Agreement and the Trust Agreement. Again, because PIC was both born from and dependent on the Trust Agreement, it simply does not make sense to state that it can then be altered in a manner which offends the Trust Agreement.

1. Conclusion

[54] The formation of PIC occurred against a unique background. The Trust Agreement is the product of careful negotiation resulting in a structure that reflects the agreement of the Piikani people. It, by definition, represents the best interest of an entire Band. For these reasons, and the additional reasons above, I find that while the Trust Agreement (inclusive of Schedule 2) may be classified as a USA, it is more aptly described as a foundational document.

[55] This said, the next step is to decide whether the Respondents' proposed resolutions and the amendments to PIC's articles and by-laws do, in fact, violate the spirit and intent of the Trust Agreement. To the extent that they do, I find that the terms of the Trust Agreement must prevail.

[56] As a preliminary step, I must first decide whether the shareholder-trustee, acting on instructions from Council, was able to pass the Resolutions at issue. As noted above, the amendments at issue were put forward by Shareholder Proposal by Chief Crow Shoe acting as

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shareholder-trustee, pursuant to s. 137 of the CBCA. The proposed amendments were adopted by BCR held before the AGM. During the Band Council meeting, Chief and Council directed the shareholder-trustee to adopt the proposed changes to the articles and by-laws. This bring us to the next issue.

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C. Issue Three: does the shareholder-trustee, acting on direction of Council, have the authority to amend PIC's articles and by-laws?

[57] In their amended amended originating notice the Applicants seek a declaration that the shareholder-trustee does not have the authority to amend PIC's by-laws by reason of Schedule 2 of the Trust Agreement as well as by ss. 102, 103 and 146 of the CBCA. In the alternative, they seek a declaration that the amendments to the by-laws are subject to the Trust Agreement. The key issue is whether the articles and by-laws were lawfully amended. If they were, then the application must fail, even if the articles and by-laws were changed in a manner which the Applicants consider untenable, as long as the changes are not in conflict with the Trust Agreement.

[58] Section 102(1) states:

> Subject to any unanimous shareholders agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.

[59] The relevant sections of 103 are as follows:

> (1) Unless the articles, by-laws or a unanimous shareholder agreement otherwise provide, the directors may, by resolution, make, amend, or repeal any by-laws that regulate the business or affairs of the corporation.
>
> (5) A shareholder entitled to vote at an annual general meeting of shareholders may, in accordance with section 137, make a proposal to make, amend or repeal a by-law.

[60] As noted above, s.146 deals with USA's. It both defines a USA and outlines the rights of a shareholder once a USA has been formed.

[61] In their brief, the Applicants argued that under s. 102(1) of the CBCA, it is the directors of PIC who have the authority and mandate to manage the business and affairs of the corporation. Also, they argued that without a USA, it is not the shareholders but the directors who are responsible for managing a corporation under s. 103.

1. Ability to amend the by-laws

[62] Even after acknowledging that the Trust Agreement was a USA in oral argument, the Applicants continued to argue that the shareholder-trustee lacked the authority to amend PIC's by-laws. Presumably this is because neither Schedule 2 nor the shareholder-trustee agreement

specifically alter the ability of the directors to amend the by-laws. The Applicants maintain that the shareholder-trustee has no authority to amend the by-laws, either under the CBCA or under the Trust Agreement.

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[63] The Respondents disagree. They submit that the wording in s. 103(1) is permissive in that while it grants a power to the directors, it does not grant that power exclusively, nor does it remove such power from the shareholders. Moreover, they argue that the shareholder-trustee has the authority to amend the by-laws pursuant to s. 103(5) of the Act.

[64] I agree with the Respondents that the shareholder-trustee had the ability to put forth a Shareholder Proposal to amend the by-laws pursuant to the CBCA. Section 103(5) confers a power on the shareholders to initiate changes in the corporate structure. If a shareholder wishes to propose a change to the by-laws he or she may call on the directors to circulate his or her proposal under s. 103(5). This is what happened when the shareholder-trustee circulated his Proposal on May 27, 2008. The Proposal was then formally adopted during the AGM.

[65] Based on the above, I cannot accept the Applicants' argument that the shareholder-trustee had no authority to take steps to amend the by-laws.

2. Ability to amend the articles

[66] The Applicants' argument on the shareholder-trustee's authority to amend the articles is less clear. In oral argument counsel submitted that a shareholder may only amend the articles under ss. 112 or 173 of the CBCA. Section 112 deals with amending the number of directors. Section 173 provides that amendments may be made to the articles of a corporation to effect changes, including, but not limited to: a change of name; an addition, alteration or removal of any restriction on the business that the corporation carries on; an increase or decrease in the number of directors or the minimum number of directors; and, generally, any alteration to the corporation's share structure.

[67] The Applicants argued that the proposed changes to articles 5 and 8 were outside the scope of the amendments allowed under sections 112 or 173. Interestingly, they did not address s. 173(o) which states that the articles of a corporation may be amended to "add, change or remove any other provision that is permitted by this Act to be set out in the Articles". Nor did they address s. 175 of the CBCA which provides:

> (1) Subject to subsection (2), a director or a shareholder who is entitled to vote at an annual meeting of shareholders may, in accordance with section 137, make a proposal to amend the articles.
>
> (2) Notice of a meeting of shareholders at which a proposal to amend the articles is to be considered shall set out the proposed amendment and, where applicable, shall state that a dissenting shareholder is entitled to be paid the fair value of their shares in accordance with section 190, but failure to make that statement does not invalidate an amendment.

[68] In sum, I find that the Applicants' interpretation of the relevant sections of the CBCA does not support the proposition that the shareholder-trustee does not have the legal authority to amend the articles. The Applicants' argument focused more on specific objections made to certain articles as opposed to the legal ability of the shareholder-trustee to make such amendments. Indeed, amendments were made to a number of other articles and by-laws through the same process without objection.

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3. Conclusion

[69] I do not accept the Applicants' submission that the shareholder-trustee does not have the ability to amend PIC's by-laws or its articles. However, the fact that the shareholder-trustee has the ability to amend PIC's articles and by-laws does not necessarily mean that the impugned amendments are valid. Rather, given the unique status as the Trust Agreement as a foundational or constating document, any proposed amendments must accord with the Agreement. Therefore, it is necessary to review each of the challenged amendments to decide if they accord with the Trust Agreement. The provisions in the Trust Agreement must prevail. I will begin with the proposed (now adopted) amendments to the articles.

D. Issue Four: are the Applicants entitled to a declaration that the amendments to articles 5 and 8 are contrary to Schedule 2 of the Trust Agreement and therefore invalid?

1. Article 8

[70] Article 8 deals, in part, with restrictions on who may be a shareholder of PIC. The original article (article of continuance 8(c)) reads:

> The number of shareholders of the Corporation is limited to not more than fifty (50) persons, exclusive of persons who are in the employment of the Corporation and persons who, having been formerly in the employment of the Corporation, were, while in that employment, shareholders of the Corporation and have continued to be shareholders of the Corporation after termination of that employment, and on the basis that two or more persons who are the joint registered owners of any one or more shares shall be counted as one shareholder.

[71] The amendment to article 8 is stated as follows in the Shareholder Proposal:

> The shareholders of the Corporation are limited to the Piikani Nation Chief and Council as elected representatives of the Piikani Nation Membership, the shares to be held by an individual or individuals appointed by Piikani Nation Chief and Council from time to time, provided such individual or individuals enter into a Trust Agreement with the Piikani Nation Chief and Council as required by Schedule 2 of the Piikani Trust Agreement of July 2002.

[72] The Applicants disagree with limiting the shareholders of PIC to the Chief and Council. They argue that Council should be unfettered in exercising its discretion on who to appoint as shareholder-trustee. They submit that the shareholder-trustee does not even have to be a member of the Nation, let alone a member of Council. Moreover, they submit that the ability to appoint someone who is not a member of Chief and Council as shareholder-trustee should be maintained as method of avoiding conflict of interest. The Applicants contend that no restriction on appointment is found in the Trust Agreement.

[73] Schedule 2 of the Trust Agreement contains the following respecting the appointment of the shareholder-trustee, at Paragraph II:

> (a) the Piikani Investment Corporation shall be located on and operate solely on the Piikani Nation Indian Reserve. It shall be 100% owned by the Piikani Nation.
>
> (b) The shares shall be held in trust for the benefit of the Piikani Nation by person(s) appointed as shareholder trustees by Council from time to time. The shares shall be exercised in accordance with a Trust Agreement between the shareholder trustees and Council substantially in the form attached hereto.

[74] The relevant Paragraph of the shareholder-trustee agreement states:

> The Trustee agrees that he shall vote and deal with the shares of the Corporation held by him as directed from time to time by the Shareholder.

[75] The Respondents say that the Trust Agreement is silent on who may be the shareholder-trustee and does not prevent members of the Chief and Council from being a shareholder-trustee. They also note that the amended article simply accords with past practice, as historically the position of shareholder-trustee has always been held by either a Chief or a Councillor. The Respondents argue that such limit will be beneficial in that it will: assist in ensuring that the shareholder-trustee is available to receive instructions from Council; will prevent a shareholder-trustee who has ceased to hold the office of Chief and Council from acting independently of Council, and; it will prevent PIC from acting on the instructions of a shareholder-trustee who is no longer a member of Council and is therefore no longer accountable to the Nation.

[76] I find some of these arguments persuasive, especially the Respondents' concern over having a shareholder-trustee who is not accountable to the Nation. However, I note that even though a shareholder-trustee may not be accountable to the Nation through his or her additional role as a member of Chief and Council, accountability will still exist through his or her relationship with the Nation, as the shareholder-trustee has expressly agreed to deal with PIC's shares as directed by the Nation. Moreover, the shareholder-trustee agreement expressly provides Chief and Council with the right to terminate the shareholder-trustee's position and provides for a transfer of all shares held in trust. Paragraph 4 of the shareholder-trustee agreement states:

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> The Chief and Council of the Shareholder may terminate this Trust Agreement upon the occurrence of any of the following:
>
> (a) at a duly convened meeting of the Chief and Council of the Shareholder a motion is passed by quorum of Council terminating this Trust Agreement; or
> (b) the Trustee receives directions from the Chief and Council to transfer the shares held in trust for the Shareholder to another Trustee; or
> (c) upon the death or incapacity of the Trustee;
>
> and in any such event the Shareholder shall be entitled to direct the solicitor of the Corporation to transfer such shares on the books of the Corporation to such replacement trustee or other person or entity as may be appointed by the Chief and Council, and this shall be their full authority to do so.

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[77] While I agree with the Respondents that the Trust Agreement is silent about who may be shareholder-trustee, I cannot accept their argument that such silence supports the proposed limit. I find that the amendment does not accord with the Trust Agreement, which uses a more open approach about who may fill the position of shareholder-trustee.

[78] Because I have found an inconsistency between article 8 as amended and the Trust Agreement, a remedy must be decided. The Respondents submit that should this Court find an irreconcilable conflict, it should use its powers under s. 241(3)(c) of the CBCA to amend either the article or the Trust Agreement to resolve the conflict. Given my finding that the Trust Agreement is a foundational document, to the extent there is a conflict, it is the articles that must be amended to accord with the Trust Agreement and not vice versa.

[79] The Applicants suggest that to the extent that the articles and by-laws are in conflict with the Trust Agreement, they should be amended to comply. Although the Applicants rely on the CBCA in bringing their Application, they did not specifically argue the oppression remedy in requesting relief, other than to state that they relied on s. 241 in a general sense. Rather, they sought direction from this Court as to how the amended articles and by-laws might be brought into line with the Trust Agreement, either by striking out any offending wording or, where necessary, through a declaration that the article or by-law itself is invalid.

[80] I find it is not necessary to make a finding of oppression. Both parties had full opportunity to argue their positions why the amendments should either be upheld or disallowed. Both parties argued how the impugned articles and by-laws may be interpreted to conform to the Trust Agreement. Paragraph 14.7 of the Trust Agreement expressly provides that this Court may provide advice and direction regarding any question about the scope of the Trust Agreement and the powers conferred thereunder. In the circumstances, it is possible to decide the propriety of the amendments without making a finding of oppression.

[81] The Applicants argue that to comply with the Trust Agreement, the wording "limited to the Piikani Nation Chief and Council" must be removed from article 8 as amended. I agree. This

limit clearly places a restriction on selection that is not found in the Trust Agreement. Nor can the amended article be interpreted in a manner that does not conflict with the Trust Agreement. Thus, the offending phrase must be removed.

2. Article 5

[82] The Applicants also take issue with the amendments made to article 5. In its original form article 5 read as follows:

> Number (or minimum and maximum number) of Directors:
>
> > No fewer than One (1) and no more than Fifteen (15).

[83] The amended article reads:

> Article 5 is deleted in its entirety and replaced with the following:
>
> "The Corporation shall have Seven (7) Directors, to be appointed by the shareholder at the direction of the Piikani Nation Chief and Council, pursuant to the terms of Schedule 2 of the Piikani Nation Trust Agreement of July 2002 and the Corporation's Bylaws."

[84] The Applicants argue that this amendment allows the by-laws to govern the appointment of PIC's directors. They claim that the appointment of directors is to be governed solely by Schedule 2 of the Trust Agreement. Paragraph III of Schedule 2 states:

> III Appointment and Removal of Directors
>
> (a) The PIC shall have seven (7) Directors, three (3) of whom shall not be Members. One director shall be a chartered accountant, one shall be a lawyer, and one an experienced businessperson. Only one (1) Director may be a member of Council.
>
> (b) All Directors shall be appointed by the Council for a period of four (4) years based on the [sic] their qualifications, experience and abilities to manage and direct investments and businesses.
>
> (c) Directors may only be removed by the Council during their tenure in office only for breach of their duties and obligations as Directors.

[85] The Applicants argue that the amended article offends Schedule 2 of the Trust Agreement. They submit that the wording "and the Corporation's Bylaws" must be removed from the amended version of article 5 to ensure compliance.

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[86] The Respondents disagree. They argue that the amended article is in much closer accordance with the Trust Agreement than is the original article. Moreover, they submit that compliance with the amended article does not prevent compliance with the Trust Agreement.

[87] While the Applicants may have been seeking restoration of the previous article in their originating notice, during argument they suggested that simply striking out that wording which they consider in conflict will be enough.

[88] While I agree with the Defendants that the "original" article 5 bears no real relationship to what was intended in the Trust Agreement, this does not end the matter. Rather, it must be decided whether the appointment of PIC's directors should be pursuant to both Schedule 2 and the by-laws or just Schedule 2. Given my above finding that the by-laws must comply with the Trust Agreement as a foundational document, there should be no conflict between Schedule 2 and the by-laws. I note that the proposed amendments to the by-laws, and in specific to by-law 4.01, acts to flesh out amended article 5. It would be illogical to enact by-laws which assist in the administration of the corporation (here regulating the appointment of directors) and then hold that an appointment cannot be made pursuant to the by-laws.

[89] Thus, I do not agree with the Applicants that the phrase "and the Corporation's Bylaws" should be removed from article 5 as amended. The Respondents suggested in oral argument that if a conflict is found between an amendment and the Trust Agreement, then this Court may wish to provide a declaration as to the interpretation of the amendment. I declare that in reading amended article 5, the phrase "and the Corporation's by-laws" must be interpreted to mean "and the Corporation's by-laws *to the extent that such by-laws are not in conflict with the Trust Agreement"*.

E. Issue Five: are the Applicants entitled to a declaration that the amendments to by-laws 4.01, 4.04, 4.06, 4.20, 8.01 and 8.03 are contrary to Schedule 2 of the Trust Agreement and therefore invalid?

[90] Issue five deals with the by-laws. Specifically, the Applicants are seeking a declaration that the amendments made to certain by-laws are invalid. Again, during oral argument there was a suggestion that any offending wording in the by-laws might be struck to ensure compliance with the Trust Agreement as opposed to declaring the impugned by-laws invalid in their entirety.

[91] While it is clear that the by-laws cannot conflict with the Trust Agreement, given its status as a foundational document, it is also the case that the by-laws cannot conflict with the Trust Document as an "ordinary" USA, given the status of a USA vis-a-vis a by-law.

1. By-law 4.01

[92] By-law 4.01 deals with PIC's number of directors. It was originally stated as follows:

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> Number of Directors - Until changed in accordance with the Act, the board shall consist of not fewer than the minimum number and not more than the maximum number of directors provided in the articles.

[93] The amended by-law states:

> Delete existing 4.01 and replace with the following:
>
> "The Board shall consist of seven (7) directors, three (3) of who shall not be members of the Piikani First Nation, one (1) who shall be a chartered accountant, one (1) who shall be a lawyer, and 1 [sic] who shall be an experienced business person, and one (1) who may be a member of the Piikani First Nation Council."

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[94] The Applicants say that the amended by-law offends Schedule 2 of the Trust Agreement. They argue that Schedule 2 expressly limits the number of Council members who may sit on the board. They suggest that to avoid conflict with Schedule 2, the wording "and one (1) who may be a member of the Piikani First Nation Council" must be amended to read "and only one (1) who may be a member of the Piikani First Nation Council". As noted above, Paragraph III of Schedule 2 states:

> III Appointment and Removal of Directors
>
> (a) The PIC shall have seven (7) Directors, three (3) of whom shall not be Members. One director shall be a chartered accountant, one shall be a lawyer, and one an experienced businessperson. Only one (1) Director may be a member of Council.

[95] The Respondents argue that the amended version of by-law 4.01 is in much closer compliance with the Trust Agreement than the original by-law. I agree. However, I also agree with the Applicants that adding the word "only" results in greater compliance with the Trust Agreement. Indeed, the word "only" acts to clear up any ambiguity present in the by-law as it currently stands. Adding this word will assist the Nation in interpreting the by-law in a manner that does not offend the Trust Agreement.

2. By-law 4.04

[96] By-law 4.04 deals with the removal of directors from PIC's board. It originally stated:

> Removal of Directors - subject to the Act, the shareholders may by resolution passed at a meeting of shareholders specifically called for such purpose remove any director from office and the vacancy created by such removal may be filled at the same meeting, failing which it may be filled by the board.

[97] The amended version of by-law 4.04 reads as follows:

> Notwithstanding paragraph 4.03 above, and subject to applicable procedural requirements of the Act, the shareholder may by resolution passed at a meeting of shareholders called for such purpose, remove any director from office prior to the expiry of the term for breach of duties and obligations as a director. Breach of duty or breach of obligation without limiting the generality of the foregoing, may include:
>
> [the list of breaches is discussed in greater detail, below]

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[98] The Applicants say that while the amendment to by-law 4.04 does comply with the Trust Agreement in that it allows for the removal of a director for breach of his or her duties and obligations as a director, it is otherwise in conflict in that the provisions are vague, uncertain, and allow the shareholder-trustee to determine subjectively whether an act constitutes a breach. They argue that it is not up to the shareholder-trustee, or Council, to expand on what the Trust Agreement has provided, nor to determine in advance what constitutes a breach. Moreover, the Applicants submit that it is Council, as opposed to the shareholder-trustee that has the right to remove a director.

[99] Schedule 2 to the Trust Agreement does not provide an itemized list as to what might constitute a breach. Rather, Paragraph III (c) simply states: "Directors may only be removed by the Council during their tenure in office only for breach of their duties and obligations as Directors."

[100] The Respondents argue that the by-law in question was amended, in part, in an attempt to shield PIC from the possible oppressive actions of a rogue director. They submit that the creation of the amended by-law as a whole does not negate the requirement in Schedule 2 that a director can only be removed for breach of duty. The Respondents argue that the list acts as a guideline as to what is expected of directors and that, even if it was deleted it would have no effect on the duties owed to PIC. They state that the actions described in each of the subparagraphs would be of no force or effect if the action does not constitute a breach of the director's duties in the circumstances.

[101] The Applicants conceded that certain of the points listed in by-law 4.04 would qualify as grounds for dismissal for breach of duty. However, they argue that it is improper for the shareholder-trustee to provide a list of proposed grounds when Schedule 2 is comprehensive in that it states that directors may only be removed for breach of their duty as directors.

[102] I will deal with each of the Applicants' objections to the amendments in turn. As a preliminary point, the Applicants take issue with the fact that the by-law allows the shareholder-trustee to remove a director. They submit that authority to remove a director was expressly given to Council under the Trust Agreement. While it is clear that the shareholder-trustee must ultimately follow the directions of the Nation (as represented by Chief and Council), the Applicants argue that giving the power to dismiss to the shareholder-trustee as opposed to

Council is more than a matter of semantics, in that it offends a fundamental authority provided under the Trust Agreement.

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[103] I note that the original by-law grants the shareholder-trustee the right to remove a director. The Applicants made no comment in this regard.

[104] Because the shareholder-trustee must ultimately take direction from Council, it is unlikely that such an amendment will have any practical effect. Indeed, if the shareholder-trustee were to terminate a director without direction from Council, the propriety of such termination could easily be challenged. However, in the Trust Agreement, the parties expressly provided that it was to be Council, as opposed to the shareholder-trustee that was to be conferred with this power.

[105] Given the status of the Trust Agreement, the by-laws must not conflict with any express provisions. Thus, although it is essentially a small point given Councils' position vis-a-vis the shareholder-trustee, the power to terminate a director should remain vested with Council.

a. By-law 4.04(a)

[106] By-law 4.04(a) states that a breach of a director's duty may include:

> (a) failure of a director to meaningfully contribute to production of regular and informative corporate reports to the Piikani Chief and Council and/or the appointed shareholder, consistent with Schedule 2 of the Trust Agreement of July 2002;

[107] The Applicants also take issue with this by-law. In particular, they argue that the phrase "meaningfully contribute" is vague. They raise the same argument for the term "informative". The Respondents submit that the phrase "meaningfully contribute" is not uncertain and that it is the specific circumstances of the alleged non-contribution that will determine whether a director's action are in breach of the Trust Agreement. They claim that the amendment was made to address the failure to provide financial information, as required both by the CBCA and Schedule 2. As noted above, Schedule 2 states that where directed by Council, PIC must "report to the Council on a quarterly basis on the operation, management and financial status of Piikani Business Entities" as well as "provide a written report to Members on the operation and financial status of Piikani Business Entities on an annual basis".

[108] The question then arises as to the degree of vagueness which must exist for a by-law to be declared invalid. The Supreme Court examined vagueness of by-laws in ***Montréal (City) v. Arcade Amusements Inc.***, [1985] 1 S.C.R. 368, where the respondent challenged a municipal by-law on a number of grounds, including that a phrase contained in the by-law was invalid due to vagueness. While ***Montréal (City)*** deals with municipal by-laws it provides useful guidance. The Supreme Court confirms, at 400, that "mere uncertainty as to the scope of a by-law will not

suffice to make it void" and later, at 402-403, that a mere difficulty as to interpretation is not a sufficient reason for declaring a by-law void. Interestingly, the Court states, at 401, that:

> Respondents and the City cited several judgments in support of their respective arguments: in each of them the courts had to determine whether some provision or certain words in a by-law were so vague as to make the by-law void. Each case is practically unique, and the courts have to determine each time whether the true meaning of the by-law in question can be understood by the persons to whom it applies. [emphasis added]

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[109] Thus, I may only find by-law 4.04 void for vagueness if the true meaning of the by-law cannot be understood by the people to whom it applies. In this case, the by-law in question applies to PIC, and through PIC to its directors. Any difficulty in understanding must go beyond a mere problem with interpretation.

[110] The Respondents have suggested that the by-law can be read in a manner that complies with the Trust Agreement. I disagree. I find that the wording used in by-law 4.04(a) is simply too broad. The phrase "meaningfully contribute" is vague and uncertain. Furthermore, while "informative" corporate reports may refer to the reports required under Schedule 2, this too is vague. Schedule 2 of the Trust Agreement states what information is to be provided by PIC. Should a director refuse to provide such information, appropriate action may be taken. The requirements for a director under by-law 4.04(a) are vague and uncertain and go beyond creating a mere difficulty of interpretation. Therefore, I declare it to be invalid.

b. By-law 4.04(b)

[111] By-law 4.04 (b) addresses the distribution or broadcast of certain types of information by a director about Chief and Council, the shareholder-trustee, PIC or the Nation. It states that a breach of duty may include:

> (b) participation by a director in dissemination of inaccurate, misleading or subversive information involving the Piikani Chief and Council, the Piikani Nation, the appointed shareholder, or the Corporation or any of their official activities or interests;

[112] This subparagraph was in direct response to certain statements made by McMullen to both the Nation and to media. Mention was made of information shared with both the Rural Electrification Association Newsletter and the Pincher Creek Echo. However, it must be kept in mind that the question whether the amendments to the by-laws are proper in law is unrelated to the conduct of the parties.

[113] The Applicants submit that 4.04(b) is void for uncertainty and vagueness. It places the shareholder-trustee in a position where he or she may decide what might be considered subversive behaviour. For example, they query whether under the amended by-law, a director might be considered "subversive" for publicly questioning Council's decision to intercept

Landco's income to repay the Trust, even though these funds had been assigned to PIC. They also submit that the term "participation" is vague and uncertain. Further, the Applicants argue that the wording of 4.04(b) imposes a strict liability standard in that if a director provides inaccurate information, there is no ability, on the face of the by-law, to argue that he or she was acting reasonably based on the information in question.

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[114] The Respondents argue that it is a breach of duty for a director to slander his or her own corporation. They contend that a similar duty exists with respect to Chief and Council, the shareholder-trustee or the Nation. To the extent that I disagree with this submission, counsel for the Respondents suggests that the phrase "the Piikani Chief and Council, the Piikani Nation, the approved shareholder" be struck. This would then leave a duty owed only to PIC.

[115] Both parties made submissions as to whether a director of PIC can properly be prohibited from making negative statements in relation to, namely Chief and Council, and the shareholder-trustee. The Respondents relied on ***Fraser v. Canada (Public Service Staff Relations Board)***, [1985] 2 S.C.R. 455, in arguing that directors of PIC should be discouraged from making critical statements regarding Chief and Council, as it does not operate independently from Council. The Respondents acknowledged that while ***Fraser*** dealt with a public servant, similar considerations should apply within the context of a corporation like PIC, as it is a vehicle for the pursuit of the objectives of the Nation that answers to the Nation's elected representatives.

[116] The Applicants relied on ***Canada (Canadian Wheat Board) v. Canada (Attorney General)***, 2008 FC 769. In this case the Minister of Agriculture issued a directive prohibiting the Wheat Board from making a public statement opposing the Government's policy regarding the Board's future. The Wheat Board argued that the directive was principally motivated to silencing the Wheat Board against advocating the promotion of any policy which might best benefit the Board. The directive was held to be of no effect. The Applicants submit that similar consideration should apply in the case of PIC.

[117] By-law 4.04(b) is void for vagueness. It is unclear what information may be given by a director. For example, what if certain information was accurate but yet subversive towards Chief and Council? A director may be left unsure of how to govern him or herself. In addition, it must be remembered that PIC was created to assist in achieving certain goals for the Nation. To the extent that certain information must be shared with the Nation to achieve these goals, the by-laws should not act to prohibit the same.

c. By-law 4.04(c)

[118] By-law 4.04(c) was not directly addressed by the Applicants and is therefore not in issue. It states that a breach may include:

> (c) a director seeking to involve or allowing the Corporation to be involved, in activities and projects in excess of the Corporations mandate without the approval of the shareholder as directed by Piikani Chief and Council;

d. By-law 4.04(d)

[119] By-law 4.04(d) was challenged by the Applicants as conflicting with the duties of a director. It states that a breach may include:

> (d) a director failing to guide the Corporation in a manner consistent with the shareholders direction as authorized by the Piikani Chief and Council or, in the absence of such specific direction, in accordance with the mandate in Schedule 2 of the Trust Agreement of July 2002;

[120] The Applicants argue that a director has an independent duty to act in the best interest of PIC and that it is improper to allow for the dismissal of a director because the director has disobeyed a shareholder. The Applicants rely on ***Peoples Department Store Inc. (Trustee of) v. Wise***, [2004] 3 S.C.R. 461 in arguing that a director's foremost duty is to PIC. Specifically, the Applicants rely on para. 31 of the judgment where the Court defines the primary role of directors, in relation to s. 102 of the CBCA, as follows:

> Although the shareholders are commonly said to own the corporation, in the absence of a unanimous shareholders agreement to the contrary, s. 102 of the CBCA provides that it is not the shareholders, but the directors elected by the shareholders, who are responsible for managing it. This clear demarcation between the respective roles of shareholders and directors long predates the 1975 enactment of the CBCA... .

[121] While I have found that the Trust Agreement fits the definition of a USA, there is nothing in the Agreement to suggest that PIC's management should vest in the shareholders, as opposed to the directors.

[122] The Applicants also rely on ***Chartrand v. De La Ronde*** (1996), 113 Man. R. (2d) 12 (C.A.), where Scott C.J.M stated, at para. 49 that "...directors are obligated to exercise their powers in the best interest of the corporation. Their duty is not to some outside group or organization, but to the corporation alone.".

[123] The Respondents say that a director only need follow the shareholder-trustee's direction on those matters for which PIC is required to take direction from Council, in accordance with Paragraph I(c) of Schedule 2, as reproduced at para. 24, above. The Respondents submit that by-law 4.04(d) merely directs a director to act in accordance with the mandate set out in Schedule 2, or, if specifically operating under Paragraph I(c), to take direction of Council through the shareholder-trustee. The Respondents submit that if the by-law is interpreted in such a fashion that there will be no conflict with Schedule 2 of the Trust Agreement and that therefore there is no need for amendment.

[124] As I read by-law 4.04(d) it imposes a broad duty for a director of PIC to follow direction of the shareholder-trustee. There is nothing in the wording of the by-law to suggest that this duty would be limited only to those circumstances set out in Paragraph I(c) of Schedule 2. Rather, the

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by-law suggests that the directors are to follow the shareholder-trustee's direction, as authorized by Chief and Council, on any matter spoken to, and where the shareholder-trustee is silent, to act in accordance with Schedule 2.

[125] The plain reading of by-law 4.04(d) therefore conflicts with the Trust Agreement. It adds a requirement to act on direction of Council through the shareholder-trustee on any number of matters. Schedule 2 only provides that PIC is to take direction from Council on a limited number of issues. As presently worded, the by-law cannot be read in the form suggested by Council. Given such conflict, by-law 4.04(d) is void.

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e. By-law 4.04(e)

[126] By-law 4.04(e) deals with advice from PIC to Council. It states that a director's breach of duty may include:

> (e) a director making recommendations to the Piikani Chief and Council to endorse or approve corporate activities or projects based on inaccurate, misleading or inadequate supporting material or investigative analysis contrary to Schedule 2 of the Trust Agreement of July 2002;

[127] The Applicants argue that the only duties owed by the directors of PIC are to the Corporation. They therefore claim that they do not owe any such duty to Council. The Respondents disagree. They submit that one of PIC's major functions is to provide financial advice to Council. In fact, they argue that PIC likely has fiduciary obligations.

[128] I agree with the Respondents that one of PIC's essential functions is to provide prudent and reliable business advice to Council. This is clearly stated in Paragraph I(a) of Schedule 2. However, this does not end the matter as I also agree with the Applicants that the wording of by-law 4.04(e) imposes a strict liability on directors. However, I find that overall, the amendment does not conflict with the Trust Agreement.

f. By-law 4.04(f) and (g)

[129] By-law 4.04(f) and (g) was not put into issue by the Applicants. It states that a breach may include:

> (f) a director failing to adhere to the conflict of interest provisions contained in this bylaw or in any governing corporate laws, statutes or regulations;
>
> (g) a director being convicted of a criminal offence or being suspended from practice by a professional governing body, agency, or tribunal;

g. By-law 4.04(h)

[130] By-law 4.04(h) provides for removal of a director where there has been a loss of confidence between the shareholder-trustee and the director to the impediment of PIC. It states that a director may breach his or her obligation if there is a:

> (h) loss of confidence between the shareholder and a director to the impediment of the Corporations day to day business activities;

[131] The Applicants argue that the wording “loss of confidence”, to be determined by the shareholder-trustee, imposes a strict liability standard on the directors and is decided solely and subjectively by the shareholder-trustee.

[132] The Respondents argue that the board’s primary duty is to advise Council and to accept direction from Council. They submit that if a director is not capable of working with a reasonable Council then the director is failing in his or her duty as director. Counsel for the Respondents stressed that this provision would not have any force if Council was not acting reasonably.

[133] By-law 4.04(h) troubles me. It suggests that agreement with Council is the end goal. While I agree with the Respondents that one of PIC’s duties is to accept directions from Council, the board must only accept directions from Council in a limited number of areas, as per Paragraph I(c) of Schedule 2. The duty being imposed on the board under the by-law is much broader than any duty found in the Trust Agreement. Mere loss of confidence of the shareholder-trustee does not necessarily equate with a breach of duty or obligation as a director, as specifically provided for in the Trust Agreement. By-law 4.04(h) imposes a duty outside what is expressly stated in the Trust Agreement and is therefore void.

h. By-law 4.04(i)

[134] By-law 4.04(i) is a “catch-all” provision, providing for removal of a director for any act or omission that the shareholder-trustee, acting reasonably, perceives as detrimental. It states that a breach of duty may include:

> (i) any other acts or omissions that the shareholder, acting reasonably, perceives as harmful, detrimental or an impediment to the transparent, effective and profitable performance of the Corporation's business.

[135] The Applicants argue that this provision allows for the shareholder-trustee to terminate a director, when the Trust Agreement clearly states that such authority lies with Council alone. They further submit that the provision allows the shareholder-trustee to determine whether a duty has been breached solely and subjectively.

[136] The Respondents say that while there may be some concern over the term “perceives”, the provision remains subject to the requirement in the Trust Agreement that there be a breach of duty.

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[137] Again, I find that the Trust Agreement must be complied with. The amendment places additional powers in the hands of the shareholder-trustee. A review of the Trust Agreement shows that the role of the shareholder-trustee is to simply hold the shares on behalf of the Nation, as opposed to playing an active role in the management of PIC. I agree with the Applicants that the term "perceives" is too vague and places too much discretionary power in the hands of the shareholder-trustee, thus offending the Trust Agreement. It is therefore void.

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3. By-law 4.06

[138] By-law 4.06 deals with the appointment and removal of directors. As originally drafted, by-law 4.06 read:

> Appointment of Additional Directors - If the articles of the Corporation so provide, the directors may, within the maximum number permitted by the articles, appoint one or more additional directors, who shall hold office for a term expiring not later than the close of the next annual meeting of the shareholders, but the total number of directors so appointed may not exceed one third of the number of directors elected at the previous annual meeting of shareholders.

[139] The amended version of by-law 4.06 reads:

> Appointment of Additional Directors - Delete the heading and the entire clause and replace with the following:
>
> "Acceptance of Appointment - Upon accepting an appointment as a director, each director shall execute and provide to the shareholder for inclusion in the Minute Book of the Corporation, a Consent to Act as Director in the form and style authorized by the shareholder from time to time, and shall execute and provide for inclusion in the Minute Book of the Corporation an undated resignation as director and/or as officer, which resignation the shareholder may date and implement during the currency of the director's term for any of the reasons in 4.04 above."

[140] As noted above, Paragraph III of Schedule 2 simply provides that:

> (b) All Directors shall be appointed by the Council for a period of four (4) years based on the [sic] their qualifications, experience and abilities to manage and direct investments and businesses.
>
> (c) Directors may only be removed by the Council during their tenure in office only for breach of their duties and obligations as Directors.

[141] The Applicants say that the Trust Agreement does not specify that a director must provide a signed resignation and that therefore the by-law is void. They have suggested that if

the wording “and shall execute and provide for inclusion in the Minute Book of the Corporation an undated resignation as director and/or as officer, which resignation the shareholder may date and implement during the currency of the director’s term for any of the reasons in 4.04 above” is removed, that the by-law will then conform with the Trust Agreement.

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[142] The Respondents challenge this submission. They argue that the amendment is needed to provide a mechanism to remove a director who refuses to call a shareholder meeting, or otherwise refuses to acknowledge a resolution removing him from office. The Respondents stress that by-law 4.06 must be exercised in accordance with by-law 4.04.

[143] I do not find that by-law 4.06 is in conflict with the Trust Agreement. Requiring an undated resignation letter does not offend Paragraph III of Schedule 2. Those provisions in by-law 4.04 which either conflicted with the Trust Agreement or were overly vague have been declared void. Therefore, there is no concern over requesting a resignation due to a breach of by-law 4.04. Paragraph III of Schedule 2 simply states that a director may only be removed for breach of his or her duties and obligations as a director. If Council wished to effect such removal by using an undated letter of resignation, it is free to do so.

4. By-law 4.20

[144] By-law 4.20 deals with remuneration and expenses for directors. The original by-law states:

> Remuneration and Expenses - Subject to any unanimous shareholder agreement, the directors shall be paid such remuneration for their services as the board may from time to time determine. The directors shall also be entitled to be reimbursed for traveling and other expenses properly incurred by them in attending meetings of the board or any committee thereof. Nothing herein contained shall preclude any director from serving the Corporation in any other capacity and receiving remuneration therefor.

[145] The amended version states:

> Remuneration and Expenses - delete the entire clause and replace with the following:
>
> “Subject to any shareholders agreement, the directors may be paid remuneration for their services as the board may from time to time determine, provided the parameters of remuneration payable for the particular services have been approved and authorized by the shareholder. The directors shall also be entitled to reimbursement of reasonable and necessary traveling and other expenses properly incurred by them in attending meetings of the board or any committee thereof, upon submitting an expense report and supporting receipts. Nothing herein contained shall preclude any director from serving the Corporation in any other capacity and receiving remuneration therefore, so long as any contract related to such service is made in accordance with the conflict of interest provisions of paragraph 4.19 above, and provided any managerial, supervisory, or

> advisory contracts are authorized by the shareholder prior to becoming effective. In the event any term of an agreement, arrangement or contract herein referred to is inconsistent with any of the articles or bylaws of the Corporation, then to the extent such term is inconsistent with the articles or bylaws, the terms of the articles or bylaws of the Corporation shall govern."

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[146] The Trust Agreement is silent about directors' remuneration. I note that s. 125 of the CBCA states:

> Subject to the articles, the by-laws or any unanimous shareholder agreement, the directors of a corporation may fix the remuneration of the directors, officers and employees of the corporation.

[147] The Applicants take issue with the phrase "subject to any shareholder agreement". They state it is unclear which shareholder agreement is being referred to. Specifically, they argue that it is unclear whether the phrase refers to the Trust Agreement as a USA or if it refers to some other agreement. This wording is distinct from the original by-law which referenced a USA. Moreover, they state that it is the directors of a corporation who have the authority to decide appropriate remuneration. They submit that the shareholder-trustee should play no role in setting remuneration for a director for his or her role as a director or for services provided to PIC in any other capacity. The Applicants point to s. 125 of the CBCA.

[148] The Applicants argue that the amended by-law essentially allows the shareholder-trustee to approve the employment contracts of any director, thereby allowing Council to control the management of PIC, which is contrary to its independent purpose. They therefore submit that the phrase "are authorized by the shareholder" be struck from the amended by-law.

[149] The Respondents submit that there is nothing in s. 125 of the CBCA which might prevent the shareholder-trustee from making this amendment. In fact, they argue that s.125 expressly provides that the shareholders may make a by-law to take away the power of the directors to set remuneration. The Respondents claim that the amendment was targeted to combat excessive salaries paid to directors and to ensure disclosure of contracts. Moreover, they submit that the discretion Council has over PIC's operating budget implies that Council should have at least indirect control over the directors' remuneration.

[150] I do not accept the Applicants' argument that only the directors of PIC have the authority to set the appropriate remuneration. Section 125 of the CBCA states that the directors' authority in this regard is subject to the articles, by-laws, or any USA. The amended by-law expressly alters the directors' powers in this regard. Further, there is nothing in the USA (the Trust Agreement) that would conflict with such an alteration. Indeed, to the extent that the Trust Agreement promotes financial accountability of PIC to the Nation, it supports such an amendment.

5. By-law 8.03

[151] The Applicants also take issue with by-law 8.03. I note that while they refer to this by-law again as by-law 4.20 in their originating notice and in written argument, they clearly meant to reference by-law 8.03. As originally drafted, this by-law read:

> Registration of Transfers - Subject to the Act, no transfer of a share shall be registered in a securities register except upon presentation of the certificate representing such share with an endorsement which complies with the Act made thereon or delivered therewith duly executed by an appropriate person as provided by the Act, together with such reasonable assurance that the endorsement is genuine and effective as the board may from time to time prescribe, upon payment of all applicable taxes and any reasonable fees prescribes by the board, upon compliance with such restrictions on transfer as are authorized by the articles and upon satisfaction of any lien referred to in section 8.09.

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[152] The amended by-law reads:

> Registration of Transfers - Insert the following phrase after the words “subject to the Act”, in the first sentence, “and subject to the requirements of Schedule 2 of the Trust Agreement of July 2002” and add at the end of the paragraph, the following: “but such transfer may only be to an individual appointed by the Piikani Chief and Council to hold shares in the Corporation on behalf of the Piikani Chief and Council, as elected representatives of the Piikani Nation Members”.

[153] The recitals of the shareholder-trustee agreement state that the Trustee holds shares in PIC in trust for the Shareholder (defined as the Nation as represented by Chief and Council). In addition, as noted above, Paragraph II(b) of Schedule 2 states:

> The shares shall be held in trust for the benefit of the Piikani Nation by person(s) appointed as shareholder trustees by Council from time to time. The shares shall be exercised in accordance with a Trust Agreement between the shareholder trustees and Council substantially in the form attached hereto.

[154] The Applicants argue that the phrase “to hold shares in the Corporation on behalf of the Piikani Chief and Council, as elected representatives of the Piikani Nation Members” should be replaced with the phrase “to hold shares in the Corporation on behalf of the Piikani Nation”. They argue that Schedule 2 and the shareholder-trustee agreement both clearly state that the shares are to be held on the behalf of the Nation, as opposed to on the behalf of Chief and Council.

[155] The Respondents submit that given the operation of the Trust Agreement there would be no substantive difference between the two versions of the by-law. They suggest the amendment would have no real impact. The Respondents also argued that the Applicants did not specifically reference by-law 8.03 in their amended amended originating notice, but rather did so for the first time during oral argument. This is not so. Although the Applicants mistakenly referred to the by-

law in question as by-law 4.20, they were clearly referencing by-law 8.03. This is apparent at paragraph xxii of the amended amended originating notice, which reads:

> xxii) Proposed amendment to Bylaw 4.20 (page 9 of Exhibit 8 to Affidavit #1 of Dale McMullen), states that the shareholder trustee hold the shares of PIC for Council. Pursuant to paragraph II to the PIC Constitution, the Shares are held for the Nation.

[156] It is clear from reference to by-law 8.03 that the Applicants were actually referring to 8.03, although they mislabeled it 4.20 (which they mistakenly reference twice).

[157] Again, given the unique status of the Trust Agreement, any conflict between the Agreement and the by-laws must be resolved in favour of the Trust Agreement. Schedule 2 clearly states that the shares are to be held in trust for the Nation. This should not be altered, even if the effect of such alteration will be negligible given the fact that the Nation is represented by Chief and Council. Wherever possible, strict compliance should be sought.

6. By-law 8.01

[158] The Applicants did not refer to by-law 8.01 in the amended amended originating notice. They raised their objections to this by-law for the first time during oral argument. The Respondents objected that the amendment to by-law 8.01 was not properly before this Court in that it was not included in the originating notice. I agree with the Respondents and will not address the Applicants' argument respecting this by-law.

F. Issue Six: are the Applicants entitled to a declaration that Resolution No. 5 is contrary to the Trust Agreement and therefore invalid?

[159] Resolution No. 5 deals with remuneration to be paid to the shareholder-trustee. It reads:

> As a matter of special business, a resolution to establish a formula and method for determining the appropriate remuneration to be paid annually, in monthly instalments, by the Corporation to the Shareholder for the indispensable services provided to the Corporation by the Shareholder.

[160] The Applicants object to this resolution on a number of grounds. First, they submit that Resolution No. 5 conflicts with Paragraph 1.2.4 of the Trust Agreement, which defines those expenses authorized by the Trust:

> "Authorized Expenses" means the expenses reasonably incurred by the Trustee in each Fiscal Year in carrying out the terms of the Trust Agreement including payment of administrative, accounting, legal, investment and other costs which have been approved by the Band Council Resolution, which the Council shall direct the Trustee to pay from Trust Property. This shall not include payment of any costs of the Council, its members,

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> or Piikani administration which they have incurred in performing any of their obligations in relation to the Piikani Trust.

[161] The Applicants argue that while PIC is not technically "the Trust", because it was established as part of the Trust, it is one of the objectives of the Trust and therefore the same rules would govern. They submit that if Council is not entitled to compensation for discharging their duties to the Trust, and one of these duties is to appoint and act as a shareholder-trustee of PIC, by analogy Council is not entitled to any such payment. The Applicants further submit that there has been no direction of Chief and Council authorizing such a request by the shareholder-trustee.

[162] The Respondents argue that the Applicants' submission is based on a misinterpretation of Paragraph 1.2.4 of the Trust Agreement. They say that the prohibition against payments to Council is only in relation to the performance of its obligations in relation to the Trust and that no such prohibition exists for goods or services that are not provided in relation to the Trust. They submit that Paragraph 1.2.4 prevents payment flowing from the Trust, specifically from the Investment Account, and does not prevent the flow of funds from PIC to Council.

[163] The Applicants also argued that the phrase "indispensable services" was unclear. Indeed, when Chief Crow Show was cross-examined on his affidavit he was asked to define "indispensable services" and was unable to. Moreover, although he undertook to provide a definition, no such definition has been provided so far.

[164] The Respondents submit that payment for "indispensable services" simply means those transactions occurring in the ordinary course of business. Counsel put forward a number of examples, including rent payable by PIC for using offices owned by the Nation, or transactions involving services that only Council can provide under the *Indian Act*, R.S.C. 1985, c. I-5, such as negotiating approvals for designations or for agricultural permits on Reserve land.

[165] The Applicants submitted that any examples of services provided by Council must not be regarded as evidence as to what might actually constitute an "indispensable service". I accept the Applicants' submission. The Applicants stressed that they were not disputing that payment may be provided for services rendered in the regular course of PIC's business. Counsel reviewed a business plan prepared for PIC and attached as Exhibit A to Chief Crow Shoe's affidavit to provide examples of the typical business expenses that may be paid by PIC.

[166] While PIC must be able to compensate the Nation for costs incurred in the ordinary course of business, I cannot endorse a resolution which compensates the shareholder-trustee for undefined "indispensable services". I find that the resolution is simply too broad. Moreover, I find that although Paragraph 1.2.4 deals specifically with payments from the Trust, the general intent was obviously to restrict such payment.

[167] For example, the shareholder-trustee agreement expressly provides that the shareholder-trustee agrees to transfer all dividends paid to him to the Nation. While Resolution No. 5 does

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not deal with dividends, it shows an intention by the drafters that the shareholder-trustee is not to receive remuneration.

[168] Overall, I find that a resolution allowing monthly payment for undefined "indispensable services" does not accord with PIC's mandate nor with its duty to be accountable to the Nation. It is too vague and it conflicts with the spirit and intent of the Trust Agreement. I note also that the absence of such resolution will not prohibit PIC from making payments for services received during the ordinary course of business.

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G. Issue Seven: is the funding of annual operating costs a mandatory obligation of the Piikani First Nation Council?

[169] The Band Council has not issued a resolution directing the Trustee to pay PIC for its annual operating costs for the 2008 fiscal year. PIC seeks to determine whether the Band Council is required to issue a BCR directing annual operating costs be paid. The Respondents argue that payment of the operating budget is not mandatory, and that the amount paid is at the discretion of Council. The Applicants say that this payment is being wrongfully withheld and that the funds are required in order for PIC to operate as the Trust Agreement contemplates.

[170] Whether the funding of annual operating costs is mandatory must be decided by reference to the words of the Settlement Agreement. Paragraph 33.1 of the Settlement Agreement provides:

> The Parties shall in good faith do such things, execute such further documents and take such further measures as may be necessary to carry out and implement the terms, conditions, intent and meaning of this Agreement.

[171] This suggests that if funding is required to ensure PIC's continued existence, as contemplated by the Settlement Agreement, then such funding should not be unreasonably withheld.

[172] The Settlement Agreement also provides, at Paragraph 37.8 that:

> This Agreement is for the benefit of, and is binding upon, Canada and Alberta and any of their Ministers, officials, servants, employees, agents, successors and assigns and upon the Piikani and its past, present and future members and any of their respective heirs, descendants, legal representative, successors and assigns.

[173] Pursuant to this provision, the Settlement Agreement is binding on the Respondents as they are part of the Piikani.

1. Specific funding provisions

[174] The specific funding provision is found in Paragraph 6.1 of the Trust Agreement:

> The Settlement Funds paid into the Investment Account shall only be used by the Trustee, as directed by the Piikani Nation as beneficiary, for the purpose of permitting the Trustee:
>
> ...
>
> (v) To pay, as directed by Band Council Resolution, the Piikani Investment Corporation in an amount not to exceed Three Hundred Thousand ($300,000.00) Dollars in each Fiscal Year to be used for the annual operating costs.

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[175] PIC cannot operate without funding for annual operating costs and, therefore, this provision is most properly interpreted as requiring the Band Council to issue a BCR directing the Trustee to pay annual operating expenses while limiting the maximum amount payable to $300,000.

[176] Even if Paragraph 6.1 allows Council to decide whether to pay the annual operating costs, Council is still obligated to authorize the Trustee to pay the annual operating costs. This is so by virtue of the Respondents' obligation to do what is necessary to ensure PIC is funded (see the Settlement Agreement provisions discussed above). Pursuant to this obligation, it would be necessary for Council to decide to direct the Trustee to pay the annual operating expenses.

[177] Regardless of whether Paragraph 6.1 is interpreted to be mandatory or permissive, based on the Settlement Agreement provisions discussed above, Council is required to direct the Trustee to pay the annual operating expenses. The amount payable, however, is subject to the $300,000 maximum.

2. Past payments

[178] The Applicants argue that since the entire $300,000 amount has been approved by Council in the past, this establishes a protocol requiring the $300,000 be paid every year, going forward. They also argue that since expenses in every other year have exceeded $300,000, that this amount should always be paid. The Respondents argue that a budget must be submitted to Council for proper approval, however, the Applicants submit that no such request was ever made.

[179] I find that when deciding whether $300,000 or some lesser amount should be paid to PIC for annual operating expenses, Council is entitled to consult the documents it deems necessary, according to its internal process. However, what Council requires for its internal approval process must not be so onerous as to infringe on PIC's ability to operate. Council's requirements must be reasonable as considered in light of its obligation, as members of the Piikani Nation, to ensure PIC continues to operate.

3. Conclusion

[180] Council is required to direct the Trustee to pay the annual operating expenses to PIC. Council is entitled to conduct a reasonable assessment of what the expenses should be, subject to the $300,000 maximum amount and the requirement to do such things to ensure PIC continues to operate.

[181] Thus, Council must direct that the annual operating expenses be paid to PIC, up to a maximum of $300,000. Council is entitled to documentation evidencing PIC's proposed annual budget as well as expenditures and is entitled to pay a lesser amount to PIC if it reasonably determines that this lesser amount is sufficient to satisfy annual budgetary requirements.

H. Issue Eight: is the appointment of the Chief as shareholder-trustee of PIC invalid based upon a conflict of interest?

[182] Chief Crow Shoe is currently the shareholder-trustee. The Applicants allege that Chief Crow Shoe has done several things that are contrary to the best interests of PIC, including attempting to remove McMullen from PIC's board of directors and approving amendments to PIC's by-laws and articles which are alleged to be attempts by the Chief to increase his powers and that of the Council over PIC. The Applicants allege that this creates a conflict of interest on the part of the Chief. They are seeking a declaration that his appointment should be set aside. Further, they are seeking a declaration that any persons appointed by Chief and Council as shareholder-trustee must be free of any conflict of interest.

[183] The shareholder-trustee is a shareholder vis-a-vis PIC and a trustee vis-a-vis the Piikani Nation as beneficiaries. Any duty owed to PIC would be based on the shareholder-trustee's status as a shareholder. If the shareholder-trustee is also the Chief of the Piikani Nation, that individual's duties to the Piikani Nation would be based on the individual's role as Chief as well as the individual's role as trustee.

[184] Thus, the relevant issues are: whether the shareholder-trustee owes a duty to PIC as a shareholder; whether the shareholder-trustee owes a duty to the Piikani Nation as trustee; and, if the shareholder-trustee owes such duties, and if the shareholder-trustee is also the Chief of the Piikani Nation, whether the duty a Chief owes to the Piikani Nation as Chief would conflict with these duties.

1. Does the shareholder-trustee owe a duty to PIC as a shareholder?

a. Canada Business Corporations Act

[185] Under the CBCA, a shareholder only owes a duty to the corporation if, by virtue of a USA, it steps into the shoes of a director:

> 146(5) To the extent that a unanimous shareholder agreement restricts the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation, parties to the unanimous shareholder agreement who are given that power to

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> manage or supervise the management of the business and affairs of the corporation have all the rights, powers, duties and liabilities of a director of the corporation, whether they arise under this Act or otherwise....

[186] The USA at issue would be the Trust Agreement. As noted above, the only powers that Schedule 2 of the Trust Agreement gives to the shareholder-trustee is at Paragraph II (b):

> The shares shall be held in trust for the benefit of the Piikani Nation by person(s) appointed as shareholder trustees by Council from time to time. The shares shall be exercised in accordance with a Trust Agreement between the shareholder trustees and Council substantially in the form attached hereto.

[187] The amended article 5 of PIC, as accepted by this Court, also provides:

> The Corporation shall have Seven (7) Directors, to be appointed by the shareholder at the direction of the Piikani Nation Chief and Council, pursuant to the terms of Schedule 2 of the Piikani Nation Trust agreement of July 2002 and the Corporation's Bylaws.

[188] The by-laws provide that the shareholder-trustee has the power to nominate and terminate directors if they are in breach of their duties. However, as the by-laws are not part of a USA, no duties or liabilities to PIC are placed on the shareholder-trustee by virtue of s. 146(5) of the CBCA.

[189] The shareholder-trustee agreement limits the shareholder-trustee's discretion, at Paragraph 1:

> The Trustee agrees that he shall vote and deal with the shares of the Corporation held by him as directed from time to time by the Shareholder.

[190] In the shareholder-trustee agreement, the 'trustee' is the shareholder-trustee, and the 'shareholder' is the Piikani Nation acting through the Chief and Council. Thus, since the shareholder-trustee is not given any managerial or supervisory role over the business and affairs of PIC in the Trust Agreement, the shareholder-trustee does not owe a duty to PIC pursuant to the CBCA.

b. Common Law

[191] The test for fiduciary duties at common law is set out by Laforest, J. in ***Hodgkinson v. Simms***, [1994] 3 S.C.R. 377 at 409:

> ... the question to ask is whether, given all surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were

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> mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

[192] In this situation, there is no evidence of any understanding that the shareholder-trustee would relinquish its own self-interest for the benefit of the Corporation and thus, no common law duty to act in the best interest of the Corporation arises.

c. Conclusion

[193] As the shareholder-trustee is not given the power to manage or supervise the business affairs of PIC under the Trust Agreement, the shareholder-trustee does not owe a duty to PIC under the CBCA. Similarly, the shareholder-trustee cannot be understood to have relinquished his or her self-interest for the benefit of PIC when signing the shareholder-trustee agreement and assuming the role as shareholder-trustee, and thus, the shareholder-trustee does not owe a common law duty to PIC.

2. Does the shareholder-trustee owe a duty to the Piikani Nation as trustee?

[194] The shareholder-trustee agreement sets out that Chief Crow Shoe is the trustee of shares in PIC and that the Piikani Nation is the beneficiary. The Applicant's position is that the shareholder-trustee agreement charges the shareholder-trustee with acting in the best interests of the Nation with relation to the shares. The Respondents assert that the shareholder-trustee obligation is simply to act in accordance with the shareholder-trustee agreement, which requires the shareholder-trustee to follow the direction of Council.

a. Jurisprudence

[195] A trustee and beneficiary relationship is an established category of the type of relationship that gives rise to a rebuttable presumption that one party has a duty to act in the best interests of the other party. In ***Hodgkinson v. Simms*** at 409-410, Laforest, J. noted:

> I [] identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an inherent vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. [emphasis added]

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[196] The question is whether the presumption of a duty to act in the best interests of the beneficiaries has been rebutted.

b. The shareholder-trustee agreement

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[197] The shareholder-trustee is required, based on Paragraph 1 of the shareholder-trustee agreement, *supra*, to vote and deal with the shares as directed by the beneficiary.

c. Conclusion

[198] Based on the shareholder-trustee agreement, the shareholder-trustee does not exercise any 'discretion' over voting the shares of PIC and there is no 'influence over interests' or 'inherent vulnerability' of the Piikani Nation in this situation. This is sufficient to rebut the presumption of a duty to act in the best interests of the other party as set out in ***Hodgkinson v. Simms***, *supra*. Thus, although the shareholder-trustee must carry out the directions of Council in accordance with the shareholder-trustee agreement, the shareholder-trustee does not, by virtue of being named a 'trustee' under the shareholder-trustee agreement, owe a duty to act in the best interest of the Piikani Nation.

[199] Even if the shareholder-trustee were to owe a fiduciary duty to the Piikani Nation, the *Trustee Act*, R.S.A. 2000, c. T-8, s. 26 allows a court to refuse to grant a remedy for a breach of fiduciary duty if the breach is instigated or consented to by the beneficiary.

> When a trustee has committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the court may, if it thinks fit ... make any order that to the court seems just for impounding all or part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through the trustee.

[200] Any direction from the beneficiary through Chief and Council, pursuant to Paragraph 1 of the shareholder-trustee agreement would fall within the ambit of this provision and this Court may exercise its discretion to deny a remedy.

3. If the shareholder-trustee owes a duty to either PIC or the Piikani Nation as beneficiaries under the shareholder-trustee agreement, and if the position of shareholder-trustee is held by members of Council or the Chief, does the duty to the Nation by members of Council and the Chief conflict with these duties?

a. Scope of duty owed by members of Chief and Council to the Piikani Nation.

[201] The parties are in agreement that Chief and Council owe a duty to the Nation. This is based on the burden placed on an elected official requiring exercise of "a very high objective standard of care": see ***Calgary Roman Catholic Separate School District No. 1 v. O'Malley***,

2007 ABQB 574, 426 A.R. 275 at para. 109. The scope of this duty encompasses the requirement that the public official be free from a conflict of interest: see ***Old St. Boniface Residence Assn. Inc. v. Winnipeg (City)***, [1990] 3 S.C.R. 1170 at 1196. The relevant question is set out in ***Old St. Boniface*** at 1198: "the test is that which applies to all public officials: would a reasonably well-informed person consider that the interest might have an influence on the exercise of the official's public duty?"

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b. Conclusion

[202] Since the shareholder-trustee does not owe a duty to PIC or the Piikani Nation as beneficiary to PIC shares, the duty owed to the Piikani Nation by the Chief and members of Council do not prevent them from assuming the role of shareholder-trustee. Note, however, that pursuant to the analysis whether the funding of annual operating costs is a mandatory obligation of the Piikani First Nation Council, discussed above, the Chief and Council have an obligation in exercising their duties to ensure PIC continues to have the ability to operate as contemplated by the Settlement Agreement.

[203] It follows that Chief Reg Crow Shoe is not in a conflict of interest because his sole duty is that owed to the Piikani Nation as Chief; he does not owe a duty to PIC or the Piikani Nation as beneficiary of PIC shares. He does, however, have an obligation to ensure that PIC is able to continue to function. Thus, the declaration sought by the Applicants in the amended amended originating notice that the appointment of the Chief as the shareholder-trustee of PIC is invalid and should be set aside, based on conflict of interest, is denied.

[204] More generally, since the shareholder-trustee does not owe a duty to PIC or the Piikani Nation by virtue of assuming the role of shareholder-trustee, a "declaration that the person appointed by Chief and Council as the shareholder-trustee of PIC need be free of conflict of interest" as sought by the Applicants in the amended amended originating notice, is not required.

I. Issue Nine: is the appointment of Councilor Herman Many Guns to the board of PIC invalid based upon a conflict of interest?

[205] Councillor Herman Many Guns is presently acting as a director for PIC. The Applicants allege that Many Guns' former actions create a conflict of interest which disqualify him from acting as a director for PIC. These actions include: voting to redirect the Annual Payment, payable to the Piikani Trust, to pay utilities; voting to prevent PIC from taking action to recover debt owed to it by a Piikani Business Entity; and, refusing to pay PIC's annual operating expenses. The Applicants are seeking a declaration that his appointment should be set aside. Further, they are seeking a declaration that any persons appointed as directors of PIC must be free of any conflict of interest and must meet the requirements as set out in Schedule 2.

1. What is the scope of a director's duty to the corporation?

[206] The duty that a director of a corporation owes to that corporation is set out in s. 122 of the CBCA:

> (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall
>
> > (a) act honestly and in good faith with a view to the best interests of the corporation; and
> > (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
>
> (2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.
>
> (3) Subject to subsection 146(5) [making shareholders liable as directors if they take on managerial duties pursuant to a unanimous shareholder agreement], no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves them from liability for breach thereof. [emphasis added].

a. Temporal scope

[207] This statutory duty arises only when the directors are "exercising their powers and discharging their duties". As individuals cannot exercise their powers and discharge their duties before actually becoming directors, the duty in s. 122 of the CBCA does not apply to the conduct of individuals *before* they become directors. Thus, there is no disqualifying conflict based on the *past* actions of Councillor Many Guns before he became a director of PIC.

b. Material contracts and transactions

[208] Section 120 of the CBCA requires the director to disclose any interests the director has in a "material contract or material transaction" and requires the director to abstain from voting on any resolution to approve the contract or transaction. If the director fails to do so, the contract or transaction can be set aside by the court and the director may be required to account to the corporation for any profit or gain realized. An exception is provided if the director was acting honestly and in good faith, the contract or transaction is approved or confirmed by a special resolution at a meeting of shareholders, there was some disclosure made to the shareholders sufficient to indicate the nature of the director’s interest before the contract or transaction was approved or confirmed, and the contract or transaction was reasonable and fair to the corporation.

[209] The parties agree that s. 120 of the CBCA is inapplicable to Councillor Many Guns.

c. Best interests of the corporation

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i. Jurisprudence

[210] The "best interests of the corporation" is defined by the Supreme Court of Canada in ***Peoples Department Store**, supra*, at paras. 42 and 43:

> ...From an economic perspective, the "best interests of the corporation" means the maximization of the value of the corporation... We accept as an accurate statement of law that in determining whether they are acting with a view to the best interest of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.
>
> ...At all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders.

ii. Trust Agreement

[211] Here, the 'circumstances' that must be considered when determining whether a director is acting in the bests interest of PIC includes the stated purpose of PIC in Schedule 2 of the Trust Agreement. This includes providing business and management advice, developing and approving business plans, and acting as directed by Council on specific matters. These specific matters are outlined in Paragraph I(c), reproduced at para. 24, above.

[212] From this list, it is evident that one of the roles PIC plays is to take direction from Council on certain matters including how to properly safeguard investments, loans and loan guarantees.

d. Conclusion

[213] The duty owed by a director is to act in the best interests of the corporation, considering the circumstances of each case, and to make declarations and refrain from voting in material contracts and transactions when he or she is in a conflict of interest, in accordance with the CBCA and the jurisprudence. Therefore, it is unnecessary to make a declaration that the persons appointed as directors of PIC need be free from conflict of interest, as requested by the Applicants in the amended amended originating notice.

2. If a Councillor is also a director of PIC, is there a conflict between the Councillor's duty to PIC as director and the Councillor's duty to the Piikani Nation as Councillor?

[214] Since PIC, and necessarily its directors as well, must take direction from Council on certain matters outlined in Schedule 2 of the Trust Agreement, to the extent that the director is acting in relation to these matters, no conflict arises.

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[215] Although there may be some situations where the best interests of PIC, which involves ensuring proper management and investment in Piikani Business Entities, would seem to conflict with the interests of the Piikani Nation, this is not actually the case. By ratifying the Settlement Agreement, the Piikani Nation has made it clear that it is it in its best interests to allow PIC and the Piikani Trust to function and to further the purposes for which they were created. All Councillors are bound by this. To the extent that this is inconsistent with other interests of the Piikani Nation, the ongoing effectiveness of PIC and the Piikani Trust must take priority.

[216] For example, in September of 2007, Council directed that the annual payment assigned to the Piikani Trust be used instead to pay various utility bills. At first glance, this would appear to create a conflict between allowing the money to flow into the Piikani Trust and paying the utility bills for the Piikani Nation. However, having ratified the Settlement Agreement, the Nation has decided that it is in its best interests to allow the money to flow into the Piikani Trust. This is not to say that PIC and the Piikani Trust are necessarily more important than heat and water to the Piikani Nation, rather, it merely shows that the funds that are designated for the Piikani Trust should always flow to the Piikani Trust, and that funds for utility bills must simply be found from another source.

[217] In light of this, although the Councillor would owe a duty to the Piikani Nation and PIC, in both situations, the obligation is to ensure the ongoing effectiveness of PIC.

[218] More generally, it is difficult to see how, in the context of the Piikani Nation, it would be proper to make a declaration that the Chief and all Councillors are barred from acting as directors of PIC based on a ‘conflict of interest’. This would in essence bar all individuals who held leadership positions within the Piikani Nation from bringing their expertise and knowledge of the goals of the Piikani Nation into the role of director of PIC. Additionally, the required composition of directors of PIC, set out in paragraph III(a) in Schedule 2 of the Trust Agreement, specifically allows one director to be a member of Council. The structure of this board recognizes that this one director could owe a double duty to both the Piikani Nation and PIC. It was not the intention of the Settlement Agreement to prevent all members of Council from ever acting as directors and this Court should not impose such a restriction now.

[219] Thus, Councillor Herman Many Guns is not in a conflict of interest in his role as director of PIC and Councillor of the Piikani Nation. When acting in his role as director, he has an obligation to PIC, and when acting in his role as Councillor, he has an obligation to the Piikani Nation, which has stated clearly that it is in its best interests to allow PIC to continue to function. Thus, in both situations, the Councillor has an obligation to act in such a way to ensure PIC continues to operate and serve its purpose for the Piikani Nation.

J. Should this Court refuse to grant declaratory relief based on the ‘clean hands’ principle?

1. Declaratory judgments

[220] This Court's jurisdiction to make declaratory judgments is set out in s. 11 of the *Judicature Act*, R.S.A. 2000, c. J-2:

> No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and <u>the Court may make binding declarations of right</u> whether or not any consequential relief is or could be claimed. [emphasis edded]

[221] The wording of s. 11 is permissive, and so, any declaratory judgment is discretionary. In ***Wawanesa Mutual Insurance Co. v. Lindblom***, 2001 ABCA 102, 281 A.R. 127, the Court stated at para. 53: "a declaration is an equitable remedy, subject to equitable defences, and the court has a discretion to withold it if it would not be just." The Court further stated, at para. 54: "it is a well-settled maxim of equity that He Who Seeks Equity Must Do Equity."

[222] The Supreme Court of Canada has confirmed that it is proper to consider the conduct of parties in exercising this discretion in ***Hong Kong Bank of Canada v. Wheeler Holdings Ltd.***, [1993] 1 S.C.R. 167 at 192: "... in the exercise of the discretion whether or not to grant a declaration, the court may take into account certain equitable principles such as the conduct of the party seeking the relief."

2. Oppression remedy

[223] Whether the 'clean hands' doctrine applies to granting relief pursuant to the oppression remedy does not need to be decided as the oppression remedy is inapplicable to the relief sought by the Applicant Corporation.

[224] The oppression remedy is available to claimants for acts of the corporation or acts that are attributable to the corporation. The corporation itself cannot be a claimant. This is made clear in s. 241(1) and s. 241(2) of the CBCA:

> (1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> > (a) any act or omission of the corporation or any of its affiliates effects a result,
> > (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
> > (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of any <u>security holder, creditor, director or officer</u>, the court may make an order to rectify the matters complained of. [emphasis added]

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[225] Thus, the only ground where the oppression remedy might apply is to the Applicants' request for "a declaration that term of office of the Applicant McMullen, a director of PIC, continues until November 30, 2008." This issue, however, was severed from these proceedings by Justice Kent's Order, dated October 18, 2008. Additionally, in oral argument, the Applicant noted that this issue is to be dealt with in separate proceedings. I make no decision with respect to the issue of when McMullen's term as a director properly expired.

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3. Whether the Applicants have 'clean hands'.

[226] The facts alleged by the Respondents to show the Applicant McMullen has 'unclean hands' include: failing to hold shareholder meetings and failing to provide financial information; failing to disclose the nature of the director's interests; failing to provide financial statements; failing to accept the direction of Council as per the Trust Agreement; and setting the remuneration of directors at more than 150% of the $300,000 annual operating costs of PIC.

[227] There was some evidence that meetings with shareholders were in fact held and that financial information was available to interested parties in other forms. Further, the Respondents may also be responsible for 'unclean hands' by virtue of directing PIC to not collect its debts and redirecting funds that have been irrevocably assigned to the Piikani Trust.

[228] Except for the issue respecting the remuneration of the directors, all the other facts, even if proven, go to the dispute as to the proper interpretation of the Settlement Agreement, the Trust Agreement, and the articles of continuance and the by-laws of PIC. The fact that the parties differ in the proper interpretation of these documents and have acted in accordance with their own interpretation of these documents does not show that either party has 'unclean hands'.

4. Conclusion

[229] Thus, I find that any prior disputes between the parties are not of the magnitude that would prevent the Court from granting declaratory relief to regulate the relationship between the parties in the future.

IV. Conclusion

[230] The Applicants originally sought 17 separate forms of relief in their amended amended originating notice. During argument, counsel for the Applicants withdrew heads 5, 6, 8, 11, 14 and 17. The remaining declarations or orders sought have been dealt with. I will summarize them for convenience sake.

[231] The first form of relief sought (para. 1.1 of the amended amended originating notice) is:

> A declaration that proposed (and now passed) resolution #5, as described in the Notice from the shareholder of the Piikani Investment Corporation ("PIC") dated May 27, 2008 (Exhibit 8 to Affidavit #1 of Dale McMullen), is contrary to PIC's Constitution

> (Schedule 2 to the Trust Agreement, exhibit 14 to Affidavit #1 of Dale McMullen), and invalid.

[232] For the reasons given starting at para.159 of this judgment, the above declaration is granted.

[233] The next form of relief sought (para. 1.1 of the amended amended originating notice) is:

> A declaration that the amendments to PIC's articles are subject to PIC's Constitution and the trust declaration.

[234] The above declaration is granted.

[235] The next form of relief sought (para. 1.2 of the amended amended originating notice) is:

> A declaration that the trustee-shareholder of PIC does not have the authority to amend PIC's bylaws by reason of, inter alia, PIC's Constitution and the *Business Corporations Act* (Canada), including sections 102, 103, and 146. In the alternative, a declaration that the amendments to the bylaws are subject to PIC's Constitution and trust declaration.

[236] The shareholder-trustee does have the authority to amend PIC's by-laws. However, any such amendments must accord with the Trust Agreement. To the extent of any conflict, the by-law will be void.

[237] The Applicants also seek (para. 2 of the amended amended originating notice):

> A declaration that the following proposed (and now passed) amendments to the articles of PIC, as described in the said Notice, are contrary to PIC's Constitution, and invalid - proposed amendments to articles 5 and 8.

[238] The proposed amendments to article 8 are in conflict with the Trust Agreement. The wording "limited to the Piiknai Nation Chief and Council" must therefore be removed. The amendments to article 5 do not offend the Trust Agreement as long as it is interpreted so as to provide that the by-laws are not in conflict with the Trust Agreement.

[239] The next form of relief sought by the Applicants (para. 3 of the amended amended originating notice) is:

> A declaration that the following proposed (and now passed) amendments to the bylaws of PIC, as described in the said Notice, are contrary to PIC's Constitution and the duties of the company's directors, and invalid - proposed amendments to bylaws 4.01, 4.04, 4.06 and 4.20.

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[240] The amendments made to by-law 4.01 conflict with the Trust Agreement. The word "only" must be added before the phrase "one (1) who may be a member of the Piikani First Nation Council" to ensure compliance with the Trust Agreement.

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[241] By-law 4.04 conflicts with the Trust Agreement to the extent that it allows the shareholder-trustee, as opposed to Council, to remove a director from office. I find this even though the original by-law granted this power to the shareholder-trustee. Even if this were amended, there are a number of issues with the examples as to what might constitute a breach of duty by a director:

(i) By-law 4.04(a) is void for vagueness and is therefore invalid;
(ii) By-law 4.04(b) is also void for vagueness;
(iii By-law 4.04(d) is in conflict with the Trust Agreement and is therefore void;
(iv) By-law 4.04(e) is not in conflict with the Trust Agreement and acceptable as amended;
(v) By-law 4.04(h) imposes a duty outside what is expressly stated in the Trust Agreement and is therefore void; and, lastly
(vi) By-law 4.04(i) is void for vagueness.

[242] By-law 4.06 is not in conflict with the Trust Agreement and is acceptable as amended.

[243] By-law 4.20 does not conflict with either the Trust Agreement or with the provisions of the CBCA. It is acceptable as amended.

[244] By-law 8.03 (mistakenly referred to as by-law 4.20) is in conflict with the Trust Agreement. As suggested by the Applicants, the wording "to hold shares in the Corporation on behalf of the Piikani Chief and Council, as elected representatives of the Piikani Nation Members" must be replaced with the phrase "to hold shares in the Corporation on behalf of the Piikani Nation" in order to ensure compliance with the Trust Agreement.

[245] The Applicants also seek (para. 7 of the amended amended originating notice):

> An order directing [Council] to authorize the Trustee to pay PIC its annual allowance for 2008.

[246] This declaration is granted with the qualification that Council is entitled to documentation evidencing PIC's proposed annual budget and expenditures and is entitled to authorize an amount less than $300,000 if it reasonably determines that this lesser amount is sufficient to satisfy the annual budgetary requirements.

[247] The forms of relief sought relating to the shareholder-trustee are found in paras. 15 and 12 of the amended amended originating notice, respectively:

> A declaration that the person appointed by Chief and Council as the shareholder-trustee of PIC need be free of conflict of interest.
>
> A declaration that the appointment of the Chief as the trustee-shareholder of PIC is invalid and should be set aside, based on conflict of interest.

[248] These declarations are denied. The shareholder-trustee does not owe a duty to either PIC or the Piikani Nation and thus, cannot be in a conflict of interest. Therefore, the Chief is not in a conflict of interest situation when he acts as shareholder-trustee of PIC.

[249] The forms of relief sought relating to director's conflict of interests are found in paras. 16 and 13 of the amended amended originating notice, respectively:

> A declaration that the persons appointed as directors of PIC need be free of conflict of interest and meet the requirements of PIC's constitution.
>
> A declaration that the Chief's appointment of Councilor Herman Many Guns to the board of PIC, as the purported representative of Council, is invalid and should be set aside based on conflict of interest.

[250] These declarations are denied. Both the CBCA and the Settlement Agreement recognize that directors may be in a conflict of interest in certain circumstances. It follows that a director cannot be barred from being a director based solely on conflict of interest. For a Councilor, there is no conflict of interest as the duty owed as a Councilor is the same as that owed as a director; that is, to enable the PIC to function effectively.

V. Costs

[251] The Applicants seek costs on a full indemnity basis (para. 10 of the amended amended originating notice). The Respondents submit that certain allegations made by the Applicants were frivolous and without basis, and seek solicitor-client costs. The parties may speak to me about costs.

[252] Finally, I note that during the application suggestions were put forth by both sides as to how the impugned amended by-laws and articles might be altered in order to ensure compliance with the Trust Agreement. Often it appeared as though the parties were able to come close to reaching a compromise during argument. It is unfortunate that such discussions could not take place before the application.

Heard on the 10th and 30th day of October, 2008.
Dated at the City of Calgary, Alberta this 17th day of December, 2008.

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P.J. McIntyre
J.C.Q.B.A.

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Appearances:

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for the Applicants

Michael L. Pflueger
Walsh Wilkins Creighton LLP
for the Respondents

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HIS MAJESTY THE KING.............. APPELLANT;

AND

CAMILLE DEUR AND OTHERS.......... RESPONDENTS.

1944
*May 15.
*June 22.
*Oct. 30.
*Nov. 20.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Criminal law—Accused charged on three counts of conspiracy—Speedy trial before Court of Sessions—Only one trial on the three charges—Only one complaint or information charging accused with the three charges, one preliminary inquiry and one option—Not the same as if several counts arise from separate informations and commitments, each charging distinct offences—This case distinguished from decision of this Court in The King v. Balciunas ([1943] S.C.R. 317).

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

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The accused, respondents, were charged on five counts, one for conspiracy to commit fraud, two for conspiracy to commit indictable offences and two for having committed the substantive offences themselves. The trial having been limited to the three conspiracy counts, the accused, having elected to be tried speedily under part 18 of the Criminal Code, were found guilty, but on appeal the conviction was set aside and a new trial was ordered. The decision of the appellate court was based on the ground that the trial judge upon speedy trial had no jurisdiction to try the three different counts in the indictment at the same time, that Court being of the opinion that it was contrary to the rule laid down by this Court in *The King v. Balciunas* ([1943] S.C.R. 317). The Crown appealed to this Court, leave having been granted under section 1025 of the Criminal Code.

Held that the appeal should be allowed. The judgment of this Court in the *Balciunas* case (*supra*) should not be considered as governing the present case, the true effect of that decision being that it is limited in its restriction of trial to cases where the several counts arise from separate informations and commitments.

The procedure was different in the two cases. In the present case, there was only one complaint which charged the respondents with the three conspiracy offences, there was only one preliminary inquiry referring to the three counts and there was only one charge sheet and one option. In the *Balciunas* case (*supra*), three separate informations were laid, each charging a distinct offence; there was a commitment for trial in each of the cases, although the three charges were set forth on a single charge sheet, there was one speedy trial on all three charges and the accused was convicted on each charge. Therefore, in the *Balciunas* decision, it was a case of a joinder for trial purposes of charges originating in different complaints, or in different and distinct commitments, or, in short, a joinder of different cases; and it was held that it was improper to try the three separate charges together.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, which allowed the respondents' appeal on questions of law and ordered a new trial, without giving any decision on questions of facts.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

Gérald Fauteux K.C. and *Gustave Adam K.C.* for the appellant.

Philippe Monette K.C. and *M. Gameroff K.C.* for the respondents.

The judgment of the Chief Justice and of Kerwin and Hudson JJ. was delivered by

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THE CHIEF JUSTICE.—The respondents were, by the Court of Sessions sitting in and for the district of Montreal, found guilty on three counts of conspiracy on which they had been tried. These counts of conspiracy formed part of a single charge sheet. The accused were charged with having conspired to commit a number of offences and also, on two other counts, with having committed the substantive offences themselves. Upon objection of the respondents, by way of motion to quash, against the joinder of the conspiracy charges and of the two other charges for having committed the substantive offences, the hearing of the two latter counts was adjourned and the case proceeded only upon the conspiracy charges, to the joinder of which, at that particular time, no objection was forthcoming from the respondents.

Against the conviction on the three counts of conspiracy, the respondents appealed on questions of law and on questions of facts.

By judgment rendered on the 30th of December, 1943, the Court of King's Bench (appeal side) unanimously allowed the appeal on the questions of law and ordered a new trial; but, although the Court had heard counsel for the parties both on the law and on the facts, no reference either in the formal judgment or in the reasons for judgment was made to the appeal on questions of facts.

The decision of the Court was that the presiding judge, upon speedy trial under part 18 of the Criminal Code, had no jurisdiction to try the three different counts in the indictment at the same time, as he had done; that this was contrary to the rule laid down by the Supreme Court of Canada in *The King* v. *Balciunas* (1). For that reason the conviction was quashed and the Court ordered a new trial.

Although the formal judgment of the Court of King's Bench states that the respondents took exception to the mode of trial, it now appears that this was a mistaken impression and that the trial proceeded and the accused were found guilty without raising the objection which they alleged in their notice of appeal.

The Crown moved for leave to appeal to this Court, under section 1025 of the Criminal Code, alleging conflict

(1) [1943] S.C.R. 317.

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in a like case between the judgment now appealed from and the judgment of the Court of Appeal of Nova Scotia in the case of *The King* v. *Cross* (1). Leave to appeal was granted.

There is no doubt about the jurisdiction of the learned judge who gave leave, because the conflict is evident. In the *Cross* case (1) the Court decided that a judge holding a speedy trial may deal with each charge as the counts in one indictment might be dealt with and is not bound to proceed with a speedy trial upon each formal charge. There was, as here, only one information. The Court of Appeal of Nova Scotia held that the magistrate had jurisdiction to try together the three charges there referred to and that the several charges were not to be treated as separate indictments and to be tried separately. The conviction was affirmed.

The judgment rendered by the Court of King's Bench in the present case is, therefore, clearly in conflict with the *Cross* case (1), and the case comes under section 1025 of the Criminal Code, unless it may be said that the judgment of this Court in the *Balciunas* case (2) overruled the judgment in the *Cross* case (1) and that the Court of King's Bench of Quebec only followed the decision rendered in this Court in the *Balciunas* case (2).

Leave having been granted, the Court first heard the appeal during the May sittings and judgment was then reserved; but, in the course of its deliberations, the Court felt there were points on which it would like to have a reargument. Accordingly counsel were advised that they were called upon to argue the following points:—

Whether, under the judgment of this Court in the *Balciunas* case, (2) in no case can more than one count be the subject of trial under Part 18 of the Code at the same time, or whether the judgment is limited in its restriction of trial to cases where the several counts arise from separate informations and commitments.

Counsel on both sides had full opportunity to be heard on the points thus submitted.

The reargument took place at the present sittings of the Court. Counsel for the Attorney-General for the province of Quebec took the position that the second alternative in

(1) (1909) 14 Can. Cr. Cas. 171. (2) [1943] S.C.R. 317.

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the question submitted by the Court was the correct one and that to which one should adhere. I have come to the conclusion that the latter view is the true effect of the *Balciunas* judgment (1). As appears in the judgment of the Court, the facts in that case were as follows:—

Three separate informations were laid against Balciunas. He was committed for trial on all three. A single charge sheet setting forth the three charges was prepared by the Crown Prosecutor and on this the accused was arraigned and elected to be tried speedily under part 18 of the Criminal Code. There was one trial on all three charges before the County Court judge and Balciunas was convicted on each charge. On appeal to the Court of Appeal this conviction was set aside and a new trial directed on the ground that it was improper to try the three separate charges together, the point being that, although there was authority in the Criminal Code to include in an indictment a number of separate charges, this was not the case as to a charge under the provisions of part 18. In this Court the judgment of the Court of Appeal was affirmed.

In the present case the procedure was different. There was only one complaint which charged the respondents with the three conspiracy offences. There was only one preliminary inquiry referring to the three counts, and there was only one charge sheet and one option.

A motion to quash was made, but it objected to the joinder of the conspiracy charges with the other charges of having committed the offences themselves; it did not object to the joinder of the three conspiracy charges.

As appears, there was a single complaint, a single inquiry, a single charge comprising the three counts, a single option in relation to that charge, and a single trial on the three counts. No objection was made to having the conspiracy counts tried simultaneously, and objection was made only to the joinder with the substantive offences counts.

The procedure, therefore, was different in the two cases and I do not think the *Balciunas* judgment (2) should be considered as governing the present case. What the Court had before it in the *Balciunas* case (2) was the fact of three separate informations, a commitment for trial on all three

(1) [1943] S.C.R. 317, at 319. (2) [1943] S.C.R. 317.

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and a single charge sheet on which the trial proceeded to conviction on all three charges. The Court did not pretend to decide anything else than what was then before it. The effect of the judgment is that, in the premises, it was improper to try the three charges together; and the decision should not be extended to a different case. Speaking broadly, however general the terms may be in which a judgment is expressed, unless a contrary intention clearly appears, they extend only to the facts and to the questions with which the Court is at the moment concerned.

In the *Balciunas* case (1) what was condemned was the joinder for trial purposes of charges originating in different complaints, or different informations, the joinder of separate records, or, in short, of different cases. It should not, therefore, be considered as concluding this particular case.

Now, as can be seen by the notice of appeal, there was substantially only one ground of appeal on the law before the Court of King's Bench in Quebec. The respondents contended that the trial judge had exceeded his jurisdiction in hearing simultaneously three counts in the indictment. Likewise, the Court of King's Bench decided that contention favourably to the respondents by resting its decision on the *Balciunas* judgment (1); but, in my opinion, the two cases are different and, as this was the real ground of the decision in the Court of King's Bench, it follows that the appeal ought to be allowed.

However, this does not dispose of the case. There was an appeal to the Court of King's Bench not only on the question of law just discussed, but also on questions of fact. The respondents were entitled to a pronouncement by the Court of King's Bench on their appeal on facts. In view of the result on the question of law, the Court of King's Bench gave no decision on the appeal on facts. The case ought, therefore, to be remitted to the Court of King's Bench (appeal side) of the province of Quebec in order that that Court may pass upon the grounds of appeal based on facts. In so ordering, I am adopting the course followed by this Court in *The King* v. *Boak* (2).

The appeal should be allowed to the extent indicated.

(1) [1943] S.C.R. 317. (2) [1925] S.C.R. 525, at 532.

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The judgment of Taschereau and Rand JJ. was delivered by

RAND J.—The respondents were charged before the Court of Sessions, district of Montreal, under the speedy trials provisions of the Criminal Code on five counts, one for conspiracy to commit fraud, two for conspiracy to commit indictable offences against sections 164 and 169 of the *Excise Act,* and two for those offences themselves. The charges had been laid in one information and the commitment was on all of them. On the objection of the respondents and with the consent of the Crown, the trial was limited to the conspiracy counts. The accused were found guilty but on appeal the conviction was set aside and new trials ordered. From that judgment the Attorney-General of Quebec appeals.

The ground on which the Court of King's Bench proceeded was that under part 18 of the Code, as interpreted by this court in the case of *The King* v. *Balciunas* (1), no more than one count or charge can be the subject of such a trial. But that was not, in my opinion, the effect of the *Balciunas* judgment (1) nor do I think it governs this case. An examination of its facts shows that three informations had been laid, each charging a distinct offence. There was a commitment in each case. The three charges, however, were set forth on one charge sheet; on them the accused elected for a speedy trial and they were tried together. It was, therefore, a case of joining charges contained in separate and distinct commitments. The Court of Appeal for Ontario had held that there was no power under part 18 to do that and that section 834 had no application because all three were contained in the commitments; and it had directed

> that the appellant be tried regularly upon the charges upon which he was committed for trial.

That judgment was affirmed in this court (1). In both, reference was made to section 856 of part 19 of the Criminal Code and assuming that section would have cured what was otherwise a misjoinder, it was held not to apply to proceedings under part 18.

(1) [1943] S.C.R. 317.

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These judgments imply that, if the three charges had been properly on the charge sheet, they could have been tried together, and this is clearly the assumption underlying section 856 in relation to an indictment. If the question had been simply whether there was jurisdiction under part 18 to try two charges together, it would have been quite unnecessary to emphasize the precise procedure followed or to make any reference to section 834.

Then does part 18 exclude all joinder of counts in a charge sheet? The commitment on the five charges was unobjectionable. Section 827 requires, for the purposes of election, that the prisoner be informed that he is charged with "the offence", which ordinarily means that upon which he has been committed, but the singular number is not to be taken as a limitation. By subsection 3,

> the prosecuting officer shall prefer the charge against the accused for which he has been committed for trial or any charge founded on the facts or evidence disclosed on the depositions.

Section 834 has already been considered. Section 839, giving all powers of amendment, authorizes the division of a count under section 891.

By the common law rule, an indictment could in general contain any number of counts. In felonies, when it appeared that they did not all arise out of the same body of facts, the court, not as a matter of jurisdiction but of judicial discretion, followed this practice: if the discreteness was detected before the prisoner pleaded, the court would quash the indictment; if it did not appear until after plea, the prosecutor was called upon to elect upon which count he would proceed; but after verdict the joinder was not available on a writ of error. So long, however, as the counts were statements of different offences arising out of what was in substance a single transaction, there was no misjoinder and all could be tried together: *The King* v. *Lockett et al.* (1), and in this background both the purpose of section 856 and the interpretation of part 18 are clarified. If a joinder of two or more counts, arising as in this case, were not allowed, then either speedy trials would be limited to commitments on a single charge or a separate trial would be necessary for each of any number of charges

(1) [1914] 2 K.B. 720.

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although they all arose out of the same transaction, and the real object of part 18 would, in large measure, be defeated. Section 710 in part 15 shows with what specific language such a limitation of trial has been prescribed.

The ground, then, upon which the court below proceeded lay in a misconception of what the *Balciunas* judgment (1) decided and the appeal must be allowed but, as the accused had appealed as well on the facts and this ground has not been considered below, I would return the case to the Court of King's Bench to be dealt with accordingly.

Appeal allowed.

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Her Majesty The Queen in Right of Canada *Appellant/Respondent on cross-appeal*

v.

Imperial Tobacco Canada Limited *Respondent/Appellant on cross-appeal*

and

Attorney General of Ontario and Attorney General of British Columbia *Interveners*

- and -

Attorney General of Canada *Appellant/Respondent on cross-appeal*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. and Philip Morris International Inc. *Respondents/Appellants on cross-appeal*

and

Attorney General of Ontario, Attorney General of British Columbia and Her Majesty The Queen in Right of the Province of New Brunswick *Interveners*

Sa Majesté la Reine du chef du Canada *Appelante/intimée au pourvoi incident*

c.

Imperial Tobacco Canada Limitée *Intimée/appelante au pourvoi incident*

et

Procureur général de l'Ontario et procureur général de la Colombie-Britannique *Intervenants*

- et -

Procureur général du Canada *Appelant/intimé au pourvoi incident*

c.

Sa Majesté la Reine du chef de la Colombie-Britannique *Intimée*

et

Imperial Tobacco Canada Limitée, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. et Philip Morris International Inc. *Intimées/appelantes au pourvoi incident*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique et Sa Majesté la Reine du chef de la province du Nouveau-Brunswick *Intervenants*

2011 SCC 42 (CanLII)

Indexed as: R. *v.* Imperial Tobacco Canada Ltd.

2011 SCC 42

File Nos.: 33559, 33563.

2011: February 24; 2011: July 29.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Third-party claims — Motion to strike — Tobacco manufacturers being sued by provincial government to recover health care costs of tobacco-related illnesses, and by consumers of "light" or "mild" cigarettes for damages and punitive damages — Tobacco companies issuing third-party notices to federal government claiming contribution and indemnity — Whether plain and obvious that third-party claims disclose no reasonable cause of action.

Torts — Negligent misrepresentation — Failure to warn — Negligent design — Duty of care — Proximity — Tobacco manufacturers being sued by provincial government and consumers and issuing third-party notices to federal government claiming contribution and indemnity — Federal government claiming representations constituted government policy immune from judicial review — Whether facts as pleaded establish prima facie duty of care — If so, whether conflicting policy considerations negate such duty.

Torts — Provincial statutory scheme establishing rights of action against tobacco manufacturers and suppliers — Whether federal government liable as a "manufacturer" under the Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, or a "supplier" under the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, and the Trade Practice Act, R.S.B.C. 1996, c. 457.

The appeal concerns two cases before the courts in British Columbia. In the *Costs Recovery* case, the

Répertorié : R. *c.* Imperial Tobacco Canada Ltée

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N[os] du greffe : 33559, 33563.

2011 : 24 février; 2011 : 29 juillet.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Procédure civile — Mise en cause — Requête en radiation — Fabricants de tabac poursuivis par le gouvernement d'une province qui cherche à recouvrer les sommes consacrées au traitement des maladies liées au tabagisme, et par des consommateurs de cigarettes dites « légères » ou « douces » qui demandent des dommages-intérêts et des dommages-intérêts punitifs — Compagnies de tabac mettant en cause le gouvernement fédéral pour lui réclamer une contribution et une indemnisation — Est-il évident et manifeste que les avis de mise en cause ne révèlent aucune cause d'action raisonnable?

Responsabilité délictuelle — Déclaration inexacte faite par négligence — Défaut de mise en garde — Conception négligente — Obligation de diligence — Lien de proximité — Poursuites engagées par le gouvernement d'une province et des consommateurs contre des fabricants de tabac qui ont mis en cause le gouvernement fédéral pour lui réclamer une contribution et une indemnisation — Gouvernement fédéral prétendant que les déclarations relevaient de la politique générale du gouvernement et étaient de ce fait soustraites au contrôle judiciaire — Les faits allégués établissent-ils l'existence d'une obligation de diligence prima facie? — Dans l'affirmative, des considérations de politique générale opposées écartent-elles cette obligation?

Responsabilité délictuelle — Régime législatif provincial conférant un droit d'action contre les fabricants et les fournisseurs de tabac — Le gouvernement fédéral a-t-il engagé sa responsabilité à titre de « fabricant » au sens de la Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, ch. 30, ou de « fournisseur » au sens de la Business Practices and Consumer Protection Act, S.B.C. 2004, ch. 2, et de la Trade Practice Act, R.S.B.C. 1996, ch. 457?

Le pourvoi porte sur deux actions intentées devant les tribunaux de la Colombie-Britannique. Dans l'*Affaire du*

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Government of British Columbia is seeking to recover, pursuant to the *Tobacco Damages and Health Care Costs Recovery Act* ("*CRA*"), the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of tobacco companies, including Imperial. British Columbia alleges that by 1950, the tobacco companies knew or ought to have known that cigarettes were harmful to one's health, and that they failed to properly warn the public about the risks associated with smoking their product. In the *Knight* case, a class action was brought against Imperial alone on behalf of class members who purchased "light" or "mild" cigarettes, seeking a refund of the cost of the cigarettes and punitive damages. The class alleges that the levels of tar and nicotine listed on Imperial's packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes was just as harmful as that produced by regular cigarettes.

In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design and failure to warn, as well as at equity. They also allege that Canada would itself be liable as a "manufacturer" under the *CRA* or a "supplier" under the *Business Practices and Consumer Protection Act* and the *Trade Practice Act*, and that they are entitled to contribution and indemnity from Canada pursuant to the *Negligence Act*. Canada brought motions to strike the third-party notices, arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies' appeals in part. A majority held that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed, as should the negligent design claim. The court unanimously struck the remainder of the tobacco companies' claims.

recouvrement des coûts, le gouvernement de la Colombie-Britannique cherche, aux termes de la *Tobacco Damages and Health Care Costs Recovery Act* (« *CRA* »), à recouvrer d'un groupe de compagnies de tabac, dont Imperial, les sommes consacrées au traitement médical de personnes souffrant de maladies liées au tabagisme. Selon la Colombie-Britannique, dès 1950, les compagnies de tabac savaient ou auraient dû savoir que les cigarettes étaient néfastes pour la santé et ont fait défaut de mettre le public en garde adéquatement contre les risques associés à l'usage de leur produit. Dans l'affaire *Knight*, un recours collectif a été intenté contre Imperial seulement, pour demander, au nom des membres qui ont acheté des cigarettes dites « légères » ou « douces », le remboursement du coût des cigarettes ainsi que le versement de dommages-intérêts punitifs. Selon eux, la teneur en goudron et en nicotine indiquée sur les paquets de cigarettes fabriquées par Imperial ne correspondait pas aux émissions toxiques réelles pour les fumeurs. Ils font valoir que la fumée dégagée par les cigarettes légères était tout aussi néfaste que celle dégagée par les cigarettes régulières.

Dans les deux affaires, les compagnies de tabac ont mis en cause le gouvernement du Canada, prétendant que, si elles étaient tenues responsables envers les demandeurs, elles avaient le droit d'être indemnisées par le Canada pour déclarations inexactes faites par négligence, conception négligente et défaut de mise en garde; ainsi qu'en vertu de l'equity. Elles font également valoir que le Canada aurait engagé sa propre responsabilité à titre de « fabricant » au sens de la *CRA* ou à titre de « fournisseur » au sens de la *Business Practices and Consumer Protection Act* et de la *Trade Practice Act*, et qu'elles sont en droit d'obtenir du Canada une contribution et une indemnisation en vertu de la *Negligence Act*. Le Canada a présenté des requêtes en radiation des avis de mise en cause, faisant valoir qu'il était évident et manifeste que ces avis ne révélaient aucune cause d'action raisonnable. Dans les deux affaires, les juges siégeant en cabinet ont ordonné la radiation de tous les avis de mise en cause. La Cour d'appel de la Colombie-Britannique a accueilli en partie les appels interjetés par les compagnies de tabac. Les juges majoritaires ont conclu à l'opportunité d'instruire, dans l'*Affaire du recouvrement des coûts* et dans l'affaire *Knight*, les demandes relatives aux déclarations inexactes faites par négligence en violation d'une prétendue obligation de diligence du Canada envers les compagnies de tabac. Dans l'affaire *Knight*, les juges majoritaires ont conclu en outre à l'opportunité d'instruire la demande relative aux déclarations inexactes faites par négligence fondée sur une prétendue obligation de diligence du Canada envers les consommateurs, ainsi que la demande relative à la conception négligente. La cour a radié à l'unanimité les autres demandes présentées par les compagnies de tabac.

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Held: The appeals should be allowed and the claims should be struck out. The tobacco companies' cross-appeals should be dismissed.

On a motion to strike, a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. The approach must be generous, and err on the side of permitting a novel but arguable claim to proceed to trial. However, the judge cannot consider what evidence adduced in the future might or might not show. Here, it is plain and obvious that none of the tobacco companies' claims against Canada have a reasonable chance of success.

Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case

In the *Costs Recovery* case, the private law claims against Canada for contribution and indemnity based on alleged breaches of a duty of care to smokers must be struck. A third party may only be liable for contribution under the *Negligence Act* if it is directly liable to the plaintiff, in this case, British Columbia. Here, even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia.

The Claims for Negligent Misrepresentation

There are two relationships at issue in these claims: one between Canada and consumers and one between Canada and tobacco companies. In the *Knight* case, Imperial alleges that Canada negligently represented the health attributes of low-tar cigarettes to consumers. In both the *Knight* case and the *Costs Recovery* case, the tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies.

The facts as pleaded do not bring Canada's relationship with consumers and the tobacco companies within a settled category of negligent misrepresentation. Accordingly, to determine whether the alleged causes of action have a reasonable prospect of success, the general requirements for liability in tort must be met. At

Arrêt : Les pourvois sont accueillis et les demandes sont radiées. Les pourvois incidents interjetés par les compagnies de tabac sont rejetés.

Dans le cas d'une requête en radiation, une demande ne sera radiée que s'il est évident et manifeste, dans l'hypothèse où les faits allégués seraient avérés, que la déclaration ne révèle aucune cause d'action raisonnable. L'approche doit être généreuse et permettre, dans la mesure du possible, l'instruction de toute demande inédite, mais soutenable. Cependant, le juge ne peut pas anticiper ce que la preuve qui sera produite permettra d'établir. En l'espèce, il est évident et manifeste qu'aucune des allégations des compagnies de tabac visant le Canada n'a une possibilité raisonnable d'être accueillie.

Les prétendues obligations de diligence du Canada envers les fumeurs dans l'Affaire du recouvrement des coûts

Dans l'*Affaire du recouvrement des coûts*, les demandes de contribution et d'indemnisation de droit privé dirigées contre le Canada et fondées sur des manquements allégués à une obligation de diligence envers les fumeurs doivent être radiées. Un tiers ne peut être tenu de verser une contribution en vertu de la *Negligence Act* que s'il est directement responsable envers le demandeur, en l'occurrence la Colombie-Britannique. En l'espèce, même si le Canada a manqué à ses obligations envers les fumeurs, ce manquement n'aurait aucune incidence sur la question de savoir s'il est responsable envers la Colombie-Britannique.

Les allégations de déclarations inexactes faites par négligence

Les allégations en l'espèce mettent en cause deux liens : celui entre le Canada et les consommateurs, et celui entre le Canada et les compagnies de tabac. Dans l'affaire *Knight*, Imperial prétend que le Canada a fait preuve de négligence en déclarant faussement aux fumeurs que la cigarette à teneur réduite en goudron serait moins nocive pour la santé. Dans l'affaire *Knight* et l'*Affaire du recouvrement des coûts*, les compagnies de tabac prétendent que le Canada leur a fait des déclarations inexactes par négligence.

Les faits allégués ne font pas entrer la relation du Canada avec les consommateurs et les compagnies de tabac dans une catégorie définie en matière de déclarations inexactes faites par négligence. Par conséquent, afin de déterminer si les causes d'action alléguées ont une possibilité raisonnable d'être accueillies, il faut que

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the first stage, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. In a claim of negligent misrepresentation, both of these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties. A special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case. If proximity is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized.

les exigences générales en matière de responsabilité délictuelle soient remplies. À la première étape, il faut se demander si les faits révèlent l'existence d'un lien de proximité dans le cadre duquel l'omission de faire preuve de diligence raisonnable peut, de façon prévisible, causer une perte ou un préjudice au plaignant. Dans le cadre d'une action pour déclaration inexacte faite par négligence, ces deux conditions pour qu'il existe une obligation de diligence *prima facie* sont remplies lorsqu'un « lien spécial » unit les parties. L'existence d'un lien spécial est établie lorsque : (1) le défendeur doit raisonnablement prévoir que le demandeur se fiera à sa déclaration; et que (2) la confiance que le demandeur accorde à la déclaration serait raisonnable dans les circonstances. Si l'existence d'un lien de proximité est établie, il y a obligation de diligence *prima facie* et l'analyse passe à l'étape suivante dans laquelle on se demande si des considérations de politique empêcheraient de reconnaître cette obligation de diligence *prima facie*.

Here, on the facts as pleaded, Canada did not owe a *prima facie* duty of care to consumers. The relationship between the two was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes. However, the relevant statutes establish only general duties to the public, and no private law duties to consumers. In light of the lack of proximity, this claim in the *Knight* case should be struck at the first stage of the analysis.

Compte tenu des faits allégués, le Canada n'avait pas d'obligation de ce genre envers les consommateurs. Le lien entre eux se limitait aux déclarations du Canada adressées au grand public selon lesquelles les cigarettes à faible teneur en goudron sont moins dangereuses pour la santé. Le Canada n'entretenait pas de rapports spéciaux avec les membres du groupe. Par conséquent, le constat qu'il s'agit d'un lien suffisamment étroit doit découler des lois applicables. Les lois pertinentes n'établissent toutefois que des obligations générales envers le public, et aucune obligation de nature privée envers les consommateurs. Vu l'absence de lien de proximité, il convient de radier cette allégation dans l'affaire *Knight* à la première étape de l'analyse.

As for the tobacco companies, the facts pleaded allege a history of interactions between Canada and the tobacco companies capable of establishing a special relationship of proximity giving rise to a *prima facie* duty of care. The allegations are that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials, going far beyond the sort of statements made by Canada to the public at large. Furthermore, Canada's regulatory powers over the manufacturers coupled with its specific advice and its commercial involvement could be seen as supporting a conclusion that Canada ought reasonably to have foreseen that the tobacco companies would rely on the representations and that such reliance would be reasonable in the pleaded circumstance.

En ce qui concerne les compagnies de tabac, les faits allégués révèlent que le Canada et les compagnies de tabac entretiennent depuis longtemps des rapports qui peuvent constituer un lien spécial imposant une obligation de diligence *prima facie*. On allègue que le Canada a joué un rôle de conseiller auprès d'un nombre déterminé de fabricants et a entretenu des rapports commerciaux avec les sociétés en cause compte tenu, en partie, des avis fournis à ces dernières par des fonctionnaires, avis qui vont bien au-delà des déclarations faites par le Canada au grand public. De plus, les pouvoirs de réglementation du Canada envers les fabricants, conjugués aux avis précis qu'il a donnés et à sa participation à des activités commerciales, pourraient être considérés comme étayant la conclusion que le Canada aurait raisonnablement dû prévoir que les compagnies de tabac se fieraient aux déclarations et que cette confiance serait raisonnable dans les circonstances alléguées.

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Canada's alleged negligent misrepresentations do not give rise to tort liability, however, because of conflicting policy considerations. The alleged representations constitute protected expressions of government policy. Core government policy decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. The representations in this case were part and parcel of a government policy, adopted at the highest level in the Canadian government and developed out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease, to encourage people who continued to smoke to switch to low-tar cigarettes.

The claims for negligent misrepresentation should also fail because they would expose Canada to indeterminate liability. Recognizing a duty of care for representations to the tobacco companies would effectively amount to a duty to consumers. While the quantum of damages owed by Canada to the companies in both cases would depend on the number of smokers and the number of cigarettes sold, Canada had no control over the number of people who smoked light cigarettes.

The Claims for Failure to Warn

The tobacco companies make two allegations for failure to warn: (1) that Canada directed the tobacco companies not to provide warnings on cigarette packages about the health hazards of cigarettes and (2) that Canada failed to warn the tobacco companies about the dangers posed by the strains of tobacco it designed and licensed. These two claims should be struck. The crux of the first claim is essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn. The same is true of the second claim. While the tort of failure to warn requires evidence of a positive duty towards the plaintiff, nothing in the third-party notices suggests that Canada was under such a positive duty here. A plea of negligence, without more, will not suffice to raise a duty to warn. In any event,

Les déclarations inexactes que le Canada aurait faites par négligence n'engagent toutefois pas sa responsabilité délictuelle parce que des considérations de politique générale s'y opposent. Les déclarations qui auraient été faites sont des expressions protégées de politique générale du gouvernement. Les décisions de politique générale fondamentale du gouvernement qui sont soustraites aux poursuites sont les décisions qui se rapportent à une ligne de conduite et reposent sur des considérations d'intérêt public, tels des facteurs économiques, sociaux ou politiques, pourvu qu'elles ne soient ni irrationnelles ni prises de mauvaise foi. Les déclarations en cause faisaient partie intégrante d'une politique générale adoptée par les plus hautes instances du gouvernement canadien et élaborée par souci pour la santé des Canadiens et des Canadiennes et en raison des coûts individuels et institutionnels associés aux maladies causées par le tabac, afin d'inciter les personnes qui continuaient de fumer à opter pour des cigarettes à faible teneur en goudron.

Les allégations de déclarations inexactes faites par négligence doivent aussi être rejetées parce qu'elles exposeraient le Canada à une responsabilité indéterminée. Reconnaître une obligation de diligence à l'égard des déclarations faites aux compagnies de tabac reviendrait en fait à reconnaître une obligation envers les consommateurs. Le montant des dommages-intérêts dus par le Canada aux compagnies de tabac dans les deux cas dépendrait du nombre de fumeurs et du nombre de cigarettes vendues, alors que le Canada n'exerçait aucun contrôle sur le nombre de fumeurs de cigarettes légères.

Les allégations de défaut de mise en garde

Les compagnies de tabac formulent deux allégations de défaut de mise en garde : (1) le Canada a interdit aux compagnies de tabac d'apposer sur les paquets de cigarettes des mises en garde à l'égard des dangers que présentent les cigarettes pour la santé et (2) le Canada n'a pas avisé les compagnies de tabac des dangers que présentent les souches de tabac conçues par le Canada et pour lesquelles il a octroyé des licences. Il faut radier ces allégations. L'élément crucial de la première allégation est essentiellement le même que celui des allégations de déclarations inexactes faites par négligence, et il y a lieu de la rejeter pour les mêmes considérations de politique générale. Les recommandations du ministre de la Santé sur les mises en garde faisaient partie intégrante de la politique générale du gouvernement visant à inciter les fumeurs à opter pour des cigarettes à faible teneur en goudron. En tant que telles, elles ne peuvent fonder une action pour défaut de mise en garde. Cela vaut aussi pour la deuxième allégation. Bien que le délit

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such a claim would fail for the policy reasons applicable to the negligent misrepresentation claim.

de défaut de mise en garde requière la preuve d'une obligation positive envers le demandeur, les avis de mise en cause ne donnent aucunement matière à croire que le Canada avait une telle obligation en l'espèce. Une allégation de négligence, sans plus, est insuffisante pour imposer une obligation de mise en garde. Quoi qu'il en soit, une allégation de ce genre serait rejetée pour les considérations de politique générale qui s'appliquent aux allégations de déclarations inexactes faites par négligence.

The Claims for Negligent Design

The tobacco companies have brought two types of negligent design claims against Canada. They submit that Canada breached its duty of care to the tobacco companies when it negligently designed its strains of low-tar tobacco. In the *Knight* case, Imperial submits that Canada breached its duty of care to consumers of light and mild cigarettes. The two negligent design claims establish a *prima facie* duty of care. With respect to Canada's design of low-tar tobacco strains, the proximity alleged with the tobacco companies is not based on a statutory duty, but on commercial interactions between Canada and the tobacco companies. In the *Knight* case also, it is at least arguable that Canada was acting in a commercial capacity towards the consumers of light and mild cigarettes when it designed its strains of tobacco. However, the decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy and based on social and economic factors. As a core government policy decision, it cannot ground a claim for negligent design. These claims should accordingly be struck.

La conception négligente

Les compagnies de tabac ont soulevé à l'encontre du Canada deux types d'allégations de conception négligente. Elles affirment que le Canada a manqué à son obligation de diligence envers elles en concevant de manière négligente ses souches de tabac à faible teneur en goudron. Dans l'affaire *Knight*, Imperial fait valoir que le Canada a manqué à son obligation de diligence envers les consommateurs de cigarettes légères et douces. Ces deux allégations de conception négligente établissent l'existence d'une obligation de diligence *prima facie*. Pour ce qui est des souches de tabac à faible teneur en goudron conçues par le Canada, le prétendu lien de proximité avec les compagnies de tabac se fonde non pas sur une obligation prévue par la loi, mais sur les rapports entre le Canada et les compagnies de tabac. Dans l'affaire *Knight* également, il est au moins possible de soutenir que le Canada agissait comme une entreprise commerciale envers les consommateurs de cigarettes légères et douces lorsqu'il a conçu ses souches de tabac. Cependant, la décision de concevoir des souches de tabac à faible teneur en goudron parce qu'on croit que les cigarettes fabriquées avec ce tabac seraient moins nuisibles pour la santé constitue une ligne de conduite fondée sur la politique générale du Canada en matière de santé et repose sur des facteurs sociaux et économiques. Cette décision de politique générale fondamentale du gouvernement ne saurait fonder une poursuite pour conception négligente. Il faut donc rejeter ces allégations.

Liability as a "Manufacturer" and a "Supplier"

The tobacco companies' contribution claim in the *Costs Recovery* case that Canada could qualify as a "manufacturer" under the *CRA* should be struck. It is plain and obvious that the federal government does not qualify as a manufacturer of tobacco under that Act. When the Act is read in context and all of its provisions are taken into account, it is apparent that the British Columbia legislature did not intend Canada to be liable as a manufacturer. This is confirmed by the text of the statute, the intent of the legislature in adopting the Act,

Responsabilité d'un « fabricant » et d'un « fournisseur »

Dans l'*Affaire du recouvrement des coûts*, la demande de contribution des compagnies de tabac visant à faire reconnaître au Canada la qualité de « fabricant » au sens de la *CRA* doit être radiée. Il est manifeste et évident que le gouvernement fédéral n'est pas un fabricant de produits du tabac au sens de cette loi. Lorsqu'on interprète la loi dans son contexte eu égard à l'ensemble de ses dispositions, il appert que la législature de la Colombie-Britannique ne voulait pas imposer au Canada la responsabilité d'un fabricant. C'est ce que

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and the broader context of the relationship between the province and the federal government. Holding Canada accountable under the *CRA* would defeat the legislature's intention of transferring the health-care costs resulting from tobacco-related wrongs from taxpayers to the tobacco industry. Similarly, the tobacco companies cannot rely on the recently adopted *Health Care Costs Recovery Act* in an action for contribution under the *CRA*. Finally, Canada could not be liable for contribution under the *Negligence Act* or at common law since it is not directly liable to British Columbia.

confirment le texte de la loi, l'intention qu'avait le législateur au moment de l'adopter et le contexte plus général des rapports entre la province et le gouvernement fédéral. Tenir le Canada responsable en application de la *CRA* contrecarrerait l'intention de la législature de faire passer des contribuables à l'industrie du tabac la responsabilité des coûts des soins de santé résultant d'une faute du fabricant. Dans le même ordre d'idées, les compagnies de tabac ne peuvent s'appuyer sur la *Health Care Costs Recovery Act*, récemment édictée, dans le cadre d'une action intentée pour obtenir une contribution en vertu de la *CRA*. Enfin, le Canada ne peut être tenu à une contribution au titre de la *Negligence Act* ou en common law parce qu'il n'est pas directement responsable envers la Colombie-Britannique.

Imperial's claim in the *Knight* case that Canada could qualify as a "supplier" under the *Trade Practice Act* and the *Business Practices and Consumer Protection Act* which replaced it should also be struck. Canada's purpose for developing and promoting tobacco as described in the third-party notice suggests that it was not acting "in the course of business" or "in the course of the person's business" as those phrases are used in those statutes. Those phrases must be understood as limited to activities undertaken for a commercial purpose. Here, it is plain and obvious from the facts pleaded that Canada did not promote the use of low-tar cigarettes for a commercial purpose, but for a health purpose. Canada is therefore not a supplier and is not liable under those statutes.

Dans l'affaire *Knight*, la demande d'Imperial de reconnaître au Canada la qualité de « fournisseur » au sens de la *Trade Practice Act* et de la loi qui l'a remplacée, la *Business Practices and Consumer Protection Act*, doit aussi être radiée. Le but recherché par le Canada lorsqu'il a développé et promu le tabac, comme l'indique l'avis de mise en cause, tend à indiquer que le Canada n'agissait pas « dans le cours de ses affaires », dans le sens où cette expression est employée dans ces lois. Cette expression doit être interprétée comme visant seulement les activités exercées à une fin commerciale. Il ressort de façon évidente et manifeste des faits allégués que le Canada a promu la consommation de cigarettes à faible teneur en goudron non pas à une fin commerciale, mais à une fin liée à la santé. Le Canada n'est donc pas un fournisseur et sa responsabilité n'est pas engagée en application de ces lois.

Claims for Equitable Indemnity and Procedural Considerations

The tobacco companies' claims of equitable indemnity should be struck. Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it is unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

Demandes d'indemnité fondées sur l'equity et considérations d'ordre procédural

Les demandes des compagnies de tabac relatives à l'indemnisation en equity doivent être radiées. La doctrine de l'indemnité fondée sur l'equity est une doctrine restreinte qui ne s'applique que dans les cas où le mandant s'engage expressément ou implicitement à indemniser son mandataire pour avoir agi conformément à ses directives. Lorsque le Canada a donné à l'industrie du tabac des directives sur la manière dont elle devrait se comporter, il le faisait à titre d'autorité de réglementation du gouvernement qui se souciait de la santé des Canadiens et des Canadiennes. Dans ces circonstances, il est déraisonnable de déduire que le Canada avait promis implicitement d'indemniser l'industrie pour avoir donné suite à sa demande.

Finally, the claims for declaratory relief should be struck. The tobacco companies' ability to mount defences would not be severely prejudiced if Canada was no longer a third party in the litigation.

Enfin, il convient de radier les demandes de jugement déclaratoire. La capacité des compagnies de tabac de se défendre ne serait pas gravement compromise si la mise en cause du Canada en l'espèce prenait fin.

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John S. Tyhurst, *Paul Vickery* and *Travis Henderson*, for the appellant/respondent on cross-appeal Her Majesty the Queen in Right of Canada (33559).

Paul Vickery, *John S. Tyhurst* and *Travis Henderson*, for the appellant/respondent on cross-appeal the Attorney General of Canada (33563).

Deborah Glendining and *Nada Khirdaji*, for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33559).

Ryan D. W. Dalziel and *Daniel A. Webster*, *Q.C.*, for the respondent Her Majesty the Queen in Right of British Columbia (33563).

John J. L. Hunter, *Q.C.*, and *Brent B. Olthuis*, for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33563).

Written submissions only by *Kenneth N. Affleck*, *Q.C.*, for the respondents/appellants on cross-appeal Rothmans, Benson & Hedges Inc. and Rothmans Inc. (33563).

Written submissions only by *Jeffrey J. Kay*, *Q.C.*, for the respondents/appellants on cross-appeal JTI-MacDonald Corp., R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc. (33563).

Written submissions only by *Craig P. Dennis* and *Michael D. Shirreff*, for the respondents/appellants on cross-appeal B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited (33563).

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Written submissions only by *D. Ross Clark*, for the respondent/appellant on cross-appeal Philip Morris U.S.A. Inc. (33563).

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John S. Tyhurst, *Paul Vickery* et *Travis Henderson*, pour l'appelante/intimée au pourvoi incident Sa Majesté la Reine du chef du Canada (33559).

Paul Vickery, *John S. Tyhurst* et *Travis Henderson*, pour l'appelant/intimé au pourvoi incident le procureur général du Canada (33563).

Deborah Glendining et *Nada Khirdaji*, pour l'intimée/appelante au pourvoi incident Imperial Tobacco Canada Limitée (33559).

Ryan D. W. Dalziel et *Daniel A. Webster*, *c.r.*, pour l'intimée Sa Majesté la Reine du chef de la Colombie-Britannique (33563).

John J. L. Hunter, *c.r.*, et *Brent B. Olthuis*, pour l'intimée/appelante au pourvoi incident Imperial Tobacco Canada Limitée (33563).

Argumentation écrite seulement par *Kenneth N. Affleck*, *c.r.*, pour les intimées/appelantes au pourvoi incident Rothmans, Benson & Hedges Inc. et Rothmans Inc. (33563).

Argumentation écrite seulement par *Jeffrey J. Kay*, *c.r.*, pour les intimées/appelantes au pourvoi incident JTI-MacDonald Corp., R.J. Reynolds Tobacco Company et R.J. Reynolds Tobacco International Inc. (33563).

Argumentation écrite seulement par *Craig P. Dennis* et *Michael D. Shirreff*, pour les intimées/appelantes au pourvoi incident B.A.T. Industries p.l.c. et British American Tobacco (Investments) Limited (33563).

Argumentation écrite seulement par *Christopher M. Rusnak*, pour l'intimée/appelante au pourvoi incident Carreras Rothmans Limited (33563).

Argumentation écrite seulement par *D. Ross Clark*, pour l'intimée/appelante au pourvoi incident Philip Morris U.S.A. Inc. (33563).

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Nancy Brown, for the intervener the Attorney General of British Columbia (33559-33563).

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

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Version française du jugement de la Cour rendu par

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I. Introduction

[1] Imperial Tobacco Canada Ltd. ("Imperial") is a defendant in two cases before the courts in British Columbia, *British Columbia v. Imperial Tobacco Canada Ltd.*, Docket: S010421, and *Knight v. Imperial Tobacco Canada Ltd.*, Docket: L031300. In the first case, the Government of British Columbia is seeking to recover the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of 14 tobacco companies, including Imperial ("*Costs Recovery* case"). The second case is a class action brought against Imperial alone by Mr. Knight on behalf of class members who purchased "light" or "mild" cigarettes, seeking a refund of the cost

I. Introduction

[1] Imperial Tobacco Canada Limitée (« Imperial ») est défenderesse dans deux actions intentées devant les tribunaux de la Colombie-Britannique, soit *British Columbia c. Imperial Tobacco Canada Ltd.*, dossier : S010421, et *Knight c. Imperial Tobacco Canada Ltd.*, dossier : L031300. Dans la première, le gouvernement de la Colombie-Britannique cherche à recouvrer d'un groupe de 14 compagnies de tabac, dont Imperial, les sommes consacrées au traitement médical de personnes souffrant de maladies liées au tabagisme (l'« *Affaire du recouvrement des coûts* »). Dans la deuxième action, un recours collectif intenté contre Imperial uniquement, M. Knight, au nom

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of the cigarettes and punitive damages ("*Knight* case").

des autres membres qui ont acheté des cigarettes dites « légères » ou « douces », demande le remboursement du coût des cigarettes ainsi que le versement de dommages-intérêts punitifs (l'« *Affaire Knight* »).

[2] In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design, and failure to warn, as well as at equity. They also allege that Canada would itself be liable under the statutory schemes at issue in the two cases. In the *Costs Recovery* case, it is alleged that Canada would be liable under the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 ("*CRA*"), as a "manufacturer". In the *Knight* case, it is alleged that Canada would be liable as a "supplier" under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"), and its predecessor, the *Trade Practice Act*, R.S.B.C. 1996, c. 457 ("*TPA*").

[2] Dans les deux affaires, les compagnies de tabac ont mis en cause le gouvernement du Canada, prétendant que si elles sont tenues responsables envers les demandeurs, elles ont le droit d'être indemnisées par le Canada pour déclarations inexactes faites par négligence, pour conception négligente et défaut de mise en garde; elles fondent aussi leur demande sur l'equity. Elles font également valoir que le Canada aurait engagé sa propre responsabilité au titre des régimes législatifs invoqués dans ces deux affaires. Dans l'*Affaire du recouvrement des coûts*, elles invoquent sa responsabilité, à titre de [TRADUCTION] « fabricant », aux termes de la *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, ch. 30 (« *CRA* »). Dans l'*Affaire Knight*, c'est à titre de [TRADUCTION] « fournisseur » que le Canada serait responsable, aux termes de la *Business Practices and Consumer Protection Act*, S.B.C. 2004, ch. 2 (« *BPCPA* ») et de la loi qui l'a précédée, la *Trade Practice Act*, R.S.B.C. 1996, ch. 457 (« *TPA* »).

[3] In both cases, Canada brought motions to strike the third party notices under r. 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 (replaced by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 9-5), arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges agreed with Canada, and struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies' appeals in part. A majority of 3-2 held that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed, as should the negligent design claims in the *Knight* case. The court unanimously

[3] Dans les deux affaires, le Canada a présenté des requêtes en radiation des avis de mise en cause en vertu du par. 19(24) des *Supreme Court Rules*, B.C. Reg. 221/90 (remplacé par la règle 9-5 des *Supreme Court Civil Rules*, B.C. Reg. 168/2009), faisant valoir qu'il était évident et manifeste que ces avis ne révélaient aucune cause d'action raisonnable. Les juges siégeant en cabinet, faisant droit aux requêtes du Canada dans les deux actions, ont ordonné la radiation de tous les avis de mise en cause. La Cour d'appel de la Colombie-Britannique a accueilli en partie les appels interjetés par les compagnies de tabac. À trois voix contre deux, les juges majoritaires ont conclu à l'opportunité d'instruire, dans l'*Affaire du recouvrement des coûts* et dans l'*Affaire Knight*, les demandes relatives aux déclarations inexactes faites par négligence en violation d'une prétendue obligation de diligence du Canada envers les compagnies de tabac. Dans l'*Affaire Knight*, les juges majoritaires ont conclu en

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struck the remainder of the tobacco companies' claims.

outre à l'opportunité d'instruire la demande relative aux déclarations inexactes faites par négligence fondée sur une prétendue obligation de diligence du Canada envers les consommateurs, ainsi que la demande relative à la conception négligente dans l'*Affaire Knight*. La cour a radié à l'unanimité les autres demandes présentées par les compagnies de tabac.

[4] The Government of Canada appeals the finding that the claims for negligent misrepresentation and the claim for negligent design should be allowed to go to trial. The tobacco companies cross-appeal the striking of the other claims.

[4] Le gouvernement du Canada en appelle de la décision de permettre l'instruction des demandes pour déclarations inexactes faites par négligence et pour conception négligente. Les compagnies de tabac forment un appel incident à l'égard de la radiation des autres demandes.

[5] For the reasons that follow, I conclude that all the claims of Imperial and the other tobacco companies brought against the Government of Canada are bound to fail, and should be struck. I would allow the appeals of the Government of Canada in both cases and dismiss the cross-appeals.

[5] Pour les motifs qui suivent, je conclus que toutes les demandes introduites par Imperial et les autres compagnies de tabac à l'encontre du gouvernement du Canada sont vouées à l'échec et doivent être radiées. Je suis d'avis d'accueillir les appels du gouvernement du Canada dans les deux affaires et de rejeter les appels incidents.

II. Underlying Claims and Judicial History

II. Demandes initiales et historique judiciaire

A. *The Knight Case*

A. *L'Affaire Knight*

[6] In the *Knight* case, consumers in British Columbia have brought a class action against Imperial under the *BPCPA* and its predecessor, the *TPA*. The class consists of consumers of light or mild cigarettes. It alleges that Imperial engaged in deceptive practices when it promoted low-tar cigarettes as less hazardous to the health of consumers. The class alleges that the levels of tar and nicotine listed on Imperial's packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes was just as harmful as that produced by regular cigarettes. The class seeks reimbursement of the cost of the cigarettes purchased, and punitive damages.

[6] Dans l'*Affaire Knight*, un groupe de consommateurs de la Colombie-Britannique, composé de fumeurs de cigarettes légères ou douces, a intenté un recours collectif contre Imperial en vertu de la *BPCPA* et de la loi qui l'a précédée, la *TPA*. Ces consommateurs prétendent qu'Imperial s'est livrée à des pratiques trompeuses en présentant les cigarettes à teneur réduite en goudron comme un choix moins nuisible à la santé des consommateurs que les autres cigarettes. Selon eux, la teneur en goudron et en nicotine indiquée sur les paquets de cigarettes légères et douces fabriquées par Imperial ne correspondait pas aux émissions toxiques réelles pour les fumeurs. Ils font valoir que la fumée dégagée par les cigarettes légères était tout aussi néfaste que celle dégagée par les cigarettes régulières. Ils réclament le remboursement du coût d'achat des cigarettes ainsi que des dommages-intérêts punitifs.

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[7] Imperial issued a third-party notice against Canada. It alleges that Health Canada advised tobacco companies and the public that low-tar cigarettes were less hazardous than regular cigarettes. Imperial alleges that while Health Canada was initially opposed to the use of health warnings on cigarette packaging, it changed its policy in 1967. It instructed smokers to switch to low-tar cigarettes if they were unwilling to quit smoking altogether, and it asked tobacco companies to voluntarily list the tar and nicotine levels on their advertisements to encourage consumers to purchase low-tar brands. Contrary to expectations, it now appears that low-tar cigarettes are potentially more harmful to smokers.

[7] Par voie d'avis, Imperial a mis en cause le gouvernement du Canada. Selon elle, Santé Canada aurait informé les compagnies de tabac et le public que les cigarettes à teneur réduite en goudron étaient moins nuisibles que les cigarettes régulières. Imperial fait valoir que Santé Canada s'était d'abord opposé à l'impression de mises en garde relatives à la santé sur les paquets de cigarettes avant de changer sa politique en 1967. Le ministère invitait les fumeurs ne souhaitant pas cesser de fumer à consommer des cigarettes à teneur réduite en goudron et a demandé aux compagnies de tabac de révéler volontairement les quantités de goudron et de nicotine dans leurs publicités afin d'encourager les consommateurs à acheter des marques à faible teneur en goudron. Contre toute attente, il appert maintenant que ces cigarettes seraient peut-être plus nuisibles à la santé des fumeurs que les autres.

[8] Imperial also alleges that Agriculture Canada researched, developed, manufactured, and licensed several strains of low-tar tobacco, and collected royalties from the companies, including Imperial, that used these strains. By 1982, Imperial pleads, the tobacco strains developed by Agriculture Canada were "almost the only tobacco varieties available to Canadian tobacco manufacturers" (*Knight* case, amended third-party notice of Imperial, at para. 97).

[8] Imperial prétend également qu'Agriculture Canada a protégé par licences plusieurs souches de tabac à teneur réduite en goudron — cultivées par lui après des travaux de recherche et de développement — et a perçu des redevances des compagnies, dont Imperial, qui utilisaient ses souches. Selon Imperial, en 1982, les souches d'Agriculture Canada représentaient [TRADUCTION] « presque les seules variétés dont disposaient les fabricants canadiens de produits du tabac » (l'*Affaire Knight*, avis de mise en cause modifié d'Imperial, par. 97).

[9] Imperial makes five allegations against Canada:

(1) Canada is itself liable under the *BPCPA* and the *TPA* as a "supplier" of tobacco products that engaged in deceptive practices, and Imperial is entitled to contribution and indemnity from Canada pursuant to the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333.

(2) Canada breached private law duties to consumers by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn them against the hazards of low-tar cigarettes, and by failing to design its tobacco

[9] Imperial formule contre le Canada les cinq allégations suivantes :

(1) La responsabilité du Canada lui-même est engagée aux termes de la *BPCPA* et de la *TPA* à titre de [TRADUCTION] « fournisseur » de produits du tabac puisqu'il s'est livré à des pratiques trompeuses, et Imperial a le droit, aux termes de la *Negligence Act*, R.S.B.C. 1996, ch. 333, de réclamer au Canada une contribution et une indemnisation.

(2) Le Canada a manqué à ses obligations de droit privé envers les consommateurs en faisant par négligence des déclarations inexactes au sujet de l'effet, sur la santé, des cigarettes à teneur réduite en goudron, en faisant défaut de les

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strain with due care. Consequently, Imperial alleges that it is entitled to contribution and indemnity from Canada under the *Negligence Act*.

(3) Canada breached its private law duties to Imperial by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn Imperial about the hazards of low-tar cigarettes, and by failing to design its tobacco strain with due care. Imperial alleges that it is entitled to damages against Canada to the extent of any liability Imperial may have to the class members.

(4) In the alternative, Canada is obliged to indemnify Imperial under the doctrine of equitable indemnity.

(5) If Canada is not liable to Imperial under any of the above claims, Imperial is entitled to declaratory relief against Canada so that it will remain a party to the action and be subject to discovery procedures under the *Supreme Court Rules*.

[10] Canada brought an application to strike the third-party claims. It was successful before Satanove J. in the Supreme Court of British Columbia (2007 BCSC 964, 76 B.C.L.R. (4th) 100). The chambers judge struck all of the claims against Canada. Imperial was partially successful in the Court of Appeal (2009 BCCA 541, 99 B.C.L.R. (4th) 93). The Court of Appeal unanimously struck the statutory claim, the claim of negligent design between Canada and Imperial, and the equitable indemnity claim. However, the majority, *per* Tysoe J.A., held that the two negligent misrepresentation claims and the negligent design claim between Canada and consumers should be allowed to proceed. The majority reasons did not address the

mettre en garde contre les risques associés à ces produits et en ne faisant pas preuve de diligence raisonnable dans la conception de sa souche de tabac. Par conséquent, Imperial se dit en droit d'obtenir du Canada une contribution et une indemnisation en vertu de la *Negligence Act*.

(3) Le Canada a manqué à ses obligations de droit privé envers Imperial en faisant par négligence des déclarations inexactes au sujet de l'effet, sur la santé, des cigarettes à teneur réduite en goudron, en faisant défaut de mettre en garde Imperial contre les risques associés à ces produits et en ne faisant pas preuve de diligence raisonnable dans la conception de sa souche de tabac. Imperial se dit en droit de réclamer au Canada des dommages-intérêts dans la mesure de leur responsabilité envers les membres du groupe.

(4) Subsidiairement, le Canada est tenu en equity d'indemniser Imperial.

(5) Si la responsabilité du Canada envers Imperial n'est reconnue à l'égard d'aucune des allégations précédentes, Imperial peut obtenir un jugement déclarant que le Canada reste partie au litige, ce qui le soumettra aux obligations de communication préalable de la preuve prévues aux *Supreme Court Rules*.

[10] Par requête, le Canada a demandé et obtenu de la juge Satanove de la Cour suprême de la Colombie-Britannique la radiation des avis de mise en cause (2007 BCSC 964, 76 B.C.L.R. (4th) 100). La juge siégeant en cabinet a radié toutes les demandes formées contre le Canada. Imperial a eu partiellement gain de cause devant la Cour d'appel (2009 BCCA 541, 99 B.C.L.R. (4th) 93). Les juges de cette cour ont radié à l'unanimité la demande relative aux manquements aux obligations légales, la demande relative à la conception négligente qui oppose Imperial au Canada, ainsi que la demande d'indemnisation en equity. Au nom des juges majoritaires, le juge Tysoe a permis l'instruction des deux demandes concernant les déclarations

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failure to warn claim. Hall J.A., dissenting, would have struck all the third-party claims.

inexactes faites par négligence et de celle portant sur la conception négligente opposant le Canada et les consommateurs. Les juges majoritaires n'ont pas traité de la demande relative au défaut de mise en garde. Le juge Hall, dissident, aurait radié toutes les demandes de mise en cause.

B. *The Costs Recovery Case*

[11] The Government of British Columbia has brought a claim under the *CRA* to recover the expense of treating tobacco-related illnesses caused by "tobacco related wrong[s]". Under the *CRA*, manufacturers of tobacco products are liable to the province directly. The claim was brought against 14 tobacco companies. British Columbia alleges that by 1950, these tobacco companies knew or ought to have known that cigarettes were harmful to one's health, and that they failed to properly warn the public about the risks associated with smoking their product.

[12] Various defendants in the *Costs Recovery* case, including Imperial, brought third-party notices against Canada for its alleged role in the tobacco industry. I refer to them collectively as the "tobacco companies". The allegations in this claim are strikingly similar to those in the *Knight* case. The tobacco companies plead that Health Canada advised them and the public that low-tar cigarettes were less hazardous and instructed smokers that they should quit smoking or purchase low-tar cigarettes. The tobacco companies allege that Canada was initially opposed to the use of warning labels on cigarette packaging, but ultimately instructed the industry that warning labels should be used and what they should say. The tobacco companies also plead that Agriculture Canada researched, developed, manufactured and licensed the strains of low-tar tobacco which they used for their cigarettes in exchange for royalties.

B. *L'Affaire du recouvrement des coûts*

[11] Le gouvernement de la Colombie-Britannique a demandé aux termes de la *CRA* de recouvrer les sommes consacrées au traitement des maladies liées au tabagisme découlant d'une [TRADUCTION] « faute d'un fabricant ». Cette loi prévoit que les fabricants de produits du tabac sont tenus de verser ces sommes directement à la province. La demande visait 14 compagnies de tabac. Selon la Colombie-Britannique, dès 1950, ces compagnies de tabac savaient ou auraient dû savoir que les cigarettes étaient néfastes pour la santé et ont fait défaut de mettre le public en garde adéquatement contre les risques associés à l'usage de leur produit.

[12] Divers défendeurs dans l'*Affaire du recouvrement des coûts*, dont Imperial, ont mis en cause le Canada pour le rôle qu'il aurait joué dans l'industrie du tabac. Je les désigne collectivement comme les « compagnies de tabac ». Les allégations contenues dans l'avis présentent une similitude frappante avec celles formulées dans l'*Affaire Knight*. Les compagnies de tabac font valoir que Santé Canada les aurait informées, ainsi que le public, de l'effet moins nuisible des cigarettes à teneur réduite en goudron par rapport aux cigarettes régulières et aurait conseillé aux fumeurs d'abandonner le tabagisme ou d'acheter des cigarettes à teneur réduite en goudron. Les compagnies de tabac prétendent que, bien qu'initialement opposé à l'impression de mises en garde sur les paquets de cigarettes, le Canada a fini par l'exiger et a déterminé les renseignements qui devaient y figurer. Les compagnies de tabac plaident également qu'Agriculture Canada avait protégé par licences les souches de tabac à teneur réduite en goudron — cultivées par lui après des travaux de recherche et de développement — que les compagnies utilisaient dans la fabrication des cigarettes en échange du paiement de redevances.

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[13] The tobacco companies brought the following claims against Canada:

(1) Canada is itself liable under the *CRA* as a "manufacturer" of tobacco products, and the tobacco companies are entitled to contribution and indemnity from Canada pursuant to the *Negligence Act*.

(2) Canada breached private law duties to consumers for failure to warn, negligent design, and negligent misrepresentation, and the tobacco companies are entitled to contribution and indemnity from Canada to the extent of any liability they may have to British Columbia under the *CRA*.

(3) Canada breached its private law duties owed to the tobacco companies for failure to warn and negligent design, and negligently misrepresented the attributes of low-tar cigarettes. The tobacco companies allege that they are entitled to damages against Canada to the extent of any liability they may have to British Columbia under the *CRA*.

(4) In the alternative, Canada is obliged to indemnify the tobacco companies under the doctrine of equitable indemnity.

(5) If Canada is not liable to the tobacco companies under any of the above claims, they are entitled to declaratory relief.

[14] Canada was successful before the chambers judge, Wedge J., who struck all of the claims (2008 BCSC 419, 82 B.C.L.R. (4th) 362). In the Court of Appeal, the majority, *per* Tysoe J.A., allowed the negligent misrepresentation claim between Canada and the tobacco companies to proceed (2009 BCCA 540, 98 B.C.L.R. (4th) 201). Hall J.A.,

[13] Les compagnies de tabac ont formulé contre le Canada les allégations suivantes :

(1) La responsabilité du Canada lui-même est engagée aux termes de la *CRA* à titre de [TRADUCTION] « fabricant » de produits du tabac, et les compagnies de tabac ont le droit, en vertu de la *Negligence Act*, de réclamer au Canada une contribution et une indemnisation.

(2) Le Canada a manqué à ses obligations de droit privé envers les consommateurs en raison du défaut de mise en garde, de la conception négligente et de déclarations inexactes faites par négligence. De plus, les compagnies de tabac sont en droit de réclamer du Canada contribution et indemnisation dans la mesure de leur responsabilité envers la Colombie-Britannique suivant la *CRA*.

(3) Le Canada a manqué à ses obligations de droit privé envers les compagnies de tabac en raison du défaut de mise en garde, de la conception négligente et de déclarations inexactes faites par négligence au sujet de l'effet, sur la santé, des cigarettes à faible teneur en goudron. Les compagnies de tabac se disent en droit de réclamer au Canada des dommages-intérêts dans la mesure de leur responsabilité envers la Colombie-Britannique au titre de la *CRA*.

(4) Subsidiairement, le Canada est tenu d'indemniser en equity les compagnies de tabac.

(5) Si la responsabilité du Canada envers les compagnies de tabac n'est retenue à l'égard d'aucune des allégations précédentes, les compagnies de tabac ont droit à une réparation de nature déclaratoire.

[14] La juge Wedge, siégeant en cabinet, a fait droit à toutes les requêtes en radiation présentées par le Canada (2008 BCSC 419, 82 B.C.L.R. (4th) 362). Les juges majoritaires de la Cour d'appel, sous la plume du juge Tysoe, ont permis l'instruction de la demande relative aux déclarations inexactes faites par négligence opposant les compagnies

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dissenting, would have struck all the third-party claims.

III. Issues Before the Court

[15] There is significant overlap between the issues on appeal in the *Costs Recovery* case and the *Knight* case, particularly in relation to the common law claims. Both cases discuss whether Canada could be liable at common law in negligent misrepresentation, negligent design and failure to warn, and in equitable indemnity. To reduce duplication, I treat the issues common to both cases together.

[16] There are also issues and arguments that are distinct in the two cases. Uniquely in the *Costs Recovery* case, Canada argues that all the contribution claims based on the *Negligence Act* and Canada's alleged duties of care to smokers should be struck because even if these alleged duties were breached, Canada would not be liable to the sole plaintiff British Columbia. The statutory claims are also distinct in the two cases. The issues may therefore be stated as follows:

1. What is the test for striking out claims for failure to disclose a reasonable cause of action?

2. Should the claims for contribution and indemnity based on the *Negligence Act* and alleged breaches of duties of care to smokers be struck in the *Costs Recovery* case?

3. Should the tobacco companies' negligent misrepresentation claims be struck out?

de tabac au Canada (2009 BCCA 540, 98 B.C.L.R. (4th) 201). Le juge Hall, dissident, aurait radié toutes les demandes de mise en cause.

III. Questions en litige

[15] Les questions à trancher dans l'*Affaire du recouvrement des coûts* et dans l'*Affaire Knight* se chevauchent considérablement, tout particulièrement quant aux demandes fondées sur la common law. Dans les deux cas, il s'agit de savoir si le Canada pourrait être tenu responsable, d'une part en common law, pour déclarations inexactes faites par négligence, conception négligente et défaut de mise en garde et, d'autre part, suivant la doctrine de l'indemnisation en equity. Par souci d'éviter les répétitions, j'examinerai ensemble les questions communes.

[16] Par ailleurs, les deux affaires présentent également des questions et des arguments distincts. Ainsi, dans l'*Affaire du recouvrement des coûts*, le Canada fait valoir que les demandes de contribution fondées sur la *Negligence Act* et sur l'obligation de diligence qu'on lui impute à l'égard des fumeurs devraient être radiées, car, même s'il avait manqué à une telle obligation, il ne pourrait être tenu responsable envers la demanderesse, la Colombie-Britannique. Les demandes fondées sur les lois sont elles aussi distinctes. Par conséquent, les questions en litige peuvent être formulées comme suit :

1. Quel est le critère applicable à la radiation d'une demande pour absence de cause d'action raisonnable?

2. Les demandes de contribution et d'indemnisation fondées sur la *Negligence Act* et sur les manquements allégués à l'obligation de diligence envers les fumeurs doivent-elles être radiées dans l'*Affaire du recouvrement des coûts*?

3. Les demandes des compagnies de tabac relatives aux déclarations inexactes faites par négligence doivent-elles être radiées?

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4. Should the tobacco companies' claims of failure to warn be struck out?

5. Should the tobacco companies' claims of negligent design be struck out?

6. Should the tobacco companies' claim in the *Costs Recovery* case that Canada could qualify as a "manufacturer" under the *CRA* be struck out?

7. Should Imperial's claim in the *Knight* case that Canada could qualify as a "supplier" under the *TPA* and the *BPCPA* be struck out?

8. Should the tobacco companies' claims of equitable indemnity be struck out?

9. If Canada is not liable to the tobacco companies under any of the third-party claims, are the tobacco companies nonetheless entitled to declaratory relief against Canada so that it will remain a party to both actions and be subject to discovery procedures under the *Supreme Court Rules*?

IV. Analysis

A. *The Test for Striking Out Claims*

[17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of

4. Les demandes des compagnies de tabac relatives au défaut de mise en garde doivent-elles être radiées?

5. Les demandes des compagnies de tabac relatives à la conception négligente doivent-elles être radiées?

6. Dans l'*Affaire du recouvrement des coûts*, la demande des compagnies de tabac de reconnaître au Canada la qualité de [TRADUCTION] « fabricant » au sens de la *CRA* doit-elle être radiée?

7. Dans l'*Affaire Knight*, la demande d'Imperial de reconnaître au Canada la qualité de [TRADUCTION] « fournisseur » au sens de la *TPA* et de la *BPCPA* doit-elle être radiée?

8. Les demandes des compagnies de tabac relatives à l'indemnisation en equity doivent-elles être radiées?

9. Si la responsabilité du Canada envers les compagnies de tabac n'est retenue à l'égard d'aucune des demandes de mise en cause, les compagnies de tabac ont-elles quand même le droit d'obtenir contre lui un jugement le déclarant partie aux deux litiges, ce qui le soumettra aux obligations de communication préalable de la preuve prévues aux *Supreme Court Rules*?

IV. Analyse

A. *Le critère applicable à la radiation d'une demande*

[17] Les parties conviennent du critère applicable à la radiation d'une demande pour absence de cause d'action raisonnable en vertu de l'al. 19(24)a) des *Supreme Court Rules* de la Colombie-Britannique. La Cour a réitéré ce critère à maintes reprises : l'action ne sera rejetée que s'il est évident et manifeste, dans l'hypothèse où les faits allégués seraient avérés, que la déclaration ne révèle aucune cause d'action raisonnable : *Succession Odhavji c. Woodhouse*, 2003 CSC 69, [2003] 3 R.C.S. 263, par. 15; *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959, p. 980. Autrement dit, la demande doit n'avoir

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success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[18] Although all agree on the test, the arguments before us revealed different conceptions about how it should be applied. It may therefore be useful to review the purpose of the test and its application.

[19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

[20] This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

[21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised

aucune possibilité raisonnable d'être accueillie. Sinon, il faut lui laisser suivre son cours : voir généralement *Syl Apps Secure Treatment Centre c. B.D.*, 2007 CSC 38, [2007] 3 R.C.S. 83; *Succession Odhavji*; *Hunt*; *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735.

[18] Bien que les parties acceptent d'emblée ce critère, il ressort des arguments qui nous ont été présentés que toutes ne voient pas du même œil son application aux faits. Il peut donc se révéler utile de revoir l'objet du critère et son application.

[19] Le pouvoir de radier les demandes ne présentant aucune possibilité raisonnable de succès constitue une importante mesure de gouverne judiciaire essentielle à l'efficacité et à l'équité des procès. Il permet d'élaguer les litiges en écartant les demandes vaines et en assurant l'instruction des demandes susceptibles d'être accueillies.

[20] Ce faisant, il favorise deux conséquences positives, soit l'instruction efficace des litiges et le bien-fondé des décisions sur ces demandes. La radiation des demandes n'ayant aucune possibilité raisonnable de succès favorise l'efficacité et fait épargner temps et argent. Les plaideurs peuvent se concentrer sur les demandes importantes et n'ont pas à consacrer des jours — parfois même des semaines — à la preuve et aux arguments de demandes vouées de toute façon à l'échec. Il en va de même pour les juges et les jurés, dont l'attention est portée là où il le faut, soit sur les demandes présentant une possibilité raisonnable de succès. Les gains d'efficacité découlant de cet élagage contribuent à leur tour à l'amélioration de l'administration de la justice. Plus la preuve et les arguments sont axés sur les vraies questions, mieux les thèses des parties à l'égard de ces questions et le bien-fondé de l'affaire se dégageront de l'instruction du procès.

[21] Quoique très utile, la requête en radiation ne saurait être accueillie à la légère. Le droit n'est pas immuable. Des actions qui semblaient hier encore vouées à l'échec pourraient être accueillies demain. Avant qu'une obligation générale de diligence envers son prochain reposant sur la prévisibilité

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on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

soit reconnue dans l'arrêt *Donoghue c. Stevenson*, [1932] A.C. 562 (H.L.), peu de gens auraient pu prévoir qu'une entreprise d'embouteillage puisse être tenue responsable, en l'absence de tout lien contractuel, du préjudice corporel et du traumatisme émotionnel causé par la découverte d'un escargot dans une bouteille de bière de gingembre. Avant l'arrêt *Hedley Byrne & Co. c. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), l'action en responsabilité délictuelle pour déclarations inexactes faites par négligence aurait paru vouée à l'échec. L'histoire de notre droit nous apprend que souvent, des requêtes en radiation ou des requêtes préliminaires semblables, à l'instar de celle présentée dans *Donoghue c. Stevenson*, amorcent une évolution du droit. Par conséquent, le fait qu'une action en particulier n'a pas encore été reconnue en droit n'est pas déterminant pour la requête en radiation. Le tribunal doit plutôt se demander si, dans l'hypothèse où les faits allégués seraient avérés, il est raisonnablement possible que l'action soit accueillie. L'approche doit être généreuse et permettre, dans la mesure du possible, l'instruction de toute demande inédite, mais soutenable.

[22] Une requête en radiation pour absence de cause d'action raisonnable repose sur le principe que les faits allégués sont vrais, sauf s'ils ne peuvent manifestement pas être prouvés : *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441, p. 455. Aucune preuve n'est admissible à l'égard d'une telle requête : par. 19(27) des *Supreme Court Rules* de la Colombie-Britannique (maintenant le par. 9-5(2) des *Supreme Court Civil Rules*). Il incombe au demandeur de plaider clairement les faits sur lesquels il fonde sa demande. Un demandeur ne peut compter sur la possibilité que de nouveaux faits apparaissent au fur et à mesure que l'instruction progresse. Il peut arriver que le demandeur ne soit pas en mesure de prouver les faits plaidés au moment de la requête. Il peut seulement espérer qu'il sera en mesure de les prouver. Il doit cependant les plaider. Les faits allégués sont le fondement solide en fonction duquel doit être évaluée la possibilité que la demande soit accueillie. S'ils ne sont pas allégués, l'exercice ne peut pas être exécuté adéquatement.

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[23] Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar cigarettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

[23] Dans notre Cour, Imperial et les autres compagnies de tabac ont prétendu que la requête en radiation devrait prendre en compte non seulement les faits plaidés, mais la possibilité que, au fur et à mesure que l'instruction progresse, la preuve en révélerait davantage quant au comportement du Canada et au rôle qu'il a joué dans la promotion de la consommation de cigarettes à teneur réduite en goudron. Cette position dénote une compréhension fondamentalement erronée de ce que vise une requête en radiation. Elle n'a rien à voir avec la preuve. Elle porte sur les actes de procédure. Les faits allégués sont réputés véridiques. La question de savoir si la preuve corrobore ou corroborera les faits allégués n'a aucune pertinence quant à la requête en radiation. Le juge saisi de la requête en radiation ne peut pas anticiper ce que la preuve qui sera produite permettra d'établir. Si l'on exigeait cela du juge, la requête en radiation perdrait sa logique et deviendrait en fin de compte inutile.

[24] This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities — as they sometimes do — the remedy is to amend the pleadings to plead new facts at that time.

[24] Cela n'a rien d'inéquitable pour le demandeur. La présomption selon laquelle les faits allégués sont vrais joue en sa faveur. Le demandeur choisit les faits qu'il allègue en fonction de la cause d'action qu'il fait valoir. Si des faits nouveaux soulèvent de nouvelles possibilités — comme c'est parfois le cas —, la solution consiste à modifier les actes de procédure afin d'alléguer les faits nouveaux à ce moment-là.

[25] Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the*

[25] La question de la conjecture est liée à la question de savoir si la requête devrait être rejetée en raison de la possibilité qu'une nouvelle preuve apparaisse éventuellement. Le juge saisi d'une requête en radiation se demande s'il existe une possibilité raisonnable que la demande soit accueillie. Dans le monde de la conjecture abstraite, il existe une probabilité mathématique qu'un certain nombre d'événements se produisent. Ce n'est pas ce que le critère applicable aux requêtes en radiation cherche à déterminer. Il suppose plutôt que la demande sera traitée de la manière habituelle dans le système judiciaire — un système fondé sur le débat contradictoire dans lequel les juges sont tenus d'appliquer le droit (et son évolution) énoncé dans les

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law and the litigation process, the claim has no reasonable chance of succeeding.

lois et la jurisprudence. Il s'agit de savoir si, dans *le contexte du droit et du processus judiciaire*, la demande n'a aucune possibilité raisonnable d'être accueillie.

[26] With this framework in mind, I proceed to consider the tobacco companies' claims.

[26] C'est en tenant compte de ce cadre que j'entame l'examen des demandes des compagnies de tabac.

B. *Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case*

B. *Les prétendues obligations de diligence du Canada envers les fumeurs dans l'Affaire du recouvrement des coûts*

[27] In the *Costs Recovery* case, Canada argues that all the claims for contribution based on its alleged duties of care to smokers must be struck. Under the *Negligence Act*, Canada submits, contribution may only be awarded if the third party would be liable to the plaintiff directly. It argues that even if Canada breached duties to smokers, such breaches cannot ground the tobacco companies' claims for contribution if they are found liable to British Columbia, the sole plaintiff in the *Costs Recovery* case. This argument was successful in the Court of Appeal.

[27] Dans l'*Affaire du recouvrement des coûts*, le Canada plaide que toutes les demandes de contribution fondées sur ses prétendues obligations de diligence envers les fumeurs doivent être radiées. Le Canada prétend que, aux termes de la *Negligence Act*, une contribution ne peut être accordée si le tiers n'est pas directement responsable envers le plaignant. Il prétend que même s'il a manqué à ses obligations envers les fumeurs, ce manquement ne peut pas servir de fondement aux demandes de contribution des compagnies de tabac si elles sont tenues responsables envers la Colombie-Britannique, l'unique demanderesse dans l'*Affaire du recouvrement des coûts*. La Cour d'appel a accepté cet argument.

[28] The tobacco companies argue that direct liability to the plaintiff is not a requirement for being held liable in contribution. They argue that contribution in the *Negligence Act* turns on fault, not liability. The object of the *Negligence Act* is to allow defendants to recover from other parties that were also at fault for the damage that resulted to the plaintiff, and barring a claim against Canada would defeat this purpose, they argue.

[28] Les compagnies de tabac prétendent qu'il n'est pas nécessaire qu'une personne soit directement responsable envers le demandeur pour être tenue de verser une contribution. Elles prétendent que la contribution dont parle la *Negligence Act* repose sur la faute et non pas sur la responsabilité. Elles affirment que la *Negligence Act* vise à permettre aux défendeurs d'être indemnisés par d'autres parties qui sont également responsables du dommage causé au plaignant, et qu'interdire un droit d'action contre le Canada ferait échec à cet objectif.

[29] I agree with Canada and the Court of Appeal that a third party may only be liable for contribution under the *Negligence Act* if it is directly liable to the plaintiff. In *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346, dealing

[29] Je souscris à l'opinion du Canada et de la Cour d'appel selon laquelle un tiers ne peut être tenu de verser une contribution en vertu de la *Negligence Act* que s'il est directement responsable envers le plaignant. Dans l'arrêt *Giffels Associates*

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with a statutory provision similar to that in British Columbia, Laskin C.J. stated:

. . . I am of the view that it is a precondition of the right to resort to contribution that there be liability to the plaintiff. I am unable to appreciate how a claim for contribution can be made under s. 2(1) by one person against another in respect of loss resulting to a third person unless each of the former two came under a liability to the third person to answer for his loss. [Emphasis added; p. 1354.]

[30] Accordingly, it is plain and obvious that the private law claims against Canada in the *Costs Recovery* case that arise from an alleged duty of care to consumers must be struck. Even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia, the plaintiff in that case. This holding has no bearing on the consumer claim in the *Knight* case since consumers of light or mild cigarettes are the plaintiffs in the underlying action.

[31] The discussion of the private law claims in the remainder of these reasons will refer exclusively to the claims based on Canada's alleged duties of care to the tobacco companies in both cases before the Court, and Canada's alleged duties to consumers in the *Knight* case.

C. *The Claims for Negligent Misrepresentation*

[32] There are two types of negligent misrepresentation claims that remain at issue on this appeal. First, in the *Knight* case, Imperial alleges that Canada negligently misrepresented the health attributes of low-tar cigarettes to consumers, and is therefore liable for contribution and indemnity on the basis of the *Negligence Act* if the class members

Ltd. c. Eastern Construction Co., [1978] 2 R.C.S. 1346, où il était question d'une disposition législative semblable à celle de la Colombie-Britannique, le juge en chef Laskin a déclaré ce qui suit :

. . . j'estime qu'il faut d'abord établir la responsabilité envers la demanderesse pour pouvoir réclamer la contribution. Je ne vois pas comment une personne pourrait, en vertu du par. 2(1), réclamer à une autre personne une contribution relativement à la perte subie par un tiers sans que chacune des deux premières personnes soit responsable envers le tiers de la perte qu'il a subie. [Je souligne; p. 1354.]

[30] Par conséquent, il est évident et manifeste que les réclamations de droit privé dirigées contre le Canada dans l'*Affaire du recouvrement des coûts* qui découlent de prétendues obligations de diligence envers les consommateurs doivent être radiées. Même si le Canada a manqué à ses obligations envers les fumeurs, ce manquement n'aurait aucune incidence sur la question de savoir s'il est responsable envers la Colombie-Britannique, la demanderesse dans cette affaire. Cette conclusion n'a aucune incidence sur la réclamation des consommateurs dans l'*Affaire Knight* puisque dans cette instance, les consommateurs de cigarettes légères ou douces sont les demandeurs.

[31] Dans le reste des présents motifs, l'examen des réclamations de droit privé ne portera que sur les demandes fondées sur les prétendues obligations de diligence du Canada envers les compagnies de tabac dans les deux causes dont la Cour est saisie, et sur les prétendues obligations du Canada envers les consommateurs dans l'*Affaire Knight*.

C. *Les demandes fondées sur des déclarations inexactes faites par négligence*

[32] Deux types de demandes fondées sur des déclarations inexactes faites par négligence sont toujours en litige dans le présent appel. Premièrement, dans l'*Affaire Knight*, Imperial prétend que le Canada a fait preuve de négligence en déclarant faussement aux consommateurs que la cigarette à teneur réduite en goudron serait

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are successful in this suit. Second, in both cases before the Court, Imperial and the other tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies, and that Canada is liable for any losses that the tobacco companies incur to the plaintiffs in either case.

moins nocive pour la santé, et qu'il est donc tenu à contribution et à indemnisation sur la base de la *Negligence Act* si les membres du groupe ont gain de cause dans cette poursuite. Deuxièmement, dans les deux affaires dont la Cour est saisie, Imperial et les autres compagnies de tabac prétendent que le Canada a fait aux compagnies de tabac des déclarations inexactes par négligence et qu'il est responsable des pertes que pourraient subir les compagnies de tabac en raison des indemnités à verser aux plaignants dans l'une ou l'autre de ces affaires.

[33] Canada applies to have the claims struck on the ground that they have no reasonable prospect of success.

[33] Le Canada demande la radiation des demandes parce qu'il n'existe aucune possibilité raisonnable qu'elles soient accueillies.

[34] For the purposes of the motion to strike, we must accept as true the facts pleaded. We must therefore accept that Canada represented to consumers and to tobacco companies that light or mild cigarettes were less harmful, and that these representations were not accurate. We must also accept that consumers and the tobacco companies relied on Canada's representations and acted on them to their detriment.

[34] Pour les besoins de la requête en radiation, nous devons tenir pour avérés les faits allégués. Nous devons donc accepter que le Canada a déclaré aux consommateurs et aux compagnies de tabac que les cigarettes légères ou douces étaient moins nocives et que ces déclarations n'étaient pas exactes. Nous devons également accepter que les consommateurs et les compagnies de tabac ont agi à leur détriment sur la foi des déclarations inexactes du Canada.

[35] The law first recognized a tort action for negligent misrepresentation in *Hedley Byrne*. Prior to this, parties were confined to contractual remedies for misrepresentations. *Hedley Byrne* represented a break with this tradition, allowing a claim for economic loss in tort for misrepresentations made in the absence of a contract between the parties. In the decades that have followed, liability for negligent misrepresentation has been imposed in a variety of situations where the relationship between the parties disclosed sufficient proximity and foreseeability, and policy considerations did not negate liability.

[35] Le droit a reconnu pour la première fois l'action en responsabilité délictuelle par suite d'une déclaration inexacte faite par négligence dans *Hedley Byrne*. Avant cette décision, les parties ne disposaient que de recours contractuels en matière de déclarations inexactes. La décision *Hedley Byrne* a rompu avec cette tradition en accueillant une action pour perte financière par suite d'une déclaration inexacte faite par négligence en l'absence d'un contrat entre les parties. Dans les décennies qui ont suivi, la responsabilité délictuelle pour déclaration inexacte faite par négligence a été retenue dans diverses situations où la relation entre les parties révélait une prévisibilité et l'existence d'un lien suffisamment étroit et où les considérations de politique générale n'empêchaient pas la reconnaissance de la responsabilité délictuelle.

[36] Imperial and the other tobacco companies argue that the facts pleaded against Canada bring their claims within the settled parameters of the

[36] Imperial et les autres compagnies de tabac prétendent que, vu les faits allégués contre le Canada, les paramètres définis du délit de

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tort of negligent misrepresentation, and therefore a *prima facie* duty of care is established. The majority in the Court of Appeal accepted this argument in both decisions below (*Knight* case, at paras. 45 and 66; *Costs Recovery* case, at para. 70).

déclaration inexacte faite par négligence correspondent à leurs demandes et, par conséquent, l'existence d'une obligation de diligence *prima facie* est établie. Les juges majoritaires de la Cour d'appel ont retenu cet argument dans les deux décisions en cause (l'*Affaire Knight*, par. 45 et 66; l'*Affaire du recouvrement des coûts*, par. 70).

[37] The first question is whether the facts as pleaded bring Canada's relationships with consumers and the tobacco companies within a settled category that gives rise to a duty of care. If they do, a *prima facie* duty of care will be established: see *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 15. However, it is important to note that liability for negligent misrepresentation depends on the nature of the relationship between the plaintiff and defendant, as discussed more fully below. The question is not whether negligent misrepresentation is a recognized tort, but whether there is a reasonable prospect that the relationship alleged in the pleadings will give rise to liability for negligent misrepresentation.

[37] Il faut se demander en premier lieu si les faits allégués font entrer la relation du Canada avec les consommateurs et les compagnies de tabac dans une catégorie définie de relations qui donnent naissance à une obligation de diligence. Le cas échéant, l'existence d'une obligation de diligence *prima facie* sera établie : voir *Childs c. Desormeaux*, 2006 CSC 18, [2006] 1 R.C.S. 643, par. 15. Toutefois, il importe de signaler que la responsabilité pour déclaration inexacte faite par négligence dépend de la nature de la relation entre le plaignant et le défendeur, comme je l'expliquerai davantage plus loin. La question n'est pas de savoir si une déclaration inexacte faite par négligence est un délit reconnu, mais de savoir s'il existe une possibilité raisonnable que la relation alléguée dans les actes de procédure engage la responsabilité pour déclaration inexacte faite par négligence.

[38] In my view, the facts pleaded do not bring either claim within a settled category of negligent misrepresentation. The law of negligent misrepresentation has thus far not recognized liability in the kinds of relationships at issue in these cases. The error of the tobacco companies lies in assuming that the relationships disclosed by the pleadings between Canada and the tobacco companies on the one hand and between Canada and consumers on the other are like other relationships that have been held to give rise to liability for negligent misrepresentation. In fact, they differ in important ways. It is sufficient at this point to note that the tobacco companies have not been able to point to any case where a government has been held liable in negligent misrepresentation for statements made to an industry. To determine whether such a cause of action has a reasonable prospect of success, we must therefore consider whether the general requirements for liability in tort are met, on the test

[38] À mon avis, les faits allégués ne font entrer aucune des demandes à l'intérieur d'une catégorie définie de déclarations inexactes faites par négligence. Le droit en matière de déclaration inexacte faite par négligence n'a jusqu'à présent pas reconnu la responsabilité dans les types de relations en cause dans ces affaires. Les compagnies de tabac ont fait l'erreur de supposer que les relations, révélées par les actes de procédure, entre le Canada et les compagnies de tabac, d'une part, et entre le Canada et les consommateurs, d'autre part, sont semblables aux autres relations à l'égard desquelles la responsabilité délictuelle pour déclaration inexacte faite par négligence a été retenue. En fait, elles comportent des différences importantes. Il suffit à ce stade de signaler que les compagnies de tabac ont été incapables de citer une décision dans laquelle un gouvernement a été tenu responsable d'une déclaration inexacte faite par négligence relativement à des déclarations faites à une industrie.

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set out by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, and somewhat reformulated but consistently applied by this Court, most notably in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537.

Afin de déterminer si une pareille cause d'action a une possibilité raisonnable d'être accueillie, nous devons donc examiner s'il a été satisfait aux exigences générales en matière de responsabilité délictuelle énoncées dans le critère établi par la Chambre des lords dans *Anns c. Merton London Borough Council*, [1978] A.C. 728, et quelque peu reformulé, mais appliqué de façon constante par la Cour, notamment dans l'arrêt *Cooper c. Hobart*, 2001 CSC 79, [2001] 3 R.C.S. 537.

[39] At the first stage of this test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129.

[39] À la première étape de ce critère, il faut se demander si les faits révèlent l'existence d'un lien de proximité dans le cadre duquel l'omission de faire preuve de diligence raisonnable peut, de façon prévisible, causer une perte ou un préjudice au plaignant. Si cette condition est remplie, il y a obligation de diligence *prima facie* et l'analyse passe à l'étape suivante dans laquelle on se demande si des considérations de politique générale empêcheraient de reconnaître cette obligation de diligence *prima facie* : *Hill c. Commission des services policiers de la municipalité régionale de Hamilton-Wentworth*, 2007 CSC 41, [2007] 3 R.C.S. 129.

(1) Stage One: Proximity and Foreseeability

(1) Première étape de l'analyse : le lien de proximité et la prévisibilité

[40] On the first branch of the test, the tobacco companies argue that the facts pleaded establish a sufficiently close and direct, or "proximate", relationship between Canada and consumers (in the *Knight* case) and between Canada and tobacco companies (in both cases) to support a duty of care with respect to government statements about light and mild cigarettes. They also argue that Canada could reasonably have foreseen that consumers and the tobacco industry would rely on Canada's statements about the health advantages of light cigarettes, and that such reliance was reasonable. Canada responds that it was acting exclusively in a regulatory capacity when it made statements to the public and to the industry, which does not give rise to sufficient proximity to ground the alleged duty of care. In the *Costs Recovery* case, Canada also alleges that it could not have reasonably foreseen that the B.C. legislature would enact the *CRA* and therefore cannot be liable for the

[40] Quant au premier volet du critère, les compagnies de tabac font valoir que les faits allégués établissent l'existence d'un lien suffisamment étroit et direct, ou lien [TRADUCTION] « de proximité », d'une part, entre le Canada et les consommateurs (dans l'*Affaire Knight*) et, d'autre part, entre le Canada et les compagnies de tabac (dans les deux affaires) pour justifier une obligation de diligence à l'égard des déclarations du gouvernement au sujet des cigarettes légères et douces. Les compagnies de tabac ajoutent que le Canada aurait pu raisonnablement prévoir que les consommateurs et l'industrie du tabac se fieraient à ses déclarations au sujet des avantages des cigarettes légères au chapitre de la santé, et qu'il était raisonnable pour eux de se fier à ces déclarations. Le Canada rétorque qu'il agissait seulement à titre d'autorité de réglementation lorsqu'il a fait des déclarations à la population et à l'industrie, ce qui n'entraîne pas la création d'un lien suffisamment étroit pour

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potential losses of the tobacco companies under that Act.

[41] Proximity and foreseeability are two aspects of one inquiry — the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Foreseeability is the touchstone of negligence law. However, not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.

[42] Proximity and foreseeability are heightened concerns in claims for economic loss, such as negligent misrepresentation: see, generally, *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210. In a claim of negligent misrepresentation, both these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties: *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24. In *Hercules Managements*, the Court, *per* La Forest J., held that a special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case (*ibid.*). Where such a relationship is established, the defendant may be liable for losses suffered by the plaintiff as a result of a negligent misstatement.

fonder l'obligation de diligence revendiquée. Dans l'*Affaire du recouvrement des coûts*, le Canada prétend aussi qu'il n'aurait pas pu raisonnablement prévoir que la législature de la Colombie-Britannique adopterait la *CRA*, et qu'il ne saurait donc être tenu responsable des pertes éventuelles des compagnies de tabac en application de cette Loi.

[41] Le lien de proximité et la prévisibilité sont deux aspects d'une même analyse — celle visant à déterminer si les faits révèlent l'existence d'un lien donnant lieu à une obligation de diligence *prima facie* en common law. La prévisibilité est l'élément fondamental du droit de la négligence. Par contre, ce ne sont pas tous les résultats prévisibles qui donnent lieu à une obligation de diligence comparable. La prévisibilité doit reposer sur un lien suffisamment étroit, ou lien de proximité suffisant, pour qu'il soit juste et raisonnable d'imposer à une partie l'obligation de prendre les mesures raisonnables pour ne pas porter préjudice à l'autre.

[42] On se soucie davantage du lien de proximité et de la prévisibilité dans les actions pour perte financière, comme celles pour déclaration inexacte faite par négligence : voir, de façon générale, *Cie des chemins de fer nationaux du Canada c. Norsk Pacific Steamship Co.*, [1992] 1 R.C.S. 1021; *Bow Valley Husky (Bermuda) Ltd. c. Saint John Shipbuilding Ltd.*, [1997] 3 R.C.S. 1210. Ces deux conditions d'une obligation de diligence *prima facie* sont remplies dans le cadre d'une action pour déclaration inexacte faite par négligence lorsqu'un « lien spécial » unit les parties : *Hercules Managements Ltd. c. Ernst & Young*, [1997] 2 R.C.S. 165, par. 24. S'exprimant au nom de la Cour dans *Hercules Managements*, le juge La Forest a affirmé que l'existence d'un lien spécial est établie lorsque : (1) le défendeur doit raisonnablement prévoir que le demandeur se fiera à sa déclaration; et que (2) la confiance que le demandeur accorde à la déclaration serait raisonnable dans les circonstances (*ibid.*). Si pareil lien est établi, le demandeur peut être tenu responsable des pertes subies par le demandeur du fait d'une déclaration inexacte faite par négligence.

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[43] A complicating factor is the role that legislation should play when determining if a government actor owed a *prima facie* duty of care. Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.

[44] The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a *prima facie* duty of care. It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*Syl Apps*). In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public: see, e.g., *Cooper* and *Syl Apps*. As stated in *Syl Apps*, "[w]here an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity" (at para. 28; see also *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132, at para. 39).

[45] The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the

[43] Un élément complique les choses : la place que doit occuper la loi lorsqu'on détermine si un acteur gouvernemental avait une obligation de diligence *prima facie*. Il est possible de distinguer deux situations. Dans la première, l'obligation de diligence revendiquée découlerait explicitement ou implicitement du régime législatif. Dans la seconde, l'obligation de diligence découlerait des rapports entre le demandeur et le gouvernement et n'est pas exclue par la loi.

[44] Selon l'argument avancé dans la première catégorie de cas, la loi elle-même crée un rapport de proximité de nature privée qui donne lieu à une obligation de diligence *prima facie*. Il peut être difficile d'arriver au constat qu'une loi crée un lien suffisamment étroit pour donner lieu à une obligation de diligence. Certaines lois peuvent imposer à des représentants de l'État des obligations envers des demandeurs en particulier, mais plus souvent, les lois visent des objectifs d'intérêt public, tels la réglementation d'une industrie (*Cooper*), ou le retrait d'un enfant d'un milieu qui lui est préjudiciable (*Syl Apps*). Dans ces circonstances, il peut être difficile d'inférer que le législateur entendait créer des obligations de droit privé envers des demandeurs. Il est encore plus difficile d'inférer cette intention si l'établissement d'une obligation de nature privée irait à l'encontre des obligations d'une autorité publique envers la population : voir notamment *Cooper* et *Syl Apps*. Tel qu'il est mentionné dans *Syl Apps*, « [u]n conflit entre l'obligation de diligence revendiquée et une obligation primordiale de nature publique ou imposée par la loi peut constituer une raison de principe impérieuse pour refuser de conclure à la proximité » (par. 28; voir aussi *Fullowka c. Pinkerton's of Canada Ltd.*, 2010 CSC 5, [2010] 1 R.C.S. 132, par. 39).

[45] Dans la deuxième catégorie de cas, on prétend que le lien étroit essentiel à l'obligation de diligence de nature privée tire son origine d'une série de rapports précis entre le gouvernement et le demandeur. On fait valoir dans ces cas que le gouvernement, de par sa conduite, a tissé avec le demandeur un lien suffisamment spécial pour établir la proximité nécessaire à une obligation de

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governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises: *Syl Apps*; see also *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401. However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant.

[46] Finally, it is possible to envision a claim where proximity is based both on interactions between the parties and the government's statutory duties.

[47] Since this is a motion to strike, the question before us is simply whether, assuming the facts pleaded to be true, there is any reasonable prospect of successfully establishing proximity, on the basis of a statute or otherwise. On one hand, where the sole basis asserted for proximity is the statute, conflicting public duties may rule out any possibility of proximity being established as a matter of statutory interpretation: *Syl Apps*. On the other, where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis.

[48] As mentioned above, there are two relationships at issue in these claims: the relationship between Canada and consumers (the *Knight* case), and the relationship between Canada and tobacco companies (both cases). The question at this stage is whether there is a *prima facie* duty of care in either or both these relationships. In my view, on the facts pleaded, Canada did not owe a *prima facie*

diligence. Dans ces cas, les lois applicables restent pertinentes pour l'analyse. Par exemple, si un constat de proximité irait à l'encontre du devoir général de nature publique imposé par la loi à l'État, le tribunal peut conclure que cette proximité n'existe pas : *Syl Apps*; voir aussi *Heaslip Estate c. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401. Cependant, ce sont les rapports précis entre l'organisme gouvernemental et le demandeur qui font naître une obligation de diligence dans un cas de ce genre.

[46] Enfin, il est possible d'imaginer une action mettant en cause un lien étroit qui se fonde à la fois sur les rapports entre les parties et sur les obligations imposées au gouvernement par la loi.

[47] Puisqu'il s'agit en l'espèce d'une requête en radiation, la question qui nous est soumise est simplement de savoir si, à supposer que les faits allégués soient vrais, il est raisonnablement possible de réussir à établir la proximité en raison d'une loi ou d'un autre facteur. D'une part, dans les cas où on invoque uniquement la loi comme fondement du lien étroit, des obligations opposées de nature publique peuvent exclure toute possibilité d'établir ce lien sur le plan de l'interprétation législative : *Syl Apps*. D'autre part, dans les cas où on affirme que le lien étroit repose sur un acte et des rapports précis, il peut être difficile de rejeter une action à ce stade. Tant qu'il est raisonnablement possible que les rapports allégués, s'ils sont vrais, amènent à conclure à l'existence d'un lien suffisamment étroit, et que la loi n'exclut pas clairement cette possibilité, il faut permettre que l'affaire soit instruite, sous réserve de l'existence de quelque considération de politique générale susceptible d'écarter l'obligation de diligence *prima facie* à la deuxième étape de l'analyse.

[48] Comme je l'ai déjà mentionné, les allégations en l'espèce mettent en cause deux liens : celui entre le Canada et les consommateurs (dans l'*Affaire Knight*), et celui entre le Canada et les compagnies de tabac (dans les deux affaires). La question qui se pose à ce stade est de savoir s'il existe une obligation de diligence *prima facie* dans l'un ou l'autre de ces liens. À mon sens, compte tenu des

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duty of care to consumers, but did owe a *prima facie* duty to the tobacco companies.

[49] The facts pleaded in Imperial's third-party notice in the *Knight* case establish no direct relationship between Canada and the consumers of light cigarettes. The relationship between the two was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes: *Cooper*, at para. 43.

[50] The relevant statutes establish only general duties to the public, and no private law duties to consumers. The *Department of Health Act*, S.C. 1996, c. 8, establishes that the duties of the Minister of Health relate to "the promotion and preservation of the health of the people of Canada": s. 4(1). Similarly, the *Department of Agriculture and Agri-Food Act*, R.S.C. 1985, c. A-9, s. 4, the *Tobacco Act*, S.C. 1997, c. 13, s. 4, and the *Tobacco Products Control Act*, R.S.C. 1985, c. 14 (4th Supp.), s. 3 [rep. 1997, c. 13, s. 64], only establish duties to the general public. These general duties to the public do not give rise to a private law duty of care to particular individuals. To borrow the words of Sharpe J.A. of the Ontario Court of Appeal in *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* (2006), 276 D.L.R. (4th) 411, "I fail to see how it could be possible to convert any of the Minister's public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals": para. 17. At the same time, the governing statutes do not foreclose the possibility of recognizing a duty of care to the tobacco companies. Recognizing a duty of care on the government when it makes representations to the tobacco companies about the health attributes of tobacco strains would not conflict with its general duty to protect the health of the public.

faits allégués, le Canada n'avait pas d'obligation de ce genre envers les consommateurs, mais il en avait une envers les compagnies de tabac.

[49] Les faits allégués dans l'avis de mise en cause d'Imperial dans l'*Affaire Knight* n'établissent aucun lien direct entre le Canada et les consommateurs de cigarettes légères. Le lien dans ce cas se limitait aux déclarations du Canada adressées au grand public selon lesquelles les cigarettes à faible teneur en goudron sont moins dangereuses pour la santé. Le Canada n'entretenait pas de rapports spéciaux avec les membres du groupe. Par conséquent, le constat qu'il s'agit d'un lien suffisamment étroit doit découler des lois applicables : *Cooper*, par. 43.

[50] Les lois pertinentes n'établissent que des obligations générales envers le public, et non des obligations de nature privée envers les consommateurs. Selon la *Loi sur le ministère de la Santé*, L.C. 1996, ch. 8, les obligations du ministre de la Santé ont trait à « la promotion et au maintien de la santé de la population » : par. 4(1). Dans la même veine, l'art. 4 de la *Loi sur le ministère de l'Agriculture et de l'Agroalimentaire*, L.R.C. 1985, ch. A-9, l'art. 4 de la *Loi sur le tabac*, L.C. 1997, ch. 13, et l'art. 3 de la *Loi réglementant les produits du tabac*, L.R.C. 1985, ch. 14 (4e suppl.), art. 3 [abr. 1997, ch. 13, art. 64], ne prévoient eux aussi que des obligations envers le grand public. Ces obligations générales envers le public n'entraînent pas d'obligation de diligence de droit privé envers des personnes en particulier. Pour reprendre les termes utilisés par le juge Sharpe de la Cour d'appel de l'Ontario dans *Eliopoulos Estate c. Ontario (Minister of Health and Long-Term Care)* (2006), 276 D.L.R. (4th) 411, [TRADUCTION] « [j]e ne vois pas en quoi il serait possible de transformer l'un des pouvoirs discrétionnaires de droit public du ministre, qui doivent être exercés dans l'intérêt public, en obligations de droit privé envers des personnes en particulier » : par. 17. Par contre, les lois applicables n'excluent pas la possibilité de reconnaître une obligation de diligence envers les compagnies de tabac. Le fait d'imposer au gouvernement une obligation de diligence lorsqu'il fait, à ces compagnies, des déclarations relativement aux effets des souches de tabac sur la santé ne serait pas incompatible avec son obligation générale de protéger la santé de la population.

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[51] Turning to the relationship between Canada and the tobacco companies, at issue in both of the cases before the Court, the tobacco companies contend that a duty of care on Canada arose from the transactions between them and Canada over the years. They allege that Canada went beyond its role as regulator of industry players and entered into a relationship of advising and assisting the companies in reducing harm to their consumers. They hope to show that Canada gave erroneous information and advice, knowing that the companies would rely on it, which they did.

[52] The question is whether these pleadings bring the tobacco companies within the requirements for a special relationship under the law of negligent misrepresentation as set out in *Hercules Managements*. As noted above, a special relationship will be established where (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation, and (2) such reliance would, in the particular circumstances of the case, be reasonable. In the cases at bar, the facts pleaded allege a history of interactions between Canada and the tobacco companies capable of fulfilling these conditions.

[53] What is alleged against Canada is that Health Canada assumed duties separate and apart from its governing statute, including research into and design of tobacco and tobacco products and the promotion of tobacco and tobacco products (third-party statement of claim of Imperial in the *Costs Recovery* case, A.R., vol. II, at p. 66). In addition, it is alleged that Agriculture Canada carried out a programme of cooperation with and support for tobacco growers and cigarette manufacturers including advising cigarette manufacturers of the desirable content of nicotine in tobacco to be used in the manufacture of tobacco products. It is alleged that officials, drawing on their knowledge and expertise in smoking and health matters, provided both advice and directions to the manufacturers including advice that the tobacco strains

[51] Passons au lien entre le Canada et les compagnies de tabac qui est en litige dans les deux affaires soumises à la Cour. Selon les compagnies de tabac, les opérations qu'elles ont conclues avec le Canada au fil des ans ont imposé une obligation de diligence au Canada. D'après elles, le Canada a dépassé les limites de son rôle comme autorité de réglementation des membres de l'industrie et a entretenu des rapports avec les compagnies de tabac en les conseillant et en les aidant à réduire le préjudice causé aux consommateurs de leurs produits. Les compagnies de tabac espèrent démontrer que le Canada leur a donné des renseignements et des conseils erronés en sachant qu'elles s'y fieraient, ce qu'elles ont d'ailleurs fait.

[52] Il s'agit de déterminer si les actes de procédure mentionnés ci-dessus font en sorte que les compagnies de tabac répondent aux conditions d'un lien spécial selon le droit en matière de déclaration inexacte faite par négligence qui sont énoncées dans *Hercules Managements*. Comme je l'ai mentionné, un lien spécial est établi lorsque (1) le défendeur doit raisonnablement prévoir que le demandeur se fiera à sa déclaration, et que (2) la confiance accordée par le demandeur serait raisonnable dans les circonstances. En l'espèce, les faits allégués révèlent que le Canada et les compagnies de tabac entretiennent depuis longtemps des rapports qui peuvent remplir ces conditions.

[53] Ce qu'on reproche au Canada, c'est que Santé Canada a exercé des fonctions distinctes de celles prévues par sa loi habilitante, y compris des recherches sur le tabac et des produits du tabac ainsi que la conception et la promotion du tabac et des produits du tabac (déclaration de mise en cause d'Imperial dans l'*Affaire du recouvrement des coûts*, d.a., vol. II, p. 66). Il est aussi allégué qu'Agriculture Canada a mis en œuvre un programme de coopération et de soutien destiné aux producteurs de tabac et aux fabricants de cigarettes, notamment en avisant ces derniers de la teneur en nicotine que devrait avoir le tabac utilisé pour la fabrication des produits du tabac. On allègue que des fonctionnaires ont fait appel à leurs connaissances et à leur expertise dans les domaines de l'usage du tabac et de la santé pour fournir à la fois des avis et des

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designed and developed by officials of Agriculture Canada and sold or licensed to the manufacturers for use in their tobacco products would not increase health risks to consumers or otherwise be harmful to them (*ibid*., at pp. 109-10). Thus, what is alleged is not simply that broad powers of regulation were brought to bear on the tobacco industry, but that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials.

instructions aux fabricants, en les avisant notamment que les souches de tabac conçues et mises au point par des fonctionnaires d'Agriculture Canada, qui leur ont été vendues ou pour lesquelles des licences leur ont été octroyées, n'exposeraient pas les consommateurs à des dangers accrus pour leur santé, ni ne leur seraient autrement néfastes (*ibid*., p. 109-110). Par conséquent, on allègue non seulement que l'exercice de larges pouvoirs de réglementation a eu des répercussions sur l'industrie du tabac, mais aussi que le Canada a joué un rôle de conseiller auprès d'un nombre déterminé de fabricants et a entretenu des rapports commerciaux avec les sociétés en cause compte tenu, en partie, des avis fournis à ces dernières par des fonctionnaires.

[54] What is alleged with respect to Canada's interactions with the manufacturers goes far beyond the sort of statements made by Canada to the public at large. Canada is alleged to have had specific interactions with the manufacturers in contrast to the absence of such specific interactions between Canada and the class members. Whereas the claims in relation to consumers must be founded on a statutory framework establishing very general duties to the public, the claims alleged in relation to the manufacturers are not alleged to arise primarily from such general regulatory duties and powers but from roles undertaken specifically in relation to the manufacturers by Canada apart from its statutory duties, namely its roles as designer, developer, promoter and licensor of tobacco strains. With respect to the issue of reasonable reliance, Canada's regulatory powers over the manufacturers, coupled with its specific advice and its commercial involvement, could be seen as supporting a conclusion that reliance was reasonable in the pleaded circumstance.

[54] Les allégations relatives aux rapports entre le Canada et les fabricants vont bien au-delà des déclarations que fait le Canada au grand public. Les rapports précis qu'aurait entretenus le Canada avec les fabricants se distinguent de l'absence de pareils rapports entre le Canada et les membres du groupe. Alors que les allégations relatives aux consommateurs doivent reposer sur un cadre législatif établissant des obligations fort générales envers le public, les allégations visant les fabricants découleraient principalement, non pas de tels obligations et pouvoirs généraux de réglementation, mais des fonctions exercées spécifiquement à l'égard des fabricants par le Canada, et ce, indépendamment de ses obligations légales. Il s'agit en l'occurrence de ses fonctions de concepteur, d'inventeur, et de promoteur de souches de tabac ainsi que de concédant de licence à l'égard de ces souches. Pour ce qui est de la confiance raisonnable, les pouvoirs de réglementation du Canada envers les fabricants, conjugués aux avis précis qu'il a donnés et à sa participation à des activités commerciales, pourraient être considérés comme étayant la conclusion que la confiance accordée était raisonnable dans les circonstances alléguées.

[55] The indicia of proximity offered in *Hercules Managements* for a special relationship (direct financial interest; professional skill or knowledge; advice provided in the course of business, deliberately or in response to a specific request) may not be particularly apt in the context of alleged

[55] Il se peut que les indices de proximité énoncés dans *Hercules Managements* dans le cas d'un lien spécial (intérêt financier direct, aptitudes ou connaissances professionnelles, avis donné dans le cours normal des affaires, délibérément ou en réponse à une demande précise) ne soient pas très

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negligent misrepresentations by government. I note, however, that the representations are alleged to have been made in the course of Health Canada's regulatory and other activities, not in the course of casual interaction. They were made specifically to the manufacturers who were subject to Health Canada's regulatory powers and by officials alleged to have special skill, judgment and knowledge.

utiles dans le contexte de déclarations inexactes que le gouvernement aurait faites par négligence. Je signale toutefois que ces déclarations auraient été faites dans le cours des activités de réglementation et des autres activités de Santé Canada, et non dans le cadre de rapports informels. Elles ont été faites précisément aux fabricants assujettis aux pouvoirs de réglementation de Santé Canada, par des fonctionnaires prétendument dotés d'aptitudes, d'une capacité de discernement et de connaissances particulières.

[56] Before leaving this issue, two final arguments must be considered. First, in the *Costs Recovery* case, Canada submits that there is no *prima facie* duty of care between Canada and the tobacco companies because the potential damages that the tobacco companies may incur under the *CRA* were not foreseeable. It argues that "[i]t was not reasonably foreseeable by Canada that a provincial government might create a wholly new type of civil obligation to reimburse costs incurred by a provincial health care scheme in respect of defined tobacco related wrongs, with unlimited retroactive and prospective reach" (A.F., at para. 36).

[56] Il faut examiner deux autres arguments avant de passer à une autre question. Premièrement, dans l'*Affaire du recouvrement des coûts*, le Canada soutient ne pas avoir d'obligation de diligence *prima facie* envers les compagnies de tabac parce que les dommages que peuvent subir les compagnies de tabac au titre de la *CRA* n'étaient pas prévisibles. En outre, [TRADUCTION] « [l]e Canada ne pouvait pas raisonnablement s'attendre à ce qu'un gouvernement d'une province puisse créer une obligation de droit civil entièrement nouvelle pour rembourser les coûts engagés par un régime provincial de soins de santé au titre des fautes d'un fabricant définies dans une loi et qu'il confère à cette obligation une portée rétroactive et prospective illimitée » (m.a., par. 36).

[57] In my view, Canada's argument was correctly rejected by the majority of the Court of Appeal. It is not necessary that Canada should have foreseen the precise statutory vehicle that would result in the tobacco companies' liability. All that is required is that it could have foreseen that its negligent misrepresentations would result in a harm of some sort to the tobacco companies: *Hercules Managements*, at paras. 25-26 and 42. On the facts pleaded, it cannot be ruled out that the tobacco companies may succeed in proving that Canada foresaw that the tobacco industry would incur this type of penalty for selling a more hazardous product. As held by Tysoe J.A., it is not necessary that Canada foresee that the liability would extend to health care costs specifically, or that provinces would create statutory causes of action to recover these costs. Rather, "[i]t is sufficient that Canada could have reasonably foreseen in a general way that the appellants would

[57] À mon sens, les juges majoritaires de la Cour d'appel ont eu raison de rejeter l'argument du Canada. Le Canada n'avait pas à prévoir la mesure législative précise qui engagerait la responsabilité des compagnies de tabac. Il suffit qu'il ait été à même de prévoir que ses déclarations inexactes faites par négligence causeraient un quelconque préjudice à ces compagnies : *Hercules Managements*, par. 25-26 et 42. Compte tenu des faits allégués, il n'est pas exclu que les compagnies de tabac réussissent à prouver que le Canada s'attendait à ce que l'industrie du tabac soit pénalisée de la sorte pour avoir vendu un produit plus dangereux. Comme l'a mentionné le juge Tysoe, le Canada n'avait pas à prévoir que la responsabilité viserait précisément les coûts des soins de santé, ou que des provinces créeraient un droit d'action d'origine législative pour recouvrer ces coûts. [TRADUCTION] « Il suffit que le Canada ait pu raisonnablement prévoir de

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suffer harm if the light and mild cigarettes were more hazardous to the health of smokers than regular cigarettes" (*Costs Recovery* case, at para. 78).

façon générale que les appelantes subiraient un préjudice si les cigarettes légères et douces étaient plus néfastes pour la santé des fumeurs que les cigarettes ordinaires » (l'*Affaire du recouvrement des coûts*, par. 78).

[58] Second, Canada argues that the relationship in this case does not meet the requirement of reasonable reliance because Canada was not acting in a commercial capacity, but rather as a regulator of an industry. It was therefore not reasonable for the tobacco companies to have relied on Canada as an advisor, it submits. This view was adopted by Hall J.A. in dissent, holding that "it could never have been the perception of the appellants that Canada was taking responsibility for their interests" (*Costs Recovery* case, at para. 51).

[58] Deuxièmement, le Canada fait valoir que le lien en l'espèce ne satisfait pas à la condition de la confiance raisonnable parce que le Canada agissait non pas comme une entreprise commerciale, mais plutôt comme une autorité de réglementation d'une industrie. Il n'était donc pas raisonnable, selon le Canada, que les compagnies de tabac se soient fiées à lui en qualité de conseiller. Le juge Hall, dissident, a souscrit à cette opinion, concluant que [TRADUCTION] « les appelantes n'auraient jamais pu croire que le Canada prenait la responsabilité de leurs intérêts » (l'*Affaire du recouvrement des coûts*, par. 51).

[59] In my view, this argument misconceives the reliance necessary for negligent misrepresentation under the test in *Hercules Managements*. When the jurisprudence refers to "reasonable reliance" in the context of negligent misrepresentation, it asks whether it was reasonable for the listener to rely on the speaker's statement as accurate, not whether it was reasonable to believe that the speaker is guaranteeing the accuracy of its statement. It is not plain and obvious that it was unreasonable for the tobacco companies to rely on Canada's statements about the advantages of light or mild cigarettes. In my view, Canada's argument that it was acting as a regulator does not relate to reasonable reliance, although it exposes policy concerns that should be considered at stage two of the *Anns/Cooper* test: *Hercules Managements*, at para. 41.

[59] À mon avis, cet argument dénature la confiance nécessaire en cas de déclaration inexacte faite par négligence selon le critère établi dans *Hercules Managements*. Lorsque la jurisprudence parle de « confiance raisonnable » dans le contexte d'une déclaration inexacte faite par négligence, elle pose la question de savoir s'il était raisonnable pour l'interlocuteur de se fier à l'exactitude de la déclaration, et non pas celle de savoir s'il était raisonnable de croire que l'auteur de la déclaration garantissait l'exactitude de celle-ci. Il n'est pas manifeste et évident que les compagnies de tabac se sont fiées de manière déraisonnable aux déclarations du Canada relatives aux avantages des cigarettes légères ou douces. J'estime que l'argument du Canada selon lequel il agissait en qualité d'autorité de réglementation n'a rien à voir avec la confiance raisonnable, mais il fait ressortir des considérations de politique générale qui doivent être examinées au deuxième volet du critère établi dans les arrêts *Anns* et *Cooper* : *Hercules Managements*, par. 41.

[60] In sum, I conclude that the claims between the tobacco companies and Canada should not be struck out at the first stage of the analysis. The pleadings, assuming them to be true, disclose a *prima facie* duty of care in negligent misrepresentation. However, the facts as pleaded in the *Knight*

[60] En résumé, je conclus que les allégations visant les compagnies de tabac et le Canada ne doivent pas être radiées à la première étape de l'analyse. À supposer qu'ils soient exacts, les actes de procédure révèlent l'existence d'une obligation de diligence *prima facie* d'éviter les déclarations

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case do not show a relationship between Canada and consumers that would give rise to a duty of care. That claim should accordingly be struck at this stage of the analysis.

(2) Stage Two: Conflicting Policy Considerations

[61] Canada submits that there can be no duty of care in the cases at bar because of stage-two policy considerations. It relies on four policy concerns: (1) that the alleged misrepresentations were policy decisions of the government; (2) that recognizing a duty of care would give rise to indeterminate liability to an indeterminate class; (3) that recognizing a duty of care would create an unintended insurance scheme; and (4) that allowing Imperial's claim would transfer responsibility for tobacco products to the government from the manufacturer, and the manufacturer "is best positioned to address liability for economic loss" (A.F., at para. 72).

[62] For the reasons that follow, I accept Canada's submission that its alleged negligent misrepresentations to the tobacco industry in both cases should not give rise to tort liability because of stage-two policy considerations. First, the alleged statements are protected expressions of government policy. Second, recognizing a duty of care would expose Canada to indeterminate liability.

(a) *Government Policy Decisions*

[63] Canada contends that it had a policy of encouraging smokers to consume low-tar cigarettes,

inexactes faites par négligence. Toutefois, les faits, tels qu'ils ont été plaidés dans l'*Affaire Knight*, ne démontrent pas l'existence, entre le Canada et les consommateurs, d'une relation qui donnerait naissance à une obligation de diligence. Cette allégation doit donc être radiée à cette étape de l'analyse.

(2) Deuxième étape de l'analyse : considérations de politique générale opposées

[61] Le Canada fait valoir qu'il ne peut y avoir d'obligation de diligence dans les présentes affaires en raison des considérations de politique générale qui entrent en jeu à la deuxième étape de l'analyse. Le Canada invoque à cet égard quatre considérations de cette nature : (1) les prétendues déclarations inexactes constituaient des décisions de politique générale du gouvernement; (2) la reconnaissance d'une obligation de diligence entraînerait la création d'une responsabilité indéterminée envers une catégorie indéterminée de personnes; (3) la reconnaissance d'une telle obligation aurait pour effet imprévu d'instaurer un régime d'assurance; et (4) si l'on fait droit à la demande d'Imperial, la responsabilité à l'égard des produits du tabac passerait du fabricant au gouvernement, et le fabricant [TRADUCTION] « est le mieux en mesure d'assumer la responsabilité des pertes financières » (m.a., par. 72).

[62] Pour les motifs exposés ci-après, je retiens la prétention du Canada selon laquelle les déclarations inexactes qu'il aurait faites par négligence à l'industrie du tabac dans les deux affaires ne doivent pas engager sa responsabilité délictuelle en raison des considérations de politique générale qui entrent en jeu à la deuxième étape de l'analyse. D'abord, les déclarations alléguées sont des expressions protégées de politique générale du gouvernement. Ensuite, la reconnaissance d'une obligation de diligence exposerait le Canada à une responsabilité indéterminée.

a) *Décisions de politique générale du gouvernement*

[63] Le Canada prétend qu'il avait pour politique générale d'encourager les fumeurs à consommer

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and pursuant to this policy, promoted this variety of cigarette and developed strains of low-tar tobacco. Canada argues that statements made pursuant to this policy cannot ground tort liability. It relies on the statement of Cory J. in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, that "[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors" (p. 1240).

des cigarettes à faible teneur en goudron, et qu'il a promu ce type de cigarette et développé des souches de tabac à faible teneur en goudron conformément à cette politique. Il ajoute que les déclarations faites en application de cette politique générale ne sauraient fonder une responsabilité délictuelle. Il s'appuie sur les propos suivants tenus par le juge Cory dans *Just c. Colombie-Britannique*, [1989] 2 R.C.S. 1228 : « Les véritables décisions de politique devraient être à l'abri des poursuites en responsabilité délictuelle, de sorte que les gouvernements soient libres de prendre leurs décisions en fonction de facteurs sociaux, politiques ou économiques » (p. 1240-1241).

[64] The tobacco companies, for their part, contend that Canada's actions were not matters of policy, but operational acts implementing policy, and therefore, are subject to tort liability. They submit that Canada's argument fails to account for the "facts" as pleaded in the third-party notices, namely that Canada was acting in an operational capacity, and as a participant in the tobacco industry. The tobacco companies also argue that more evidence is required to determine if the government's actions were operational or pursuant to policy, and that the matter should therefore be permitted to go to trial.

[64] Pour leur part, les compagnies de tabac prétendent que les actes du Canada ne relevaient pas de la politique générale; il s'agissait plutôt d'actes de mise en œuvre d'une politique générale qui engagent pour cette raison la responsabilité délictuelle du Canada. Selon elles, l'argument du Canada ne tient pas compte des « faits » allégués dans les avis de mise en cause, soit que le Canada exerçait une fonction opérationnelle en tant que membre de l'industrie du tabac. Les compagnies de tabac prétendent aussi qu'il faut plus d'éléments de preuve pour décider si les actes du gouvernement étaient de nature opérationnelle ou conformes à une politique générale, et que l'affaire doit être instruite pour cette raison.

[65] In the *Knight* case, the majority in the Court of Appeal, *per* Tysoe J.A., agreed with Imperial's submissions, holding that "evidence is required to determine which of the actions and statements of Canada in this case were policy decisions and which were operational decisions" (para. 52). Hall J.A. dissented; in his view, it was clear that all of Canada's initiatives were matters of government policy:

[Canada] had a responsibility, as pleaded in the Third Party Notice, to protect the health of the Canadian public including smokers. Any initiatives it took to develop less hazardous strains of tobacco, or to publish the tar and nicotine yields of different cigarette brands were directed to this end. While the development of

[65] Dans l'*Affaire Knight*, les juges majoritaires de la Cour d'appel, sous la plume du juge Tysoe, ont souscrit aux prétentions d'Imperial, affirmant qu'[TRADUCTION] « une preuve est nécessaire pour déterminer lesquels des actes et déclarations du Canada en l'espèce constituaient des décisions de politique générale et lesquels étaient des décisions opérationnelles » (par. 52). Le juge Hall était dissident; à son avis, toutes les initiatives du Canada relevaient manifestement de la politique générale du gouvernement :

[TRADUCTION] Tel qu'il est allégué dans l'avis de mise en cause, [le Canada] avait la responsabilité de protéger la santé de la population canadienne, y compris les fumeurs. Toutes les mesures qu'il a prises pour développer des souches de tabac moins dangereuses, ou pour rendre publiques les teneurs en goudron et en nicotine

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new strains of tobacco involved Agriculture Canada, in my view the government engaged in such activities as a regulator of the tobacco industry seeking to protect the health interests of the Canadian public. Policy considerations underlaid all of these various activities undertaken by departments of the federal government. [para. 100]

de différentes marques de cigarettes, visaient cet objectif. Bien qu'Agriculture Canada ait participé au développement de nouvelles souches de tabac, j'estime que le gouvernement s'est livré à pareilles activités en qualité d'autorité de réglementation de l'industrie du tabac dans le but de protéger la santé de la population canadienne. Des considérations de politique générale soustendaient l'ensemble des diverses activités susmentionnées entreprises par les ministères fédéraux. [par. 100]

[66] In order to resolve the issue of whether the alleged "policy" nature of Canada's conduct negates the *prima facie* duty of care for negligent misrepresentation established at stage one of the analysis, it is necessary to first consider several preliminary matters.

[66] Pour régler la question de savoir si la nature censément « politique » de la conduite du Canada a pour effet d'écarter l'obligation de diligence *prima facie* en matière de déclarations inexactes faites par négligence, une obligation dont l'existence a été établie à la première étape de l'analyse, il faut d'abord examiner plusieurs questions préliminaires.

(i) Conduct at Issue

[67] The first preliminary matter is the conduct at issue for purposes of this discussion. The third-party notices describe two distinct types of conduct — one that is related to the allegation of negligent misrepresentation and one that is not. The first type of conduct relates to representations by Canada that low-tar and light cigarettes were less harmful to health than other cigarettes. The second type of conduct relates to Agriculture Canada's role in developing and growing a strain of low-tar tobacco and collecting royalties on the product. In argument, the tobacco companies merged the two types of conduct, emphasizing aspects that cast Canada in the role of a business operator in the tobacco industry. However, in considering negligent misrepresentation, only the first type of conduct — conduct relevant to statements and representations made by Canada — is at issue.

(i) La conduite en cause

[67] La conduite en cause est la première question préliminaire à examiner dans le cadre de la présente analyse. Les avis de mise en cause traitent de deux types distincts de conduite : la conduite visée par l'allégation de déclaration inexacte faite par négligence et la conduite non visée par cette allégation. La première a trait aux déclarations du Canada selon lesquelles les cigarettes à faible teneur en goudron et les cigarettes légères étaient moins nuisibles pour la santé que les autres cigarettes. La deuxième conduite a trait au rôle joué par Agriculture Canada dans le développement et la culture d'une souche de tabac à faible teneur en goudron ainsi que dans la perception des redevances sur le produit. Les compagnies de tabac ont fusionné les deux types de conduite dans leur plaidoirie, en faisant ressortir des éléments qui campent le Canada dans un rôle de commerçant dans l'industrie du tabac. Toutefois, dans l'analyse des déclarations inexactes faites par négligence, seul est en cause le premier type de conduite, celui relatif aux déclarations du Canada.

(ii) Relevance of Evidence

[68] This brings us to the second and related preliminary matter — the helpfulness of evidence in resolving the question of whether the third-party claims for negligent misrepresentation should be

(ii) La pertinence de la preuve

[68] Cela nous amène à la deuxième question préliminaire connexe : l'utilité de la preuve pour déterminer s'il convient de radier les demandes de mise en cause fondées sur les déclarations inexactes faites

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struck. The majority of the Court of Appeal concluded that evidence was required to establish whether Canada's alleged misrepresentations were made pursuant to a government policy. Likewise, the tobacco companies in this Court argued strenuously that insofar as Canada was developing, growing, and profiting from low-tar tobacco, it should not be regarded as a government regulator or policy maker, but rather a business operator. Evidence was required, they urged, to determine the extent to which this was business activity.

par négligence. La Cour d'appel a conclu à la majorité qu'une preuve était nécessaire pour établir si les déclarations inexactes attribuées au Canada avaient été faites conformément à une politique générale du gouvernement. Dans la même veine, les compagnies de tabac ont soutenu vigoureusement devant notre Cour que, dans la mesure où le Canada développait et cultivait du tabac à faible teneur en goudron et en tirait profit, il devrait être considéré non pas comme une autorité de réglementation du gouvernement ou un architecte des politiques publiques, mais comme un commerçant. Les compagnies de tabac ont fait valoir avec insistance qu'une preuve était nécessaire pour déterminer la mesure dans laquelle il s'agissait d'une activité commerciale.

[69] There are two problems with this argument. The first is that, as mentioned, it relies mainly on conduct — the development and marketing of a strain of low-tar tobacco — that is not directly related to the allegation of negligent misrepresentation. The only question at this point of the analysis is whether policy considerations weigh against finding that Canada was under a duty of care to the tobacco companies to take reasonable care to accurately represent the qualities of low-tar tobacco. Whether Canada produced strains of low-tar tobacco is not directly relevant to that inquiry. The question is whether, insofar as it made statements on this matter, policy considerations militate against holding it liable for those statements.

[69] Cet argument pose problème à deux égards. Premièrement, comme je l'ai mentionné, il repose principalement sur des actes — le développement et la commercialisation d'une souche de tabac à faible teneur en goudron — qui n'ont pas de lien direct avec l'allégation de déclarations inexactes faites par négligence. La seule question qui se pose à ce stade de l'analyse est de savoir si les considérations de politique générale militent contre la conclusion que le Canada avait envers les compagnies de tabac l'obligation de prendre les mesures raisonnables pour énoncer correctement les avantages du tabac à faible teneur en goudron. La question de savoir si le Canada a produit des souches de tabac à faible teneur en goudron n'est pas directement pertinente pour cette analyse. Il s'agit plutôt de savoir si, dans la mesure où le Canada a fait des déclarations à cet égard, des considérations de politique générale nous empêcheraient de le tenir responsable de ces déclarations.

[70] The second problem with the argument is that, as discussed above, a motion to strike is, by its very nature, not dependent on evidence. The facts pleaded must be assumed to be true. Unless it is plain and obvious that on those facts the action has no reasonable chance of success, the motion to strike must be refused. To put it another way, if there is a reasonable chance that the matter as pleaded may in fact turn out not to be a matter of policy, then the application to strike must be dismissed. Doubts as to what may be proved in the

[70] Deuxièmement, comme je l'ai déjà indiqué, une requête en radiation ne dépend pas, de par sa nature, de la preuve. Les faits allégués doivent être tenus pour avérés. Le rejet de la requête en radiation s'impose, à moins qu'il ne soit évident et manifeste, d'après ces faits, que l'action n'a aucune possibilité raisonnable de succès. Autrement dit, s'il existe une possibilité raisonnable que la question alléguée s'avère en fait une question de politique générale, la requête en radiation doit alors être rejetée. Les doutes quant à ce que la preuve peut démontrer

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evidence should be resolved in favour of proceeding to trial. The question for us is therefore whether, assuming the facts pleaded to be true, it is plain and obvious that any duty of care in negligent misrepresentation would be defeated on the ground that the conduct grounding the alleged misrepresentation is a matter of government policy and hence not capable of giving rise to liability in tort.

[71] Before we can answer this question, we must consider a third preliminary issue: what constitutes a policy decision immune from review by the courts?

(iii) What Constitutes a Policy Decision Immune From Judicial Review?

[72] The question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one, upon which much judicial ink has been spilled. There is general agreement in the common law world that government policy decisions are not justiciable and cannot give rise to tort liability. There is also general agreement that governments may attract liability in tort where government agents are negligent in carrying out prescribed duties. The problem is to devise a workable test to distinguish these situations.

[73] The jurisprudence reveals two approaches to the problem, one emphasizing discretion, the other, policy, each with variations. The first approach focuses on the discretionary nature of the impugned conduct. The "discretionary decision" approach was first adopted in *Home Office v. Dorset Yacht Co.*, [1970] 2 W.L.R. 1140 (H.L.). This approach holds that public authorities should be exempt from liability if they are acting within their discretion, unless the challenged decision is irrational.

ne devraient pas empêcher la tenue d'un procès. La question dont nous sommes saisis est donc de savoir s'il ressort clairement des faits tenus pour avérés qu'une obligation de faire diligence afin d'éviter les déclarations inexactes faites par négligence serait écartée parce que la conduite à l'origine de la déclaration inexacte alléguée relève d'une politique générale du gouvernement et n'est donc pas susceptible d'engager la responsabilité délictuelle de son auteur.

[71] Pour être en mesure de répondre à cette question, nous devons examiner une troisième question préliminaire : en quoi consiste une décision de politique générale soustraite au contrôle judiciaire?

(iii) Les décisions de politique générale soustraites au contrôle judiciaire

[72] La question de savoir en quoi consiste une décision de politique générale qui écarte généralement toute responsabilité pour négligence est une question épineuse qui a fait couler beaucoup d'encre. Les tribunaux de common law de partout dans le monde s'entendent généralement pour dire que les décisions de politique générale des gouvernements ne sont pas justiciables et ne peuvent engager la responsabilité délictuelle de ces derniers. On s'entend aussi généralement pour dire que la responsabilité délictuelle de l'État peut être engagée lorsque ses mandataires exercent de façon négligente des fonctions prescrites. La difficulté tient à l'élaboration d'un critère qui permette de distinguer ces situations.

[73] La jurisprudence révèle l'existence de deux méthodes d'analyse utilisées pour résoudre cette difficulté, l'une étant axée sur la notion de pouvoir discrétionnaire, et l'autre sur la notion de politique générale, et chacune a ses propres variantes. La première méthode met l'accent sur la nature discrétionnaire de la conduite reprochée. La méthode fondée sur la [TRADUCTION] « décision discrétionnaire » a été retenue pour la première fois dans *Home Office c. Dorset Yacht Co.*, [1970] 2 W.L.R. 1140 (H.L.). Selon cette méthode, les autorités publiques doivent être exonérées de toute responsabilité lorsqu'elles agissent dans l'exercice de leur pouvoir discrétionnaire, à moins que la décision attaquée ne soit irrationnelle.

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[74] The second approach emphasizes the "policy" nature of protected state conduct. Policy decisions are conceived of as a subset of discretionary decisions, typically characterized as raising social, economic and political considerations. These are sometimes called "true" or "core" policy decisions. They are exempt from judicial consideration and cannot give rise to liability in tort, provided they are neither irrational nor taken in bad faith. A variant of this is the policy/operational test, in which "true" policy decisions are distinguished from "operational" decisions, which seek to implement or carry out settled policy. To date, the policy/operational approach is the dominant approach in Canada: *Just*; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145.

[74] La seconde méthode insiste sur la qualité de « politique générale » de la conduite de l'État bénéficiant d'une protection. On considère que les décisions de politique générale forment un sous-groupe de décisions discrétionnaires, qui font habituellement intervenir des considérations d'ordre social, économique et politique. Elles sont parfois qualifiées de « véritables » décisions de politique générale ou décisions de politique générale « fondamentale ». Les décisions de politique générale sont soustraites au contrôle judiciaire et ne peuvent engager la responsabilité délictuelle de l'État, sauf si elles sont irrationnelles ou ont été prises de mauvaise foi. Une variante de cette méthode est le critère politique générale-opérations, lequel fait la distinction entre les « véritables » décisions de politique générale et les décisions « opérationnelles », qui visent la mise en œuvre ou l'application d'une politique générale établie. De nos jours, c'est le critère politique générale-opérations qui prévaut au Canada : *Just*; *Brown c. Colombie-Britannique (Ministre des Transports et de la Voirie)*, [1994] 1 R.C.S. 420; *Swinamer c. Nouvelle-Écosse (Procureur général)*, [1994] 1 R.C.S. 445; *Lewis (Tutrice à l'instance de) c. Colombie-Britannique*, [1997] 3 R.C.S. 1145.

[75] To complicate matters, the concepts of discretion and policy overlap and are sometimes used interchangeably. Thus Lord Wilberforce in *Anns* defined policy as a synonym for discretion (p. 754).

[75] Pour compliquer les choses, les notions de pouvoir discrétionnaire et de politique générale se chevauchent et sont parfois employées de manière interchangeable. Ainsi, dans *Anns*, lord Wilberforce a décrit la notion de politique générale comme étant synonyme de pouvoir discrétionnaire (p. 754).

[76] There is wide consensus that the law of negligence must account for the unique role of government agencies: *Just*. On the one hand, it is important for public authorities to be liable in general for their negligent conduct in light of the pervasive role that they play in all aspects of society. Exempting all government actions from liability would result in intolerable outcomes. On the other hand, "the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions": *Just*, at p. 1239. The challenge,

[76] On admet généralement que le droit de la négligence doit prendre en compte le rôle unique des organismes gouvernementaux : *Just*. D'une part, il importe que les organismes publics soient responsables en général de leur négligence compte tenu du grand rôle qu'ils jouent dans tous les aspects de la vie en société. Soustraire les gouvernements à toute responsabilité pour leurs actes entraînerait des conséquences inacceptables. Par contre, « la Couronne n'est pas une personne et elle doit pouvoir être libre de gouverner et de prendre de véritables décisions de politique sans encourir pour autant une

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to repeat, is to fashion a just and workable legal test.

[77] The main difficulty with the "discretion" approach is that it has the potential to create an overbroad exemption for the conduct of government actors. Many decisions can be characterized as to some extent discretionary. For this reason, this approach has sometimes been refined or replaced by tests that narrow the scope of the discretion that confers immunity.

[78] The main difficulty with the policy/operational approach is that courts have found it notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line. Even low-level state employees may enjoy some discretion related to how much money is in the budget or which of a range of tasks is most important at a particular time. Is the decision of a social worker when to visit a troubled home, or the decision of a snow-plow operator when to sand an icy road, a policy decision or an operational decision? Depending on the circumstances, it may be argued to be either or both. The policy/operational distinction, while capturing an important element of why some government conduct should generally be shielded from liability, does not work very well as a legal test.

[79] The elusiveness of a workable test to define policy decisions protected from judicial review is captured by the history of the issue in various courts. I begin with the House of Lords. The House initially adopted the view that all discretionary decisions of government are immune, unless they are irrational: *Dorset Yacht*. It then moved on to a two-stage test that asked first whether the decision was discretionary and, if so, rational; and asked second whether it was a core policy decision,

responsabilité civile délictuelle » : *Just*, p. 1239. La difficulté, encore une fois, consiste à formuler un critère juridique équitable et utile.

[77] La principale difficulté que pose la méthode d'analyse fondée sur la notion de « décision discrétionnaire » réside dans la possibilité qu'elle applique à la conduite des acteurs gouvernementaux une exemption trop générale. Bien des décisions peuvent être qualifiées de discrétionnaires dans une certaine mesure. Cette méthode d'analyse a donc parfois été peaufinée ou remplacée par des critères restreignant le pouvoir discrétionnaire qui dégage son titulaire de toute responsabilité.

[78] La principale difficulté que pose le critère politique générale-opérations tient au fait qu'il est notoirement difficile pour les tribunaux de décider si une décision gouvernementale donnée relève d'une politique générale ou des opérations. Même des fonctionnaires aux échelons inférieurs peuvent jouir d'un certain pouvoir discrétionnaire pour ce qui est d'établir le montant des fonds disponibles ou de décider quelle tâche parmi d'autres revêt le plus d'importance à un moment donné. La décision d'un travailleur social quant au moment de rendre visite à une famille perturbée, ou celle d'un conducteur de chasse-neige quant au moment d'épandre du sable sur une route glacée, sont-elles des décisions de politique générale ou des décisions opérationnelles? On peut soutenir que les deux réponses sont bonnes, selon les circonstances. Bien qu'elle illustre un facteur clé en raison duquel certains actes du gouvernement doivent généralement être à l'abri de toute responsabilité, la distinction politique générale-opérations ne constitue pas un critère juridique très utile.

[79] L'historique du traitement de la question par différents tribunaux illustre la difficulté que présente l'élaboration d'un critère utile pour décrire les décisions de politique générale soustraites au contrôle judiciaire. Commençons par la Chambre des lords, qui estimait au départ que toutes les décisions discrétionnaires du gouvernement qui ne sont pas irrationnelles sont soustraites au contrôle judiciaire : *Dorset Yacht*. Elle a ensuite appliqué un critère à deux volets, en se demandant en

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in which case it was entirely exempt from judicial scrutiny: *X v. Bedfordshire County Council*, [1995] 3 All E.R. 353. Within a year of adopting this two-stage test, the House abandoned it with a ringing declamation of the policy/operational distinction as unworkable in difficult cases, a point said to be evidenced by the Canadian jurisprudence: *Stovin v. Wise*, [1996] A.C. 923 (H.L.), *per* Lord Hoffmann. In its most recent foray into the subject, the House of Lords affirmed that both the policy/operational distinction and the discretionary decision approach are valuable tools for discerning which government decisions attract tort liability, but held that the final test is a "justiciability" test: *Barrett v. Enfield London Borough Council*, [2001] 2 A.C. 550. The ultimate question on this test is whether the court is institutionally capable of deciding on the question, or "whether the court should accept that it has no role to play" (p. 571). Thus at the end of the long judicial voyage the traveller arrives at a test that essentially restates the question. When should the court hold that a government decision is protected from negligence liability? When the court concludes that the matter is one for the government and not the courts.

premier lieu si la décision était discrétionnaire et, dans l'affirmative, si elle était rationnelle; elle s'est demandé en second lieu s'il s'agissait d'une décision de politique fondamentale, et donc entièrement soustraite à l'examen judiciaire : *X c. Bedfordshire County Council*, [1995] 3 All E.R. 353. Moins d'un an après avoir retenu ce critère à deux volets, la Chambre des lords l'a laissé tomber en déclamant de manière retentissante que le critère politique générale-opérations était inapplicable dans les cas difficiles, ce dont témoignerait la jurisprudence canadienne : *Stovin c. Wise*, [1996] A.C. 923 (H.L.), lord Hoffmann. Lors de sa dernière incursion dans ce domaine, la Chambre des lords a mentionné que tant le critère politique générale-opérations que l'analyse fondée sur la notion de décision discrétionnaire sont utiles pour déterminer les décisions du gouvernement qui engagent la responsabilité délictuelle de celui-ci, mais elle a jugé que le critère final en est un de « justiciabilité » : *Barrett c. Enfield London Borough Council*, [2001] 2 A.C. 550. Selon ce critère, il s'agit de savoir, en définitive, si le tribunal est habile, sur le plan institutionnel, à trancher la question ou [TRADUCTION] « si le tribunal doit reconnaître qu'il n'a pas à intervenir » (p. 571). Ainsi, à la fin de ce long périple jurisprudentiel, on se retrouve avec un critère qui ne fait que reformuler la question. Quand le tribunal doit-il juger qu'une décision gouvernementale ne donne pas prise à la responsabilité pour négligence? Quand le tribunal conclut que l'affaire est du ressort du gouvernement et non des tribunaux.

[80] Australian judges in successive cases have divided between a discretionary/irrationality model and a "true policy" model. In *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424 (H.C.), two of the justices (Gibbs C.J. and Wilson J.) adopted the *Dorset Yacht* rule that all discretionary decisions are immune, provided they are rational (p. 442). They endorsed the policy/operational distinction as a logical test for discerning which decisions should be protected, and adopted Lord Wilberforce's definition of policy as a synonym for discretion. Mason J., by contrast, held that only core policy decisions, which he viewed as a narrower subset of discretionary decisions, were protected (p. 500). Deane J. agreed with Mason J.

[80] Des juges australiens s'étant prononcés dans des décisions successives sont partagés entre le modèle décision discrétionnaire-décision irrationnelle et celui de la « véritable décision de politique générale ». Dans *Sutherland Shire Council c. Heyman* (1985), 157 C.L.R. 424 (H.C.), deux des juges (le juge en chef Gibbs et le juge Wilson) ont adopté la règle établie dans l'arrêt *Dorset Yacht*, selon laquelle toutes les décisions discrétionnaires échappent au contrôle judiciaire, pourvu qu'elles soient rationnelles (p. 442). Ils ont souscrit à la thèse que la distinction entre la politique générale et les opérations était un critère logique pour déterminer quelles décisions ne donnent pas prise à la responsabilité, et ils ont fait leur la description de lord

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for somewhat different reasons. Brennan J. did not comment on which test should be adopted, leaving the test an open question. The Australian High Court again divided in *Pyrenees Shire Council v. Day*, [1998] HCA 3, 192 C.L.R. 330, with three justices holding that a discretionary government action will only attract liability if it is irrational and two justices endorsing different versions of the policy/operational distinction.

[81] In the United States, the liability of the federal government is governed by the *Federal Tort Claims Act* of 1946, 28 U.S.C. ("*FTCA*"), which waived sovereign immunity for torts, but created an exemption for discretionary decisions. Section 2680(a) excludes liability in tort for

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, <u>or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused</u>.

Significantly, s. 2680(h) of the *FTCA* exempts the federal government from any claim of misrepresentation, either intentional or negligent: *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), at p. 430; *United States v. Neustadt*, 366 U.S. 696 (1961).

[82] Without detailing the complex history of the American jurisprudence on the issue, it suffices to say that the cases have narrowed the concept of discretion in the *FTCA* by reference to the concept of policy. Some cases develop this analysis by distinguishing between policy and operational decisions:

Wilberforce voulant que la politique générale soit synonyme de pouvoir discrétionnaire. Pour sa part, le juge Mason a affirmé que l'État bénéficiait de la protection uniquement à l'égard des décisions de politique générale fondamentale, qu'il considérait comme un sous-groupe plus restreint de décisions discrétionnaires (p. 500). Le juge Deane a souscrit à l'opinion du juge Mason, mais pour des raisons quelque peu différentes. Quant au juge Brennan, il n'a pas dit quel critère devrait être retenu, laissant cette question en suspens. La Haute Cour d'Australie était encore une fois divisée dans *Pyrenees Shire Council c. Day*, [1998] HCA 3, 192 C.L.R. 330, où trois juges ont conclu qu'une mesure gouvernementale discrétionnaire n'engage la responsabilité de l'État que si elle est irrationnelle, et deux juges ont retenu des versions différentes du critère politique générale-opérations.

[81] Aux États-Unis, la responsabilité du gouvernement fédéral est régie par la *Federal Tort Claims Act* de 1946, 28 U.S.C. (« *FTCA* »), qui écarte l'immunité absolue à l'égard de la responsabilité délictuelle, mais crée une exemption en faveur des décisions discrétionnaires. L'alinéa 2680a) écarte la responsabilité du gouvernement à l'égard de

> [TRADUCTION] [t]oute poursuite fondée sur l'acte ou l'omission d'un fonctionnaire dans l'exécution diligente d'une loi ou d'un règlement, que ces derniers soient ou non valides, <u>ou fondée sur l'exercice ou le défaut d'exercice d'une fonction ou d'un pouvoir discrétionnaire de la part d'un organisme fédéral ou d'un fonctionnaire, qu'il y ait eu ou non exercice abusif de ce pouvoir discrétionnaire</u>.

Fait important, l'al. 2680h) de la *FTCA* soustrait le gouvernement fédéral à toute poursuite pour déclaration inexacte, faite délibérément ou par négligence : *Office of Personnel Management c. Richmond*, 496 U.S. 414 (1990), p. 430; *United States c. Neustadt*, 366 U.S. 696 (1961).

[82] Sans entrer dans les détails de l'historique complexe de la jurisprudence américaine en la matière, il suffit de dire que les tribunaux ont restreint le concept de pouvoir discrétionnaire énoncé dans la *FTCA* en invoquant la notion de politique générale. Dans certaines décisions, ils développent

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e.g., *Dalehite v. United States*, 346 U.S. 15 (1953). The Supreme Court of the United States has since distanced itself from the approach of defining a true policy decision negatively as "not operational", in favour of an approach that asks whether the impugned state conduct was based on public policy considerations. In *United States v. Gaubert*, 499 U.S. 315 (1991), White J. faulted the Court of Appeals for relying on "a nonexistent dichotomy between discretionary functions and operational activities" (p. 326). He held that the "discretionary function exception" of the *FTCA* "<u>protects only governmental actions and decisions based on considerations of public policy</u>" (at p. 323, citing *Berkovitz v. United States*, 486 U.S. 531 (1988), at p. 537 (emphasis added)), such as those involving social, economic and political considerations: see also *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984).

cette analyse en distinguant les décisions de politique générale des décisions opérationnelles : p. ex. *Dalehite c. United States*, 346 U.S. 15 (1953). La Cour suprême des États-Unis s'est depuis distanciée de l'approche qui consiste à décrire de façon négative une véritable décision de politique générale comme une décision [TRADUCTION] « n'étant pas de nature opérationnelle » et favorise une approche visant à déterminer si la conduite contestée de l'État reposait sur des considérations d'intérêt public. Dans *United States c. Gaubert*, 499 U.S. 315 (1991), le juge White a reproché à la Court of Appeals de se fonder sur une [TRADUCTION] « dichotomie inexistante entre les fonctions discrétionnaires et les activités opérationnelles » (p. 326). Selon lui, l'« exception relative aux fonctions discrétionnaires » prévue par la *FTCA* « <u>ne vise que les mesures et les décisions du gouvernement qui reposent sur des considérations d'intérêt public</u> » (p. 323, citant *Berkovitz c. United States*, 486 U.S. 531 (1988), p. 537 (je souligne)), comme celles faisant intervenir des considérations sociales, économiques ou politiques; voir aussi *United States c. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984).

[83] In *Gaubert*, only Scalia J. found lingering appeal in defining policy decisions as "not operational", but only in the narrow sense that people at the operational level will seldom make policy decisions. He stated that "there is something to the planning vs. operational dichotomy — though . . . not precisely what the Court of Appeals believed" (p. 335). That "something" is that "[o]rdinarily, an employee working at the operational level is not responsible for policy decisions, even though policy considerations may be highly relevant to his actions". For Scalia J., a government decision is a protected policy decision if it "ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations".

[83] Dans *Gaubert*, seul le juge Scalia trouvait encore attrayante l'idée de définir les décisions de politique générale comme des décisions [TRADUCTION] « n'étant pas de nature opérationnelle », mais seulement au sens strict selon lequel les employés au niveau opérationnel prennent rarement des décisions de politique générale. Selon lui, [TRADUCTION] « un facteur intervient dans la dichotomie entre la planification et les opérations [. . .] mais ce n'est pas tout à fait ce que les cours d'appel avaient en tête » (p. 335). Ce « facteur », c'est que, « [h]abituellement, un employé au niveau opérationnel n'a pas à prendre des décisions de politique générale, même si ses actes peuvent être étroitement liés à des considérations de cette nature ». D'après le juge Scalia, une décision du gouvernement constitue une décision de politique générale bénéficiant de protection si elle « doit tenir compte de considérations sociales, économiques ou politiques et si elle est prise par un fonctionnaire dont l'une des responsabilités officielles consiste à évaluer ces considérations ».

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[84] A review of the jurisprudence provokes the following observations. The first is that a test based simply on the exercise of government discretion is generally now viewed as too broad. Discretion can imbue even routine tasks, like driving a government vehicle. To protect all government acts that involve discretion unless they are irrational simply casts the net of immunity too broadly.

[84] Les observations suivantes s'imposent comme suite à l'analyse de la jurisprudence. Premièrement, un critère fondé uniquement sur l'exercice du pouvoir discrétionnaire du gouvernement est maintenant perçu par la plupart des tribunaux comme étant trop général. Même les tâches courantes, comme la conduite d'un véhicule du gouvernement, peuvent requérir l'exercice d'un certain pouvoir discrétionnaire. Soustraire à l'examen judiciaire tous les actes de l'administration publique qui font intervenir un pouvoir discrétionnaire, pourvu qu'ils ne soient pas irrationnels, a pour effet de donner une portée trop large à l'immunité.

[85] The second observation is that there is considerable support in all jurisdictions reviewed for the view that "true" or "core" policy decisions should be protected from negligence liability. The current Canadian approach holds that only "true" policy decisions should be so protected, as opposed to operational decisions: *Just*. The difficulty in defining such decisions does not detract from the fact that the cases keep coming back to this central insight. Even the most recent "justiciability" test in the U.K. looks to this concept for support in defining what should be viewed as justiciable.

[85] Deuxièmement, un grand nombre de tribunaux dans tous les ressorts visés par l'analyse s'entendent pour dire que l'État devrait être soustrait à toute responsabilité pour négligence dans les cas de « véritables » décisions de politique générale ou de décisions de politique générale « fondamentale ». Selon le point de vue qui prévaut au Canada, seules les « véritables » décisions de politique générale (par opposition aux décisions opérationnelles) ne devraient pas donner prise à cette responsabilité : *Just*. La difficulté liée à la détermination des décisions de cette nature ne change rien au fait que les tribunaux s'en remettent encore à ces indications essentielles. Même le critère de « justiciabilité » établi tout récemment au Royaume-Uni s'inspire de ce concept pour déterminer ce qui doit être perçu comme étant justiciable.

[86] A third observation is that defining a core policy decision negatively as a decision that is not an "operational" decision may not always be helpful as a stand-alone test. It posits a stark dichotomy between two water-tight compartments — policy decisions and operational decisions. In fact, decisions in real life may not fall neatly into one category or the other.

[86] Troisièmement, le fait de définir négativement une décision de politique générale fondamentale comme une décision n'étant pas de nature « opérationnelle » ne constitue peut-être pas un critère distinct utile dans tous les cas. Ce critère suppose une nette dichotomie entre deux compartiments étanches : les décisions de politique générale et les décisions opérationnelles. Dans les faits, il est possible que les décisions n'appartiennent pas clairement à l'une ou l'autre de ces catégories.

[87] Instead of defining protected policy decisions negatively, as "not operational", the majority in *Gaubert* defines them positively as discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and

[87] Au lieu de définir négativement les décisions de politique générale à l'abri de l'examen judiciaire comme des décisions [TRADUCTION] « n'étant pas de nature opérationnelle », les juges majoritaires dans *Gaubert* les décrivent positivement comme

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political considerations. Generally, policy decisions are made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. The decision is a considered decision that represents a "policy" in the sense of a general rule or approach, applied to a particular situation. It represents "a course or principle of action adopted or proposed by a government": *New Oxford Dictionary of English* (1998), at p. 1434. When judges are faced with such a course or principle of action adopted by a government, they generally will find the matter to be a policy decision. The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.

[88] Policy, used in this sense, is not the same thing as discretion. Discretion is concerned with whether a particular actor had a choice to act in one way or the other. Policy is a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations, like economic, social and political considerations. Policy decisions are always discretionary, in the sense that a different policy could have been chosen. But not all discretionary decisions by government are policy decisions.

[89] While the main focus on the *Gaubert* approach is on the nature of the decision, the role of the person who makes the decision may be of assistance. Did the decision maker have the responsibility of looking at social, economic or political factors and formulating a "course" or "principle" of action with respect to a particular problem facing the government? Without suggesting that

étant des décisions et des mesures discrétionnaires d'ordre législatif ou administratif qui se fondent sur des considérations sociales, économiques ou politiques. Les décisions de politique générale sont habituellement prises par le législateur ou un fonctionnaire tenu officiellement d'évaluer et de mettre en balance des considérations d'intérêt public. La décision est réfléchie et traduit une « politique générale » dans le sens d'une règle ou orientation générale appliquée dans une situation précise. La politique désigne une « ligne de conduite adoptée par un organisme [. . .] public » : *Multidictionnaire de la langue française*, p. 1261. Les juges saisis d'une pareille ligne de conduite adoptée par un organisme public estiment généralement qu'il s'agit d'une décision de politique générale. Il appartient véritablement au gouvernement, et non aux tribunaux, de mettre en balance des considérations sociales, économiques et politiques pour en arriver à une ligne de conduite. C'est pourquoi les décisions et les actes reposant sur ces considérations ne sauraient fonder une action en responsabilité délictuelle.

[88] Utilisée dans ce sens, la notion de politique générale diffère de la notion de pouvoir discrétionnaire. Un tel pouvoir dépend de la question de savoir si un acteur donné a la faculté de choisir d'agir d'une façon ou d'une autre. Les politiques générales forment un sous-ensemble restreint de décisions discrétionnaires, et n'englobent que les décisions fondées sur des considérations d'intérêt public, comme des considérations d'ordre économique, social ou politique. Toutes les décisions de politique générale sont discrétionnaires, en ce sens qu'une politique différente aurait pu être retenue. Toutefois, les décisions discrétionnaires du gouvernement ne sont pas toutes des décisions de politique générale.

[89] Bien que l'approche préconisée dans *Gaubert* mette l'accent sur la nature de la décision, le rôle du décideur peut se révéler utile. Ce dernier était-il chargé d'étudier les facteurs sociaux, économiques ou politiques et d'élaborer une « ligne de conduite » à l'égard d'un problème auquel fait face le gouvernement? Sans prétendre qu'il est possible de répondre à la question en invoquant

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the question can be resolved simply by reference to the rank of the actor, there is something to Scalia J.'s observation in *Gaubert* that employees working at the operational level are not usually involved in making policy choices.

[90] I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

[91] Applying this approach to motions to strike, we may conclude that where it is "plain and obvious" that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort. If it is not plain and obvious, the matter must be allowed to go to trial.

simplement le niveau hiérarchique du décideur, on peut s'inspirer de l'observation faite par le juge Scalia dans *Gaubert* selon laquelle les employés au niveau opérationnel ne participent habituellement pas à la prise de décisions de politique générale.

[90] Je conclus que les décisions de « politique générale fondamentale » du gouvernement à l'égard desquelles ce dernier est soustrait aux poursuites se rapportent à une ligne de conduite et reposent sur des considérations d'intérêt public, tels des facteurs économiques, sociaux ou politiques, pourvu qu'elles ne soient ni irrationnelles ni prises de mauvaise foi. Cette approche concorde avec le message essentiel de la jurisprudence canadienne à cet égard, bien qu'elle fasse ressortir des caractéristiques positives des décisions de politique générale, au lieu de se fonder exclusivement sur le fait qu'elles ne sont pas de « nature opérationnelle ». Elle est aussi étayée par les réflexions faites dans la nouvelle jurisprudence canadienne et étrangère. Cela dit, elle n'est pas censée constituer un critère décisif. On peut s'attendre à ce que surviennent de temps à autre des situations délicates où il n'est pas facile de décider si le degré de « politique générale » en cause suffit à mettre une décision à l'abri de toute responsabilité pour négligence. Il serait illusoire de vouloir établir un critère absolu qui donnerait rapidement et infailliblement une réponse à l'égard de toute décision parmi la gamme infinie de celles que peuvent prendre les acteurs gouvernementaux. On pourra néanmoins facilement cerner la plupart des décisions gouvernementales qui représentent une ligne de conduite fondée sur une mise en balance de considérations économiques, sociales et politiques.

[91] L'application de l'approche exposée ci-dessus aux requêtes en radiation nous permet de conclure que, dans les cas où il est « évident et manifeste » qu'une décision contestée du gouvernement constitue une décision de politique générale, l'allégation peut à juste titre être radiée au motif qu'elle ne saurait fonder une action en responsabilité délictuelle. S'il n'est pas évident et manifeste qu'il s'agit d'une décision de politique générale, il faut permettre l'instruction de l'affaire.

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(iv) Conclusion on the Policy Argument

[92] As discussed, the question is whether the alleged representations of Canada to the tobacco companies that low-tar cigarettes are less harmful to health are matters of policy, in the sense that they constitute a course or principle of action of the government. If so, the representations cannot ground an action in tort.

[93] The third-party notices plead that Canada made statements to the public (and to the tobacco companies) warning about the hazards of smoking, and asserting that low-tar cigarettes are less harmful than regular cigarettes; that the representations that low-tar cigarettes are less harmful to health were false; and that insofar as consumption caused extra harm to consumers for which the tobacco companies are held liable, Canada is required to indemnify the tobacco companies and/or contribute to their losses.

[94] The third-party notices implicitly accept that in making the alleged representations, Health Canada was acting out of concern for the health of Canadians, pursuant to its policy of encouraging smokers to switch to low-tar cigarettes. They assert, in effect, that Health Canada had a policy to warn the public about the hazardous effects of smoking, and to encourage healthier smoking habits among Canadians. The third-party claims rest on the allegation that Health Canada accepted that some smokers would continue to smoke despite the adverse health effects, and decided that these smokers should be encouraged to smoke lower-tar cigarettes.

[95] In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a "true" or "core" policy, in the sense of a course or principle of action that the government

(iv) Conclusion sur l'argument relatif à la politique générale

[92] Comme je l'ai indiqué, il s'agit de savoir si les déclarations qu'auraient faites le Canada aux compagnies de tabac, selon lesquelles les cigarettes à faible teneur en goudron sont moins nuisibles pour la santé, sont des questions de politique générale, en ce sens qu'elles constituent une ligne de conduite du gouvernement. Dans l'affirmative, ces déclarations ne peuvent fonder une action en responsabilité délictuelle.

[93] On soutient dans les avis de mise en cause que le Canada a mis en garde la population (et les compagnies de tabac) contre les dangers de l'usage du tabac et a affirmé que les cigarettes à faible teneur en goudron sont moins nocives que les cigarettes ordinaires. On soutient aussi que ces déclarations étaient fausses et que, dans la mesure où l'usage du tabac a causé aux consommateurs un préjudice additionnel dont sont tenues responsables les compagnies de tabac, le Canada doit indemniser celles-ci ou éponger une partie de leurs pertes.

[94] Les avis de mise en cause concèdent implicitement que Santé Canada a fait les déclarations qu'on lui attribue par souci pour la santé des Canadiens et Canadiennes, conformément à sa politique d'inciter les fumeurs à opter pour des cigarettes à faible teneur en goudron. Ils mentionnent en fait que Santé Canada avait pour politique de mettre en garde la population contre les effets nocifs de l'usage du tabac, et d'encourager les Canadiens et Canadiennes à fumer plus sainement. Les demandes de mise en cause reposent sur l'allégation que Santé Canada s'est résigné à ce que certaines personnes continuent de fumer malgré les effets nuisibles de cette habitude sur leur santé, et a décidé qu'il convenait de les inciter à fumer des cigarettes à faible teneur en goudron.

[95] En bref, les déclarations sur lesquelles s'appuient les demandes de mise en cause faisaient partie intégrante d'une politique générale du gouvernement visant à inciter les personnes qui continuaient de fumer à opter pour des cigarettes à faible teneur en goudron. Il s'agissait d'une « véritable »

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adopted. The government's alleged course of action was adopted at the highest level in the Canadian government, and involved social and economic considerations. Canada, on the pleadings, developed this policy out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease. In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies' claims against Canada for negligent misrepresentation must be struck out.

politique générale ou d'une politique générale « fondamentale » au sens d'une ligne de conduite adoptée par le gouvernement. La ligne de conduite gouvernementale alléguée a été adoptée par les plus hautes instances du gouvernement canadien et mettait en jeu des considérations sociales et économiques. Selon les actes de procédure, le Canada a élaboré cette politique par souci pour la santé des Canadiens et Canadiennes et en raison des coûts individuels et institutionnels associés aux maladies causées par le tabac. Il m'apparaît évident et manifeste que les déclarations alléguées relevaient de la politique générale du gouvernement, de sorte que les allégations de déclarations inexactes faites par négligence qu'ont formulées les compagnies de tabac à l'encontre du Canada doivent être radiées.

[96] Having concluded that the claims for negligent misrepresentation are not actionable because the alleged representations were matters of government policy, it is not necessary to canvas the other stage-two policy grounds that Canada raised against the third-party claims relating to negligent misrepresentation. However, since the argument about indeterminate liability was fully argued, I will briefly discuss it. In my view, it confirms that no liability in tort should be recognized for Canada's alleged misrepresentations.

[96] Vu ma conclusion que les allégations de déclarations inexactes faites par négligence ne peuvent fonder une action parce que les déclarations alléguées relevaient de la politique générale du gouvernement, point n'est besoin de passer en revue les autres motifs de politique générale — liés à la deuxième étape de l'analyse — qu'a invoqués le Canada à l'encontre des demandes de mise en cause pour déclarations inexactes faites par négligence. Mais, comme l'argument relatif à la responsabilité indéterminée a été débattu à fond, je vais l'analyser brièvement. À mon avis, cet argument confirme que la responsabilité délictuelle du Canada ne doit pas être reconnue à l'égard des déclarations inexactes qu'il aurait faites.

(b) *Indeterminate Liability*

b) *Responsabilité indéterminée*

[97] Canada submits that allowing the defendants' claims in negligent misrepresentation would result in indeterminate liability, and must therefore be rejected. It submits that Canada had no control over the number of cigarettes being sold. It argues that in cases of economic loss, the courts must limit liability to cases where the third party had a means of controlling the extent of liability.

[97] Le Canada soutient que, si l'on accepte les allégations des défenderesses en matière de déclaration inexacte faite par négligence, cela entraînerait une responsabilité indéterminée de sa part, et qu'il faut donc les rejeter. Le Canada affirme que le nombre de cigarettes vendues était indépendant de sa volonté. En outre, dans les cas de perte financière, les tribunaux ne doivent conclure à la responsabilité du mis en cause que lorsque celui-ci est à même d'en contrôler la portée.

[98] The tobacco companies respond that Canada faces extensive, but not indeterminate liability.

[98] Les compagnies de tabac répondent que la responsabilité à laquelle s'expose le Canada est

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They submit that the scope of Canada's liability to tobacco companies is circumscribed by the tort of negligent misrepresentation. Canada would only be liable to the smokers of light cigarettes and to the tobacco companies.

considérable, mais non indéterminée. Selon les compagnies de tabac, la responsabilité du Canada envers elles se limite au délit de déclaration inexacte faite par négligence. Le Canada ne serait responsable qu'envers les fumeurs de cigarettes légères et les compagnies de tabac.

[99] I agree with Canada that the prospect of indeterminate liability is fatal to the tobacco companies' claims of negligent misrepresentation. Insofar as the claims are based on representations to consumers, Canada had no control over the number of people who smoked light cigarettes. This situation is analogous to *Cooper*, where this Court held that it would have declined to apply a duty of care to the Registrar of Mortgage Brokers in respect of economic losses suffered by investors because "[t]he Act itself imposes no limit and the Registrar has no means of controlling the number of investors or the amount of money invested in the mortgage brokerage system" (para. 54). While this statement was made in *obiter*, the argument is persuasive.

[99] Je suis d'accord avec le Canada pour dire que la possibilité d'une responsabilité indéterminée porte un coup fatal aux allégations des compagnies de tabac relatives aux déclarations inexactes faites par négligence. Dans la mesure où les allégations reposent sur des déclarations faites aux consommateurs, le Canada n'exerçait aucun contrôle sur le nombre de fumeurs de cigarettes légères. Cette situation est analogue à celle dans l'arrêt *Cooper* dans lequel notre Cour a affirmé qu'elle aurait refusé d'attribuer au registrateur des courtiers en hypothèques une obligation de diligence à l'égard des pertes financières subies par les investisseurs, parce que « [l]a Loi elle-même n'impose aucune limite au nombre des investisseurs et aux montants d'argent investis dans le système de courtage en hypothèques, et le registrateur ne dispose d'aucun moyen pour les contrôler » (par. 54). Cette affirmation constituait une remarque incidente, mais il s'agit d'un argument convaincant.

[100] The risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss. In *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, the Court, *per* Rothstein J., held that "in cases of pure economic loss, to paraphrase Cardozo C.J., care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate" (para. 62). If Canada owed a duty of care to consumers of light cigarettes, the potential class of plaintiffs and the amount of liability would be indeterminate.

[100] Le risque de responsabilité indéterminée est aggravé par le caractère purement financier de la perte alléguée. Dans *Design Services Ltd. c. Canada*, 2008 CSC 22, [2008] 1 R.C.S. 737, sous la plume du juge Rothstein, la Cour a mentionné que « dans les cas de perte purement financière, il faut, pour paraphraser le juge en chef Cardozo, prendre soin de ne reconnaître une obligation que dans la mesure où l'on peut déterminer la catégorie des demandeurs, la période et les montants en cause » (par. 62). Si le Canada avait une obligation de diligence envers les fumeurs de cigarettes légères, le nombre potentiel de demandeurs et l'ampleur de la responsabilité seraient indéterminés.

[101] Insofar as the claims are based on representations to the tobacco companies, they are at first blush more circumscribed. However, this distinction breaks down on analysis. Recognizing a duty of care for representations to the tobacco

[101] Dans la mesure où les allégations reposent sur des déclarations faites aux compagnies de tabac, elles semblent plus limitées à première vue. Cette distinction ne résiste toutefois pas à l'analyse. Si l'on reconnaissait une obligation de diligence à

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companies would effectively amount to a duty to consumers, since the quantum of damages owed to the companies in both cases would depend on the number of smokers and the number of cigarettes sold. This is a flow-through claim of negligent misrepresentation, where the tobacco companies are passing along their potential liability to consumers and to the province of British Columbia. In my view, in both cases, these claims should fail because Canada was not in control of the extent of its potential liability.

l'égard des déclarations faites aux compagnies de tabac, cela reviendrait effectivement à reconnaître une obligation envers les consommateurs, vu que le montant des dommages-intérêts dus aux compagnies de tabac dans les deux cas dépendrait du nombre de fumeurs et du nombre de cigarettes vendues. Il s'agit d'allégations de déclaration inexacte faite par négligence par lesquelles les compagnies de tabac détournent leur responsabilité potentielle vers les consommateurs et la province de la Colombie-Britannique. À mon avis, il faut rejeter ces allégations dans les deux cas, parce que le Canada n'avait aucune prise sur l'ampleur de sa responsabilité potentielle.

(c) *Summary on Stage-Two Policy Arguments*

c) *Résumé quant aux arguments de politique générale soulevés à la deuxième étape de l'analyse*

[102] In my view, this Court should strike the negligent misrepresentation claims in both cases as a result of stage-two policy concerns about interfering with government policy decisions and the prospect of indeterminate liability.

[102] J'estime que notre Cour doit radier les allégations de déclarations inexactes faites par négligence dans les deux pourvois en raison de considérations de politique générale soulevées à la deuxième étape de l'analyse, à savoir l'immixtion dans les décisions de politique générale du gouvernement et la possibilité de responsabilité indéterminée.

D. *Failure to Warn*

D. *Le défaut de mise en garde*

[103] The tobacco companies make two allegations of failure to warn: B.A.T. alleges that Canada directed the tobacco companies not to provide warnings on cigarette packages (the labelling claim) about the health hazards of cigarettes; and Imperial alleges that Canada failed to warn the tobacco companies about the dangers posed by the strains of tobacco designed and licensed by Canada.

[103] Les compagnies de tabac formulent deux allégations au sujet du défaut de mise en garde : B.A.T. prétend que le Canada a interdit aux compagnies de tabac d'apposer sur les paquets de cigarettes des mises en garde (l'allégation relative à l'étiquetage) à l'égard des dangers que présentent les cigarettes pour la santé; Imperial, quant à elle, prétend que le Canada a fait défaut de mettre les compagnies de tabac en garde contre les dangers que présentent les souches de tabac conçues par le Canada et pour lesquelles il a octroyé des licences.

(1) Labelling Claim

(1) L'allégation relative à l'étiquetage

[104] B.A.T. alleges that by instructing the industry to not put warning labels on their cigarettes, Canada is liable in tort for failure to warn. In the *Knight* case, Tysoe J.A. did not address the failure

[104] B.A.T. allègue que, en donnant à l'industrie la directive de ne pas apposer de mise en garde sur ses paquets de cigarettes, le Canada a engagé sa responsabilité délictuelle pour défaut de mise en

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to warn claims. Hall J.A., writing for the minority, would have struck those claims on stage-two grounds, finding that Canada's decision was a policy decision and that liability would be indeterminate. Hall J.A. also held that liability would conflict with the government's public duties (para. 99). In the *Costs Recovery* case, Tysoe J.A. adopted Hall J.A.'s analysis from the *Knight* case in rejecting the failure to warn claim as between Canada and the tobacco companies (para. 89). B.A.T. challenges these findings.

garde. Dans l'*Affaire Knight*, le juge Tysoe n'a pas abordé les allégations relatives au défaut de mise en garde. Pour sa part, le juge Hall, exprimant l'opinion de la minorité, aurait rejeté ces allégations pour des motifs liés à l'étape deux de l'analyse, estimant que la décision du Canada était une décision de politique générale et que la responsabilité du Canada serait indéterminée. Il a aussi conclu qu'imposer cette responsabilité au gouvernement irait à l'encontre des obligations du Canada envers la population (par. 99). Dans l'*Affaire du recouvrement des coûts*, le juge Tysoe a souscrit à l'analyse faite par le juge Hall dans l'*Affaire Knight* en rejetant l'allégation relative au défaut du Canada de mettre en garde les compagnies de tabac (par. 89). B.A.T. conteste ces conclusions.

[105] The crux of this failure to warn claim is essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn.

[105] L'élément crucial de cette allégation relative au défaut de mise en garde est essentiellement le même que celui des allégations de déclarations inexactes faites par négligence, et il y a lieu de la rejeter pour les mêmes considérations de politique générale. Les recommandations du ministre de la Santé sur les mises en garde faisaient partie intégrante de la politique générale du gouvernement visant à inciter les fumeurs à opter pour des cigarettes à faible teneur en goudron. En tant que telles, elles ne peuvent fonder une action pour défaut de mise en garde.

(2) Failure to Warn Imperial About Health Hazards

(2) Le défaut de mettre Imperial en garde contre les dangers pour la santé

[106] The Court of Appeal, *per* Tysoe J.A., held that the third-party notices did not sufficiently plead that Canada failed to warn the industry about the health hazards of its strains of tobacco. Imperial argues that this was in error, because the elements of a failure to warn claim are identical to the elements of the negligence claim, which was sufficiently pleaded.

[106] S'exprimant au nom de la Cour d'appel, le juge Tysoe a conclu que l'on n'avait pas suffisamment plaidé, dans les avis de mise en cause, que le Canada avait fait défaut de mettre l'industrie en garde contre les dangers pour la santé que présentaient ses souches de tabac. Imperial prétend que cette conclusion était erronée, car les éléments de l'allégation de défaut de mise en garde sont identiques à ceux de l'allégation de négligence qui, elle, avait suffisamment été plaidée.

[107] Canada points out that the two paragraphs of the third-party notices that discuss failure to warn only mention the claims that relate to labels, and not the claim that Canada failed to

[107] Le Canada souligne que les deux paragraphes des avis de mise en cause où il est question du défaut de mise en garde ne font allusion qu'aux allégations concernant l'étiquetage, et non à l'allégation

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warn Imperial about potential health hazards of the tobacco strains. Canada also argues that to support a claim of failure to warn, the plaintiff must not only show that the defendant acted negligently, but that the defendant was also under a positive duty to act. It submits that nothing in the third-party notices suggests that Canada was under such a positive duty here.

que le Canada a fait défaut de mettre Imperial en garde contre les dangers possibles pour la santé que présentaient les souches de tabac. Le Canada soutient également que pour étayer une allégation de défaut de mise en garde, le demandeur doit non seulement démontrer que le défendeur a fait preuve de négligence, mais aussi que celui-ci avait l'obligation positive d'agir. Toujours selon le Canada, les avis de mise en cause ne donnent aucunement matière à croire qu'il avait une telle obligation en l'espèce.

[108] I agree with Canada that the tort of failure to warn requires evidence of a positive duty towards the plaintiff. Positive duties in tort law are the exception rather than the rule. In *Childs v. Desormeaux*, the Court held:

> Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved. [para. 31]

Moreover, none of the authorities cited by Imperial support the proposition that a plea of negligence, without more, will suffice to raise a duty to warn: *Day v. Central Okanagan (Regional District)*, 2000 BCSC 1134, 79 B.C.L.R. (3d) 36, *per* Drossos J.; see also *Elias v. Headache and Pain Management Clinic*, 2008 CanLII 53133 (Ont. S.C.J.), *per* Macdonald J. (paras. 6 to 9).

[108] Je conviens avec le Canada que le délit de défaut de mise en garde requiert la preuve d'une obligation positive envers le demandeur. En droit des délits, les obligations positives constituent l'exception et non la règle. Dans *Childs c. Desormeaux*, la Cour a affirmé ce qui suit :

> Bien qu'il ne fasse aucun doute qu'une omission peut emporter négligence, la common law, en règle générale, est une fervente protectrice de l'autonomie individuelle. L'obligation de prendre des mesures concrètes face à un risque ou à un danger n'est pas une obligation distincte. Généralement, le simple fait qu'une personne court un danger ou constitue un danger pour autrui n'impose pas en soi une quelconque obligation aux personnes susceptibles d'intervenir. [par. 31]

Qui plus est, aucune des décisions citées par Imperial n'étaye l'argument qu'une allégation de négligence, sans plus, est suffisante pour imposer une obligation de mise en garde : *Day c. Central Okanagan (Regional District)*, 2000 BCSC 1134, 79 B.C.L.R. (3d) 36, le juge Drossos; voir aussi *Elias c. Headache and Pain Management Clinic*, 2008 CanLII 53133 (C.S.J. Ont.), le juge Macdonald (par. 6 à 9).

[109] Even if pleading negligence were viewed as sufficient to raise a claim of duty to warn, which I do not accept, the claim would fail for the stage-two policy reasons applicable to the negligent misrepresentation claim.

[109] Même si l'on considérait qu'il suffit de plaider la négligence pour formuler une allégation d'obligation de mise en garde, ce que je ne puis accepter, l'allégation serait rejetée pour les considérations de politique générale liées à la deuxième étape de l'analyse et qui s'appliquent à l'allégation de déclaration inexacte faite par négligence.

E. *Negligent Design*

E. *La conception négligente*

[110] The tobacco companies have brought two types of negligent design claims against Canada

[110] Les compagnies de tabac ont soulevé à l'encontre du Canada deux types d'allégations

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that remain to be considered. First, they submit that Canada breached its duty of care to the tobacco companies when it negligently designed its strains of low-tar tobacco. The Court of Appeal held that the pleadings supported a *prima facie* duty of care in this respect, but held that the duty was negated by the stage-two policy concern of indeterminate liability. Second, Imperial submits that Canada breached its duty of care to the consumers of light and mild cigarettes in the *Knight* case. A majority of the Court of Appeal held that this claim should proceed to trial.

de conception négligente qu'il reste à examiner. Premièrement, elles affirment que le Canada a manqué à son obligation de diligence envers elles en concevant de manière négligente ses souches de tabac à faible teneur en goudron. La Cour d'appel a jugé que les actes de procédure appuyaient une obligation de diligence *prima facie* à cet égard, mais que cette obligation était écartée par la considération de politique générale liée à la responsabilité indéterminée, soulevée à la deuxième étape de l'analyse. Deuxièmement, Imperial fait valoir que le Canada a manqué à son obligation de diligence envers les consommateurs de cigarettes légères et douces dans l'*Affaire Knight*. La Cour d'appel a conclu à la majorité que cette allégation est matière à procès.

[111] In my view, both remaining negligent design claims establish a *prima facie* duty of care, but fail at the second stage of the analysis because they relate to core government policy decisions.

[111] J'estime que ces deux allégations de conception négligente établissent l'existence d'une obligation de diligence *prima facie*, mais doivent être rejetées à la deuxième étape de l'analyse parce qu'elles ont trait à des décisions de politique générale fondamentale du gouvernement.

(1) *Prima Facie* Duty of Care

[112] I begin with the claim that Canada owed a *prima facie* duty of care to the tobacco companies. Canada submits that there was no *prima facie* duty of care since there is no proximity between Canada and the tobacco companies, relying on the same arguments that it raises in the negligent misrepresentations claims.

[113] In my view, the Court of Appeal correctly concluded that Canada owed a *prima facie* duty of care towards the tobacco companies with respect to its design of low-tar tobacco strains. I agree with Tysoe J.A. that the alleged relationship in this case meets the requirements for proximity:

> If sufficient proximity exists in the relationship between a designer of a product and a purchaser of the product, it would seem to me to follow that there is sufficient proximity in the relationship between the designer of a product and a manufacturer who uses the product in goods sold to the public. Also, the designer of the

(1) Obligation de diligence *prima facie*

[112] Je commence par l'allégation que le Canada avait une obligation de diligence *prima facie* envers les compagnies de tabac. Se fondant sur les mêmes arguments qu'il avance à l'encontre des allégations de déclarations inexactes faites par négligence, le Canada affirme ne pas avoir d'obligation de cette nature, parce qu'il n'existe pas de lien de proximité entre lui et les compagnies de tabac.

[113] À mon sens, la Cour d'appel a conclu avec raison que le Canada avait une obligation de diligence *prima facie* envers les compagnies de tabac relativement à la conception des souches de tabac à faible teneur en goudron. Je suis d'accord avec le juge Tysoe pour dire que les rapports invoqués en l'espèce répondent aux conditions de proximité :

> [TRADUCTION] Si les rapports entre le concepteur et l'acheteur d'un produit sont suffisamment étroits, il s'ensuit, à mon avis, qu'il existe un lien suffisamment étroit entre le concepteur d'un produit et celui qui s'en sert pour fabriquer des biens vendus au public. En outre, dans le contexte de la présente affaire, le concepteur du

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product ought reasonably to have the manufacturer in contemplation as a person who would be affected by its design in the context of the present case. It would have been reasonably foreseeable to the designer of the product that a manufacturer of goods incorporating the product could be required to refund the purchase price paid by consumers if the design of the product did not accomplish that which it was intended to accomplish. [*Knight* case, para. 67]

produit devrait raisonnablement s'attendre à ce que sa conception ait une incidence sur le fabricant. Le concepteur pouvait raisonnablement prévoir qu'un fabricant de biens auxquels le produit est intégré serait tenu de rembourser le prix d'achat payé par des consommateurs si la conception du produit n'atteignait pas l'objectif qu'elle était censée atteindre. [L'*Affaire Knight*, par. 67]

[114] The allegation is that Canada was acting like a private company conducting business, and conducted itself toward the tobacco companies in a way that established proximity. The proximity alleged is not based on a statutory duty, but on interactions between Canada and the tobacco companies. Canada's argument that a duty of care would result in conflicting private and public duties does not negate proximity arising from conduct, although it may be a relevant stage-two policy consideration.

[114] On allègue que le Canada se comportait comme une société commerciale privée et entretenait des rapports étroits avec les compagnies de tabac. Le prétendu lien de proximité se fonde non pas sur une obligation prévue par la loi, mais sur les rapports entre le Canada et les compagnies de tabac. L'argument du Canada selon lequel une obligation de diligence donnerait lieu à un conflit entre des obligations de droit privé et des obligations de droit public n'écarte pas la possibilité qu'un lien de proximité découle de sa conduite, mais il peut constituer une considération de politique générale pertinente à la deuxième étape de l'analyse.

[115] For similar reasons, I conclude that on the facts pleaded, Canada owed a *prima facie* duty of care to the consumers of light and mild cigarettes in the *Knight* case. On the facts pleaded, it is at least arguable that Canada was acting in a commercial capacity when it designed its strains of tobacco. As Tysoe J.A. held in the court below, "a person who designs a product intended for sale to the public owes a *prima facie* duty of care to the purchasers of the product" (para. 48).

[115] Pour des motifs semblables et compte tenu des faits allégués, je conclus que le Canada avait une obligation de diligence *prima facie* envers les consommateurs de cigarettes légères et douces dans l'*Affaire Knight*. Vu ces faits, il est au moins possible de soutenir que le Canada agissait comme une entreprise commerciale lorsqu'il a conçu ses souches de tabac. Comme l'a affirmé le juge Tysoe de la Cour d'appel, [TRADUCTION] « le concepteur d'un produit destiné à être vendu au public a une obligation de diligence *prima facie* envers ceux et celles qui achètent ce produit » (par. 48).

(2) Stage-Two Policy Considerations

(2) Considérations de politique générale soulevées à la deuxième étape de l'analyse

[116] For the reasons given in relation to the negligent misrepresentation claim, I am of the view that stage-two policy considerations negate this *prima facie* duty of care for the claims of negligent design. The decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy. It was a decision based on

[116] Pour les motifs fournis à l'égard des allégations de déclarations inexactes faites par négligence, j'estime que les considérations de politique générale qui entrent en jeu à la deuxième étape de l'analyse écartent l'obligation de diligence *prima facie* à l'égard des allégations de conception négligente. La décision de concevoir des souches de tabac à faible teneur en goudron parce qu'on croit que les cigarettes fabriquées avec ce tabac seraient

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social and economic factors. As a core government policy decision, it cannot ground a claim for negligent design. This conclusion makes it unnecessary to consider the argument of indeterminate liability also raised as a stage-two policy objection to the claim of negligent design.

moins nuisibles pour la santé constitue une ligne de conduite fondée sur la politique générale du Canada en matière de santé. Il s'agissait d'une décision reposant sur des facteurs sociaux et économiques. Cette décision de politique générale fondamentale du gouvernement ne saurait fonder une poursuite pour conception négligente. Vu cette conclusion, point n'est besoin d'examiner l'argument relatif à la responsabilité indéterminée, opposé lui aussi à l'allégation de conception négligente en tant que considération de politique générale à la deuxième étape de l'analyse.

F. *The Direct Claims Under the Costs Recovery Acts*

F. *Les allégations directes faites en vertu des lois sur le recouvrement des coûts*

[117] The tobacco companies submit that the Court of Appeal erred when it held that it was plain and obvious that Canada could not qualify as a manufacturer under the *CRA*. They also present three alternative arguments: (1) that if Canada is not liable under the Act, it is liable under the recently adopted *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 ("*HCCRA*"); (2) that if Canada is not liable under either the *CRA* or the *HCCRA*, it is nonetheless liable to the defendants for contribution under the *Negligence Act*; and (3) that in the further alternative, Canada could be liable for contribution under the common law (joint factum of Rothmans, Benson & Hedges ("RBH") and Philip Morris only).

[117] Selon les compagnies de tabac, la Cour d'appel a conclu à tort qu'il était manifeste et évident que le Canada ne pouvait pas être un fabricant au sens de la *CRA*. Elles présentent également trois arguments subsidiaires : (1) si la responsabilité du Canada n'est pas engagée en application de la *CRA*, elle l'est aux termes de la *Health Care Costs Recovery Act*, S.B.C. 2008, ch. 27 (« *HCCRA* »), récemment édictée; (2) si la responsabilité du Canada n'est pas engagée aux termes de l'une de ces deux lois, il est néanmoins tenu de verser aux défenderesses une contribution aux termes de la *Negligence Act*; et (3) enfin, le Canada peut être tenu en common law de verser une contribution (mémoire conjoint de Rothmans, Benson & Hedges (« RBH ») et de Philip Morris seulement).

[118] Section 2 of the *CRA* establishes that "[t]he government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong". The words "manufacture" and "manufacturer" are defined in s. 1(1) of the Act as follows:

[118] Aux termes de l'art. 2 de la *CRA*, [TRADUCTION] « [l]e gouvernement a contre un fabricant un droit d'action direct et distinct pour le recouvrement du coût des services de soins de santé occasionnés ou favorisés par une faute du fabricant ». Les termes « fabrication » et « fabricant » sont définis comme suit à l'art. 1(1) de la *CRA* :

> **1** (1) . . .
>
> **"manufacture"** includes, for a tobacco product, the production, assembly or packaging of the tobacco product;

[TRADUCTION]

> **1** (1) . . .
>
> **« fabricant »** Personne qui fabrique ou a fabriqué un produit du tabac, y compris la personne qui, selon le cas :

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"manufacturer" means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past

(a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,

(b) for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons,

(c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or

(d) is a trade association primarily engaged in

(i) the advancement of the interests of manufacturers,

(ii) the promotion of a tobacco product, or

(iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;

The third-party notices allege that Canada grew (manufactured) tobacco and licensed it to the tobacco industry for a profit, and that Canada "promoted" the use of mild or light cigarettes to the industry and the public. These facts, they say, bring Canada within the definition of "manufacturer" of the *CRA*.

[119] Canada submits that it is not a manufacturer under the Act. In the alternative, it submits that it is immune from the operation of this provincial statute at common law and alternatively under the Constitution.

[120] For the reasons that follow, I conclude that Canada is not a manufacturer under the Act. Indeed,

a) directement ou indirectement, fait ou a fait fabriquer un produit du tabac dans le cadre d'ententes conclues avec des entrepreneurs, des sous-traitants, des titulaires de licence, des franchisés ou d'autres personnes;

b) au cours d'un de ses exercices, tire ou a tiré au moins 10 % de ses revenus, calculés sur une base consolidée conformément aux principes comptables généralement reconnus au Canada, de la fabrication ou de la promotion de produits du tabac par elle-même ou par d'autres personnes;

c) se livre ou s'est livrée à la promotion d'un produit du tabac ou fait ou a fait, directement ou indirectement, que d'autres personnes s'y livrent;

d) est une association commerciale se consacrant principalement :

(i) à l'avancement des intérêts des fabricants,

(ii) à la promotion d'un produit du tabac, ou

(iii) à faire faire, directement ou indirectement, la promotion par d'autres personnes d'un produit du tabac.

« fabrication » Est assimilé à la fabrication d'un produit du tabac sa production, son assemblage ou son empaquetage;

On allègue dans les avis de mise en cause que le Canada a cultivé (fabriqué) du tabac et octroyé des licences visant celui-ci à l'industrie du tabac à des fins lucratives, et qu'il a « fait la promotion » des cigarettes douces ou légères auprès de l'industrie et de la population. Selon les compagnies de tabac, ces faits font en sorte que le Canada répond à la définition de « fabricant » qui figure dans la *CRA*.

[119] Le Canada dit ne pas être un fabricant au sens de la *CRA*. Subsidiairement, il affirme être soustrait à l'application de cette loi provinciale en vertu de la common law et, sinon, en vertu de la Constitution.

[120] Pour les motifs exposés ci-après, je conclus que le Canada n'est pas un fabricant au sens de la

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holding Canada accountable under the *CRA* would defeat the legislature's intention of transferring the health-care costs resulting from tobacco related wrongs from taxpayers to the tobacco industry. This conclusion makes it unnecessary to consider Canada's arguments that it would in any event be immune from liability under the provincial Act. I would also reject the tobacco companies' argument for contribution under the *HCCRA* and the *Negligence Act*, and the common law contribution argument.

CRA. En effet, si l'on tenait le Canada responsable en application de la *CRA*, cela contrecarrerait l'intention de la législature de faire passer des contribuables à l'industrie du tabac la responsabilité des coûts des soins de santé résultant d'une « faute d'un fabricant ». Vu cette conclusion, nul n'est besoin d'étudier les arguments du Canada voulant qu'il soit en tout état de cause exonéré de toute responsabilité en vertu de la loi provinciale. Je suis également d'avis de rejeter l'argument des compagnies de tabac en faveur d'une contribution au titre de la *HCCRA* et de la *Negligence Act*, ainsi que l'argument en faveur d'une contribution en common law.

(1) Could Canada Qualify as a Manufacturer Under the *Tobacco Damages and Health Care Costs Recovery Act*?

(1) Le Canada peut-il être un fabricant au sens de la *Tobacco Damages and Health Care Costs Recovery Act*?

[121] The Court of Appeal held that the definition of "manufacturer" could not apply to the Government of Canada. I agree. While the argument that Canada could qualify as a manufacturer under the *CRA* has superficial appeal, when the Act is read in context and all of its provisions are taken into account, it is apparent that the British Columbia legislature did not intend for Canada to be liable as a manufacturer. This is confirmed by the text of the statute, the intent of the legislature in adopting the Act, and the broader context of the relationship between the province and the federal government.

[121] La Cour d'appel a affirmé que le gouvernement canadien ne pouvait pas être visé par la définition de « fabricant ». Je suis du même avis. L'argument selon lequel le Canada peut être un fabricant au sens de la *CRA* a un attrait superficiel, mais, lorsqu'on interprète la *CRA* dans son contexte eu égard à l'ensemble de ses dispositions, il appert que la législature de la Colombie-Britannique ne voulait pas imposer au Canada la responsabilité d'un fabricant. C'est ce que confirment le texte de la loi, l'intention qu'avait le législateur au moment d'adopter la *CRA* et le contexte plus général des rapports entre la province et le gouvernement fédéral.

(a) *Text of the Statute*

a) *Le texte de la loi*

[122] The definition of manufacturer in s. 1(1) "manufacturer" (b) of the Act includes a person who "for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons". Hall J.A. held that this definition indicated that the legislature intended the Act to apply to companies involved in the tobacco industry, and not to governments.

[122] Aux termes de l'al. b) de la définition de [TRADUCTION] « fabricant » qui se trouve à l'art. 1(1) de la *CRA*, ce terme s'entend d'une personne qui, « au cours d'un de ses exercices, tire ou a tiré au moins 10 % de ses revenus, calculés sur une base consolidée conformément aux principes comptables généralement reconnus au Canada, de la fabrication ou de la promotion de produits du tabac par elle-même ou par d'autres personnes ». Le juge Hall a conclu que, selon cette définition, le législateur souhaitait que la *CRA* s'applique aux compagnies membres de l'industrie du tabac, et non aux gouvernements.

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[123] The tobacco companies respond that the definition of "manufacturer" is disjunctive since it uses the word "or", such that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). Even if Canada is incapable of meeting the definition in (b) of the Act (deriving 10% of its revenues from the manufacture or promotion of tobacco products), Canada qualifies under subparagraphs (a) (causing the manufacture of tobacco products) and (c) (engaging in or causing others to engage in the promotion of tobacco products) on the facts pled, they argue.

[123] Les compagnies de tabac répondent que la définition du mot « *manufacturer* » (« fabricant ») est disjonctive, vu qu'elle renferme le mot « *or* » (habituellement rendu en français par l'expression « selon le cas »), de telle sorte qu'une personne sera considérée comme un fabricant si elle répond à l'une des quatre définitions qui figurent aux al. a) à d). Même si le Canada ne peut répondre à la définition de l'al. b) de la *CRA* (tirer 10 % de ses revenus de la fabrication ou de la promotion de produits du tabac), elles soutiennent que, à la lumière des faits allégués, le Canada répond aux définitions des al. a) (fait fabriquer un produit du tabac) et c) (fait ou fait faire la promotion d'un produit du tabac).

[124] Like the Court of Appeal, I would reject this argument. It is true that s. 1 must be read disjunctively, and that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). However, the Act must nevertheless be read purposively and as a whole. A proper reading of the Act will therefore take each of the four definitions into account. It will also consider the rest of the statutory scheme, and the legislative context. When the Act is read in this way, it is clear that the B.C. legislature did not intend to include the federal government as a potential manufacturer under the *CRA*.

[124] À l'instar de la Cour d'appel, je suis d'avis de rejeter l'argument susmentionné. Il est vrai qu'il faut interpréter de façon disjonctive la définition de fabricant à l'article premier, et qu'un particulier sera assimilé à un fabricant s'il répond à l'une ou l'autre des quatre définitions des al. a) à d). Il faut néanmoins interpréter de manière téléologique la *CRA* dans son ensemble. Par conséquent, une interprétation adéquate de la *CRA* tient compte de chacune des quatre définitions. Elle prend aussi en considération le reste du régime législatif et le contexte législatif. Interprétée ainsi, la *CRA* indique clairement que la législature de la Colombie-Britannique ne voulait pas faire du gouvernement fédéral un fabricant potentiel au sens de cette loi.

[125] The fact that one of the statutory definitions is based on revenue percentage suggests that the term "manufacturer" is meant to capture businesses or individuals who earn profit from tobacco-related activities. This interpretation is reinforced by the provisions of the Act that establish the liability of defendants. Section 3(3)(b) provides that "each defendant to which the presumptions [provided in s. 3(2) of the *CRA*] apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product". This language cannot be stretched to include the Government of Canada.

[125] Le fait qu'une des définitions de la *CRA* repose sur un pourcentage des revenus donne à penser que le mot « fabricant » est censé viser des entreprises ou des particuliers qui tirent profit des activités liées au tabac. Les dispositions de la *CRA* établissant la responsabilité des défenderesses renforcent cette interprétation. Aux termes de l'al. 3(3)b), [TRADUCTION] « chaque défendeur auquel s'appliquent les présomptions [créées par le par. 3(2) de la *CRA*] est responsable du coût global visé à l'alinéa a) au prorata de sa part de marché du type de produit du tabac ». On ne saurait considérer cette disposition comme visant le gouvernement du Canada.

[126] I conclude that the text of the *CRA*, read as a whole, does not support the view that Canada is a "manufacturer" under the Act.

[126] J'estime que, interprété dans son ensemble, le texte de la *CRA* n'étaye pas la thèse selon laquelle le Canada est un « fabricant » au sens de cette loi.

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(b) *Legislative Intention*

[127] I agree with Canada that considerations related to legislative intent further support the view that Canada does not fall within the definition of "manufacturer". When the *CRA* was introduced in the legislature, the Minister responsible stated that "the industry" manufactured a lethal product, and that "the industry" composed of "tobacco companies" should accordingly be held accountable (B.C. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, 4th Sess., 36th Parl., June 7, 2000, at p. 16314). It is plain and obvious that the Government of Canada would not fit into these categories.

[128] Imperial submits that it is improper to rely on excerpts from *Hansard* on an application to strike a pleading, since evidence is not admissible on such an application. However, a distinction lies between evidence that is introduced to prove a point of fact and evidence of legislative intent that is provided to assist the court in discerning the proper interpretation of a statute. The former is not relevant on an application to strike; the latter may be. Applications to strike are intended to economize judicial resources in cases where on the facts pled, the law does not support the plaintiff's claim. Courts may consider all evidence relevant to statutory interpretation in order to achieve this purpose.

(c) *Broader Context*

[129] The broader context of the statute strongly supports the conclusion that the British Columbia legislature did not intend the federal government to be liable as a manufacturer of tobacco products. The object of the Act is to recover the cost of providing health care to British Columbians from the companies that sold them tobacco products. As held by this Court in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473:

b) *L'intention du législateur*

[127] Je suis d'accord avec le Canada pour dire que les considérations liées à l'intention du législateur appuient davantage la thèse voulant que la définition de [TRADUCTION] « fabricant » ne vise pas le Canada. Quand la *CRA* a été présentée à l'assemblée législative, le ministre responsable a affirmé que [TRADUCTION] « l'industrie » fabriquait un produit mortel, et que les « compagnies de tabac » qui en faisaient partie devraient en être tenues responsables pour cette raison (C.-B., *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, 4e sess., 36e lég., 7 juin 2000, p. 16314). Il est évident et manifeste que le gouvernement du Canada n'appartient pas à cette catégorie.

[128] Selon Imperial, il ne convient pas d'invoquer des extraits du *Hansard* dans le cadre d'une requête en radiation d'une allégation, étant donné que des éléments de preuve ne peuvent être présentés à l'occasion d'une telle demande. Il y a toutefois une distinction entre une preuve produite pour établir un fait et une preuve de l'intention du législateur qui est produite pour aider la cour à déterminer l'interprétation que doit recevoir une loi. La première n'est pas pertinente dans le cadre d'une requête en radiation, mais la seconde peut l'être. Les requêtes en radiation visent à économiser les ressources judiciaires dans les cas où la loi n'appuie pas une demande compte tenu des faits allégués. Les tribunaux peuvent prendre en considération tous les éléments de preuve pertinents à l'interprétation de la loi pour arriver à cette fin.

c) *Le contexte plus général*

[129] Le contexte plus général de la loi étaye fortement la conclusion que la législature de la Colombie-Britannique n'avait pas l'intention d'imposer au gouvernement fédéral la responsabilité d'un fabricant de produits du tabac. La *CRA* a pour objet le recouvrement du coût des soins de santé fournis aux Britanno-Colombiens auprès des compagnies qui leur ont vendu des produits du tabac. Comme l'a affirmé notre Cour dans *Colombie-Britannique c. Imperial Tobacco Canada Ltée*, 2005 CSC 49, [2005] 2 R.C.S. 473 :

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[T]he driving force of the Act's cause of action is compensation for the government of British Columbia's health care costs, not remediation of tobacco manufacturers' breaches of duty. While the Act makes the existence of a breach of duty one of several necessary conditions to a manufacturer's liability to the government, it is not the mischief at which the cause of action created by the Act is aimed. [para. 40]

The legislature sought to transfer the medical costs from provincial taxpayers to the private sector that sold a harmful product. This object would be fundamentally undermined if the funds were simply recovered from the federal government, which draws its revenue from the same taxpayers.

[130] The tobacco companies' proposed application of the *CRA* to Canada is particularly problematic in light of the long-standing funding relationship between the federal and provincial governments with regards to health care. The federal government has been making health transfer payments to the provinces for decades. As held by Hall J.A.:

If the *Costs Recovery Act* were to be construed to permit the inclusion of Canada as a manufacturer targeted for the recovery of provincial health costs, this would permit a direct economic claim to be advanced against Canada by British Columbia to obtain further funding for health care costs. In light of these long-standing fiscal arrangements between governments, I cannot conceive that the legislature of British Columbia could ever have envisaged that Canada might be a target under the *Costs Recovery Act*. [para. 33]

[131] Imperial argues that the only way to achieve the object of the *CRA* is to allow the province to recover from all those who participated in the tobacco industry, including the federal government. I disagree. Holding the federal government accountable under the Act would defeat the legislature's intention of transferring the cost of medical treatment from taxpayers to the tobacco industry.

[L']élément déterminant de la cause d'action créée par la Loi demeure l'indemnisation des coûts engagés par le gouvernement de la Colombie-Britannique au titre des soins de santé, et non la correction des manquements aux obligations des fabricants de produits du tabac. La Loi fait de l'existence d'une violation d'une obligation une des diverses conditions préalables à l'établissement de la responsabilité du fabricant envers le gouvernement, mais ce n'est pas cette faute que vise la cause d'action créée par la Loi. [par. 40]

La législature cherchait à transférer la responsabilité des frais médicaux des contribuables provinciaux aux entreprises privées qui vendaient un produit nocif. Cet objectif serait gravement compromis si l'on recouvrait simplement les fonds auprès du gouvernement fédéral, qui tire son revenu des mêmes contribuables.

[130] L'assujettissement du Canada à la *CRA* que font valoir les compagnies de tabac est particulièrement problématique compte tenu des rapports de longue date entre le gouvernement fédéral et les provinces en matière de financement des soins de santé. Depuis des décennies, le gouvernement fédéral verse aux provinces des paiements de transfert relatifs à la santé. Comme l'a mentionné le juge Hall :

[TRADUCTION] Si l'on interprétait la *Costs Recovery Act* comme permettant de qualifier le Canada de fabricant visé aux fins du recouvrement des coûts engagés par les provinces au titre des soins de santé, il serait possible pour la Colombie-Britannique d'exercer un recours pécuniaire direct contre le Canada en vue d'obtenir des fonds supplémentaires au titre des soins de santé. Étant donné ces accords fiscaux de longue date entre les gouvernements, je ne puis imaginer que la législature de la Colombie-Britannique ait pensé à quelque moment que ce soit à la possibilité que le Canada soit poursuivi en vertu de la *Costs Recovery Act*. [par. 33]

[131] Imperial soutient que le seul moyen de réaliser l'objet de la *CRA* est d'autoriser la province à recouvrer le coût des soins de santé auprès de tous les participants à l'industrie du tabac, dont le gouvernement fédéral. Je ne puis retenir cet argument. Si l'on tenait le gouvernement fédéral responsable en vertu de la *CRA*, cela contrecarrerait l'intention du législateur de transférer le coût des traitements médicaux des contribuables à l'industrie du tabac.

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(d) *Summary*

[132] For the foregoing reasons, I conclude that it is plain and obvious that the federal government does not qualify as a manufacturer of tobacco products under the *CRA*. This pleading must therefore be struck.

(2) Could Canada Be Found Liable Under the *Health Care Costs Recovery Act*?

[133] The tobacco companies submit that if Canada is not liable under the *CRA*, it would be liable under the *HCCRA*, which creates a cause of action for the province to recover health care costs generally from wrongdoers (s. 8(1)). Canada submits that the *HCCRA* is inapplicable because it provides that the cause of action does not apply to cases that qualify as "tobacco related wrong[s]" under the *CRA* (s. 24(3)(b)). RBH and Philip Morris respond that a "tobacco related wrong" under the *CRA* may only be committed by a "manufacturer". Consequently, if the *CRA* does not apply to Canada because it cannot qualify as a manufacturer, it is not open to Canada to argue that the more general *HCCRA* does not apply either.

[134] In my view, the tobacco companies cannot rely on the *HCCRA* in a *CRA* action for contribution. While it is true that Canada is incapable of committing a tobacco-related wrong itself if it is not a manufacturer, the underlying cause of action in this case is that it is the defendants who are alleged to have committed a tobacco-related wrong. The *HCCRA* specifies that it does not apply in cases "arising out of a tobacco related wrong as defined in the *Tobacco Damages and Health Care Costs Recovery Act*" (s. 24(3)(b)). This precludes contribution claims arising out of that Act.

d) *Résumé*

[132] Pour les motifs qui précèdent, j'estime qu'il est manifeste et évident que le gouvernement fédéral n'est pas un fabricant de produits du tabac au sens de la *CRA*. Cette allégation doit donc être radiée.

(2) Le Canada peut-il être tenu responsable en vertu de la *Health Care Costs Recovery Act*?

[133] Les compagnies de tabac affirment que si la responsabilité du Canada n'est pas engagée au titre de la *CRA*, elle le serait en vertu de la *HCCRA*, qui confère à la province un droit d'action pour recouvrer auprès de l'auteur d'une faute le coût des soins de santé dans la plupart des cas (par. 8(1)). Selon le Canada, la *HCCRA* est inapplicable parce qu'elle dispose que le droit d'action ne peut être exercé dans les cas de [TRADUCTION] « faute d'un fabricant » au sens de la *CRA* (al. 24(3)b)). RBH et Philip Morris rétorquent qu'une [TRADUCTION] « faute d'un fabricant » au sens de la *CRA* ne peut être commise que par un [TRADUCTION] « fabricant ». Par conséquent, si la *CRA* ne s'applique pas au Canada parce que ce dernier ne peut être un fabricant, il n'est pas loisible au Canada de faire valoir que la *HCCRA* — une loi plus générale — ne trouve pas application non plus.

[134] À mon avis, les compagnies de tabac ne peuvent s'appuyer sur la *HCCRA* dans le cadre d'une action intentée en vertu de la *CRA* pour obtenir une contribution. Certes, le Canada n'est pas en mesure de commettre lui-même une faute d'un fabricant s'il n'est pas un fabricant, mais la cause d'action sous-jacente en l'espèce est la faute d'un fabricant qu'auraient commise les défenderesses. Il est précisé dans la *HCCRA* que cette loi ne s'applique pas dans les affaires [TRADUCTION] « découlant d'une faute d'un fabricant au sens de la *Tobacco Damages and Health Care Costs Recovery Act* » (al. 24(3)b)), ce qui fait obstacle aux demandes de contribution présentées en application de cette loi.

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(3) Could Canada Be Liable for Contribution Under the *Negligence Act* if It Is Not Directly Liable to British Columbia?

[135] RBH and Philip Morris submit that even if Canada is not liable to British Columbia, it can still be held liable for contribution under the *Negligence Act*. They argue that direct liability to the plaintiff is not a requirement for being held liable in contribution.

[136] As noted above, I agree with Canada's submission that, following *Giffels*, a party can only be liable for contribution if it is also liable to the plaintiff directly.

[137] Accordingly, I would reject the argument that the *Negligence Act* in British Columbia allows recovery from a third party that could not be liable to the plaintiff.

(4) Could Canada Be Liable for Common Law Contribution?

[138] RBH and Philip Morris submit that if this Court rejects the contribution claim under the *Negligence Act*, it should allow a contribution claim under the common law. They rely on this Court's decisions in *Bow Valley* and *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3, in which this Court recognized claims of contribution which were not permitted by statute.

[139] I would reject this argument. In my view, the cases cited by RBH and Philip Morris support common law contribution claims only if the third party is directly liable to the plaintiff. In *Bow Valley*, the Court recognized a limited right of contribution "between tortfeasors", and noted that the defendants were "jointly and severally liable to the plaintiff" (paras. 101 and 102). A similar point was made by this Court in *Blackwater* (*per* McLachlin C.J.), which stated that a "common law right of contribution between tortfeasors may exist" (para. 68

(3) Le Canada peut-il être tenu à une contribution en application de la *Negligence Act* s'il n'est pas directement responsable envers la Colombie-Britannique?

[135] RBH et Philip Morris affirment que, même si le Canada n'est pas responsable envers la Colombie-Britannique, il peut néanmoins être tenu à une contribution au titre de la *Negligence Act*. Elles font valoir que le défendeur n'a pas à être directement responsable envers le demandeur pour être condamné à verser une contribution.

[136] Comme je l'ai déjà mentionné, je souscris à l'argument du Canada que, depuis l'arrêt *Giffels*, une partie ne peut être condamnée à verser une contribution que si elle est aussi directement responsable envers le demandeur.

[137] Je suis donc d'avis de rejeter l'argument selon lequel la *Negligence Act* de la Colombie-Britannique permet de recouvrer des sommes d'argent auprès d'un tiers qui ne pouvait pas être responsable envers le demandeur.

(4) Le Canada peut-il être tenu en common law de verser une contribution?

[138] D'après RBH et Philip Morris, si notre Cour rejette la demande de contribution présentée en vertu de la *Negligence Act*, elle devrait faire droit à une telle demande en common law. Elles invoquent les arrêts *Bow Valley* et *Blackwater c. Plint*, 2005 CSC 58, [2005] 3 R.C.S. 3, où notre Cour a accueilli des demandes de contribution non permises par la loi.

[139] Je suis d'avis de rejeter cet argument. Les décisions citées par RBH et Philip Morris me semblent n'appuyer les demandes de contribution en common law que dans les cas où le tiers est directement responsable envers le demandeur. Dans *Bow Valley*, la Cour a reconnu un droit restreint à la contribution « entre coauteurs d'un délit », et a fait remarquer que les défenderesses étaient « solidairement responsables envers la demanderesse » (par. 101 et 102). Notre Cour a fait une observation semblable dans *Blackwater* (la juge en chef

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(emphasis added)). There is no support in our jurisprudence for allowing contribution claims in cases where the third party is not liable to the plaintiff.

McLachlin), affirmant que, « en common law, les coauteurs d'un délit pouvaient se réclamer mutuellement une contribution » (par. 68 (je souligne)). Rien dans notre jurisprudence ne permet d'accueillir des demandes de contribution en l'absence de responsabilité du tiers envers le demandeur.

G. *Liability Under the Trade Practice Act and the Business Practices and Consumer Protection Act*

G. *Responsabilité en vertu de la Trade Practice Act et de la Business Practices and Consumer Protection Act*

[140] In the *Knight* case, Imperial alleges that Canada satisfies the definition of a "supplier" under the *Trade Practice Act* ("*TPA*") and the *Business Practices and Consumer Protection Act* ("*BPCPA*"). The *TPA* was repealed and replaced by the *BPCPA* in 2004. Imperial argues that the Court of Appeal erred in striking its claim against Canada under these statutes.

[140] Dans l'*Affaire Knight*, Imperial prétend que le Canada répond aux définitions de « *supplier* » (« fournisseur ») qui figurent dans la *Trade Practice Act* (« *TPA* ») et la *Business Practices and Consumer Protection Act* (« *BPCPA* »). La *TPA* a été abrogée et remplacée par la *BPCPA* en 2004. Imperial fait valoir que la Cour d'appel a radié à tort la poursuite qu'elle avait intentée contre le Canada en vertu de ces lois.

[141] In my view, Canada could not qualify as a "supplier" under the Acts on the facts pled. Section 1 of the *TPA* defined "supplier" as follows:

> **1** . . .
>
> "**supplier**" means a person, other than a consumer, who in the course of the person's business solicits, offers, advertises or promotes the disposition or supply of the subject of a consumer transaction or who engages in, enforces or otherwise participates in a consumer transaction, whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of the supplier.

[141] À mon avis, le Canada ne peut être un « fournisseur » au sens de ces deux lois compte tenu des faits allégués. L'article 1 de la *TPA* définissait ainsi le mot « fournisseur » :

[TRADUCTION]

> **1** . . .
>
> **« fournisseur »** Une personne autre qu'un consommateur qui, dans le cours de ses affaires, sollicite, offre ou annonce l'aliénation ou la fourniture de l'objet d'une opération commerciale ou se livre à des activités promotionnelles à cet égard, prend part à une opération commerciale, l'exécute ou y participe autrement, qu'il y ait ou non un lien contractuel entre cette personne et le consommateur. Sont également visés par la présente définition le successeur du fournisseur et le cessionnaire de ses droits et obligations.

Section 1(1) of the *BPCPA* defines "supplier" as follows:

> **1** (1) . . .
>
> **"supplier"** means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by

Pour sa part, l'art. 1(1) de la *BPCPA* le définit ainsi :

[TRADUCTION]

> **1** (1) . . .
>
> **« fournisseur »** Une personne, se trouvant en Colombie-Britannique ou ailleurs qui, dans le cours de ses affaires, prend part à une opération commerciale

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(a) supplying goods or services or real property to a consumer, or

(b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",

whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 *[Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit]*, includes a person who solicits a consumer for a contribution of money or other property by the consumer;

a) soit en fournissant des biens ou des services à un consommateur,

b) soit en sollicitant, en offrant ou en annonçant l'opération visée à l'alinéa a) de la définition d'« opération commerciale » ou en se livrant à des activités promotionnelles à cet égard,

qu'il y ait ou non un lien contractuel entre cette personne et le consommateur. Sont également visés par la présente définition le successeur de cette personne, le cessionnaire de ses droits et obligations et, sauf aux parties 3 à 5 *[Droits des cessionnaires et garants en matière de crédit au consommateur; Contrats de consommation; Communication du coût du crédit au consommateur]*, la personne qui demande une somme d'argent ou un bien à un consommateur;

[142] The Court of Appeal unanimously held that neither definition could apply to Canada because its alleged actions were not undertaken "in the course of business". The court held that the pleadings allege that Canada promoted the use of mild or light cigarettes, but only in order to reduce the health risks of smoking, not in the course of a business carried on for the purpose of earning a profit (*Knight* case, para. 35).

[142] La Cour d'appel a jugé à l'unanimité qu'aucune de ces définitions ne pouvaient s'appliquer au Canada, parce que celui-ci n'a pas commis les actes qu'on lui reproche [TRADUCTION] « dans le cours de ses affaires ». Selon la Cour d'appel, il est allégué dans les actes de procédure que le Canada a encouragé la consommation de cigarettes douces et légères, mais uniquement dans le but de réduire les risques que présente l'usage du tabac pour la santé, et non dans le cadre d'une activité exercée en vue de réaliser un profit (l'*Affaire Knight*, par. 35).

[143] Imperial submits that it is not necessary for Canada to have been motivated by profit to qualify as a "supplier" under the Acts, provided it researched, designed and manufactured a defective product. Canada responds that its alleged purpose of improving the health of Canadians shows that it was not acting in the course of business. This was not a case where a public authority was itself operating in the private market as a business, but rather a case where a public authority sought to regulate the industry by promoting a type of cigarette.

[143] Imperial soutient que le Canada n'avait pas à être motivé par le profit pour être un « fournisseur » au sens des lois applicables, pourvu qu'il ait conçu et fabriqué un produit défectueux et fait des recherches à cet égard. Le Canada répond que son intention d'améliorer la santé des Canadiens et Canadiennes démontre qu'il n'agissait pas dans le cours de ses affaires. Il n'était pas question en l'espèce d'un organisme public exerçant les activités d'une entreprise du secteur privé, mais plutôt d'un organisme public qui cherche à réglementer l'industrie en faisant la promotion d'un type de cigarette.

[144] I accept that Canada's purpose for developing and promoting tobacco as described in the third-party notice suggests that it was not acting "in the course of business" or "in the course of the person's business" as those phrases are used in

[144] Je reconnais que le but recherché par le Canada lorsqu'il a développé et promu le tabac, comme l'indique l'avis de mise en cause, tend à indiquer que le Canada n'agissait pas [TRADUCTION] « dans le cours de ses affaires », dans le sens où

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the *TPA* or the *BPCPA*, and therefore that Canada could not be a "supplier" under either of those statutes. The phrases "in the course of business" and "in the course of the person's business" may have different meanings, depending of the context. On the one hand, they can be read as including all activities that an individual undertakes in his or her professional life: e.g., see discussion of the indicia of reasonable reliance above. On the other, they can be understood as limited to activities undertaken for a commercial purpose. In my view, the contexts in which the phrases are used in the *TPA* and the *BPCPA* support the latter interpretation. The definitions of "supplier" in both Acts refer to "consumer transaction[s]", and contrast suppliers, who must have a commercial purpose, with consumers. It is plain and obvious from the facts pleaded that Canada did not promote the use of low-tar cigarettes for a commercial purpose, but for a health purpose. Canada is therefore not a supplier under the *TPA* or the *BPCPA*, and the contribution claim based on this ground and the *Negligence Act* should be struck.

cette expression est employée dans la *TPA* ou la *BPCPA*, et que le Canada ne peut donc être un « fournisseur » au sens de l'une ou l'autre de ces lois. L'expression [TRADUCTION] « dans le cours de ses affaires » peut avoir des significations différentes selon le contexte. D'une part, il est possible de considérer qu'elle englobe toutes les activités auxquelles se livre un particulier durant sa carrière professionnelle : voir notamment l'analyse ci-dessus des indices de confiance raisonnable. D'autre part, elle peut être interprétée comme visant seulement les activités exercées à une fin commerciale. J'estime que les contextes dans lesquels cette expression est employée dans la *TPA* et la *BPCPA* appuient la deuxième interprétation. Les définitions de [TRADUCTION] « fournisseur » figurant dans les deux lois renvoient à des [TRADUCTION] « opérations commerciales » et font la distinction entre les fournisseurs — qui poursuivent une fin commerciale — et les consommateurs. Il ressort de façon évidente et manifeste des faits allégués que le Canada a promu la consommation de cigarettes à faible teneur en goudron non pas à une fin commerciale, mais à une fin liée à la santé. Le Canada n'est donc pas un fournisseur au sens de la *TPA* ou de la *BPCPA*, et la demande de contribution fondée sur ce motif et sur la *Negligence Act* doit être radiée.

[145] Having concluded that Canada is not liable under the *TPA* and the *BPCPA*, it is unnecessary to consider whether, if it were, Canada would be protected by Crown immunity.

[145] Vu ma conclusion que la responsabilité du Canada n'est pas engagée en application de la *TPA* ou de la *BPCPA*, point n'est besoin de déterminer si le Canada serait, dans l'affirmative, protégé par l'immunité de l'État.

H. *The Claim for Equitable Indemnity*

H. *La demande d'indemnité fondée sur l'equity*

[146] RBH and Philip Morris submit that if the tobacco companies are found liable in the *Costs Recovery* case, Canada is liable for "equitable indemnity" on the facts pleaded. They submit that whenever a person requests or directs another person to do something that causes the other to incur liability, the requesting or directing person is liable to indemnify the other for its liability. Imperial adopts this argument in the *Knight* case.

[146] RBH et Philip Morris soutiennent que, si les compagnies de tabac sont tenues responsables dans l'*Affaire du recouvrement des coûts*, le Canada doit verser une [TRADUCTION] « indemnité en equity » compte tenu des faits allégués. Selon elles, chaque fois qu'une personne demande ou ordonne à une autre de faire quelque chose qui engage la responsabilité de cette dernière, la personne qui demande ou ordonne de faire cette chose est tenue d'indemniser l'autre pour sa responsabilité. C'est ce que fait valoir Imperial dans l'*Affaire Knight*.

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[147] Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. As stated in *Parmley v. Parmley*, [1945] S.C.R. 635, claims of equitable indemnity "proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so" (p. 648, quoting Bowen L.J. in *Birmingham and District Land Co. v. London and North Western Railway Co.* (1886), 34 Ch. D. 261, at p. 275.

[147] La doctrine de l'indemnité fondée sur l'equity est une doctrine restreinte qui ne s'applique que dans les cas où le mandant s'engage expressément ou implicitement à indemniser son mandataire pour avoir agi conformément à ses directives. Comme le mentionne l'arrêt *Parmley c. Parmley*, [1945] R.C.S. 635, les demandes d'indemnité fondées sur l'equity [TRADUCTION] « reposent sur l'idée qu'une personne fait une demande dans des circonstances où la loi présume que les deux parties sont conscientes de l'obligation d'indemniser la personne donnant suite à la demande » (p. 648, citant le juge Bowen, *Birmingham and District Land Co. c. London and North Western Railway Co.* (1886), 34 Ch. D. 261, p. 275.

[148] In my view, the Court of Appeal, *per* Hall J.A., correctly held that the tobacco companies could not establish this requirement of the claim:

> [I]f the notional reasonable observer were asked whether or not Canada, in the interaction it had over many decades with the appellants, was undertaking to indemnify them from some future liability that might be incurred relating to their business, the observer would reply that this could not be a rational expectation, having regard to the relationship between the parties. Likewise, if Canada through its agents had been specifically asked or a suggestion had been made to its agents by representatives of the appellants that Canada might in future be liable for any such responsibility or incur such a liability, the answer would have been firmly in the negative. [*Costs Recovery* case, para. 57]

When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it is unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

[148] À mon avis, le juge Hall de la Cour d'appel avait raison de conclure que les compagnies de tabac n'étaient pas en mesure d'établir cette condition de la demande :

> [TRADUCTION] [S]i l'on demandait à l'observateur raisonnable hypothétique si, dans les rapports qu'il a entretenus pendant de nombreuses décennies avec les appelantes, le Canada s'était engagé à les indemniser pour une quelconque responsabilité ultérieure susceptible de découler de leurs activités, l'observateur répondrait que cette attente ne pourrait être rationnelle, eu égard à la relation entre les parties. De même, si les représentants des appelantes avaient demandé explicitement ou suggéré au Canada, par l'entremise de ses mandataires, d'indemniser les appelantes pour une telle responsabilité ou d'engager pareille responsabilité, le Canada aurait répondu fermement par la négative. [L'*Affaire du recouvrement des coûts*, par. 57]

Lorsque le Canada a donné à l'industrie du tabac des directives sur la manière dont elle devrait se comporter, il le faisait à titre d'autorité de réglementation du gouvernement qui se souciait de la santé des Canadiens et des Canadiennes. Dans ces circonstances, il est déraisonnable de déduire que le Canada avait promis implicitement d'indemniser l'industrie pour avoir donné suite à sa demande.

I. *Procedural Considerations*

[149] In the courts below, the tobacco companies argued that even if the claims for compensation against Canada are struck, Canada should

I. *Considérations d'ordre procédural*

[149] Les compagnies de tabac ont fait valoir devant les juridictions inférieures que, même si les demandes d'indemnisation présentées à l'encontre

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remain a third party in the litigation for procedural reasons. The tobacco companies argued that their ability to mount defences against British Columbia in the *Costs Recovery* case and the class members in the *Knight* case would be severely prejudiced if Canada was no longer a third party. This argument was rejected in chambers by both Wedge J. and Satanove J. The majority of the Court of Appeal found it unnecessary to consider the question, while Hall J.A. would have affirmed the holdings of the chambers judges.

du Canada étaient radiées, la mise en cause du Canada devrait se poursuivre en l'espèce pour des motifs d'ordre procédural. Toujours selon les compagnies de tabac, leur capacité de se défendre contre la Colombie-Britannique dans l'*Affaire du recouvrement des coûts* ainsi que contre le groupe dans l'*Affaire Knight* serait gravement compromise si la mise en cause du Canada prenait fin. Les juges Wedge et Satanove, qui siégeaient en cabinet, ont toutes deux rejeté cet argument. La Cour d'appel a conclu à la majorité qu'il était inutile d'examiner la question, alors que le juge Hall était d'avis de confirmer les conclusions des juges siégeant en cabinet.

[150] The tobacco companies did not pursue this issue on appeal. I would affirm the findings of Wedge J., Satanove J. and Hall J.A. and strike the claims for declaratory relief.

[150] Les compagnies de tabac n'ont pas débattu cette question dans le pourvoi. Je suis d'avis de confirmer les conclusions des juges Wedge, Satanove et Hall, et de radier les demandes de jugement déclaratoire.

V. Conclusion

V. Conclusion

[151] I conclude that it is plain and obvious that the tobacco companies' claims against Canada have no reasonable chance of success, and should be struck out. Canada's appeals in the *Costs Recovery* case and the *Knight* case are allowed, and the cross-appeals are dismissed. Costs are awarded throughout against Imperial in the *Knight* case, and against the tobacco companies in the *Costs Recovery* case. No costs are awarded against or in favour of British Columbia in the *Costs Recovery* case.

[151] Je conclus qu'il est manifeste et évident que les allégations des compagnies de tabac visant le Canada n'ont aucune possibilité raisonnable d'être retenues et doivent être radiées. Les appels interjetés par le Canada dans l'*Affaire du recouvrement des coûts* et l'*Affaire Knight* sont accueillis, et les appels incidents sont rejetés. Imperial est condamnée aux dépens devant toutes les cours dans l'*Affaire Knight*, et les compagnies de tabac sont condamnées aux dépens devant toutes les cours dans l'*Affaire du recouvrement des coûts*. Aucuns dépens ne sont adjugés contre la Colombie-Britannique ou en faveur de celle-ci dans l'*Affaire du recouvrement des coûts*.

Appeals allowed and cross-appeals dismissed with costs.

Pourvois accueillis et pourvois incidents rejetés avec dépens.

Solicitor for the appellants/respondents on cross-appeal (33559-33563): Attorney General of Canada, Ottawa.

Procureur des appelants/intimés au pourvoi incident (33559-33563) : Procureur général du Canada, Ottawa.

Solicitors for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33559):

Procureurs de l'intimée/appelante au pourvoi incident Imperial Tobacco Canada Limitée

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Hunter Litigation Chambers Law Corporation, Vancouver.

Solicitors for the respondent Her Majesty the Queen in Right of British Columbia (33563): Bull, Housser & Tupper, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33563): Osler, Hoskin & Harcourt, Toronto.

Solicitors for the respondents/appellants on cross-appeal Rothmans, Benson & Hedges Inc. and Rothmans Inc. (33563): Affleck Hira Burgoyne, Vancouver.

Solicitors for the respondents/appellants on cross-appeal JTI-MacDonald Corp., R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc. (33563): Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the respondents/appellants on cross-appeal B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited (33563): Sugden, McFee & Roos, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Carreras Rothmans Limited (33563): Harper Grey, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Philip Morris U.S.A. Inc. (33563): Davis & Company, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Philip Morris International Inc. (33563): McCarthy Tétrault, Montréal.

Solicitor for the intervener the Attorney General of Ontario (33559-33563): Attorney General of Ontario, Toronto.

Solicitors for the intervener Her Majesty the Queen in Right of the Province of New Brunswick (33563): Bennett Jones, Toronto.

(33559) : Hunter Litigation Chambers Law Corporation, Vancouver.

Procureurs de l'intimée Sa Majesté la Reine du chef de la Colombie-Britannique (33563) : Bull, Housser & Tupper, Vancouver.

Procureurs de l'intimée/appelante au pourvoi incident Imperial Tobacco Canada Limitée (33563) : Osler, Hoskin & Harcourt, Toronto.

Procureurs des intimées/appelantes au pourvoi incident Rothmans, Benson & Hedges Inc. et Rothmans Inc. (33563) : Affleck Hira Burgoyne, Vancouver.

Procureurs des intimées/appelantes au pourvoi incident JTI-MacDonald Corp., R.J. Reynolds Tobacco Company et R.J. Reynolds Tobacco International Inc. (33563) : Farris, Vaughan, Wills & Murphy, Vancouver.

Procureurs des intimées/appelantes au pourvoi incident B.A.T. Industries p.l.c. et British American Tobacco (Investments) Limited (33563) : Sugden, McFee & Roos, Vancouver.

Procureurs de l'intimée/appelante au pourvoi incident Carreras Rothmans Limited (33563) : Harper Grey, Vancouver.

Procureurs de l'intimée/appelante au pourvoi incident Philip Morris U.S.A. Inc. (33563) : Davis & Company, Vancouver.

Procureurs de l'intimée/appelante au pourvoi incident Philip Morris International Inc. (33563) : McCarthy Tétrault, Montréal.

Procureur de l'intervenant le procureur général de l'Ontario (33559-33563) : Procureur général de l'Ontario, Toronto.

Procureurs de l'intervenante Sa Majesté la Reine du chef de la province du Nouveau-Brunswick (33563) : Bennett Jones, Toronto.

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Solicitor for the intervener the Attorney General of British Columbia (33559-33563): Attorney General of British Columbia, Victoria.

Procureur de l'intervenant le procureur général de la Colombie-Britannique (33559-33563) : Procureur général de la Colombie-Britannique, Victoria.

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COURT OF APPEAL FOR ONTARIO

CITATION: Rea v. Wildeboer, 2015 ONCA 373
DATE: 20150526
DOCKET: C59168

2015 ONCA 373 (CanLII)

Weiler, Sharpe and Blair JJ.A.

BETWEEN

Natale Rea, Rea Holdings Inc. and Edward Sorbara

Plaintiffs (Appellants)

and

Robert Wildeboer, Nick Orlando, Fred Jaekel, Armando Pagliari, Suleiman Rashid, R.A.M. Contracting Limited, Robert Marzilli, 1530309 Ontario Limited, Martin Pathak and Martinrea International Inc.

Defendants (Respondents)

AND BETWEEN

Robert Wildeboer, Armando Pagliari, Suleiman Rashid and Martinrea International Inc.

Plaintiffs by Counterclaim

and

Natale Rea and Rea Holdings Inc.

Defendants to the Counterclaim

Jeremy C. Millard and Holly V.A. Cunliffe, for the appellants

Don H. Jack and Courtney Raphael, for the respondents

Heard: January 9, 2015

On appeal from the judgment of Justice T. McEwen of the Superior Court of Justice, dated June 30, 2014.

2015 ONCA 373 (CanLII)

R.A. Blair J.A.:

[1] "Oppression remedy" or "derivative action"? What is the nature of these proceedings?

[2] The appellants have asserted an oppression claim under s. 248 of the *Business Corporations Act* alleging misappropriation of funds from Martinrea International Inc. and seeking to recover those funds for the corporation. They submit that they are entitled to proceed on that basis, arguing that the "somewhat murky" line between oppression remedies and derivative actions has all but disappeared. The respondents argue, on the other hand, that the claim is solely Martinrea's claim and that it must be pursued as a derivative action on behalf of the corporation, with leave of the court.

[3] The motion judge agreed with the respondents and struck the claim as against them. In the context of this claim as against these respondents, I too agree, and for the following reasons would dismiss the appeal.

Background and Facts

[4] Martinea is a successful Canadian manufacturer of auto parts. It is a widely-held public company, trading on the Toronto Stock Exchange, with approximately 84.5 million outstanding shares.

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[5] The appellant Natale Rea and the defendant Fred Jaekel are the company's principal founders. They became directors, along with the defendants Wildeboer, Orland and Rashid. The defendant Pagliari was a Martinrea executive, but not a board member. All of these defendants are referred to in the appellants' submissions as the "Insider Defendants".

[6] Between 2002 (when the company was founded) and 2012, Mr. Rea and his holding corporation, Rea Holdings Inc., were significant minority shareholders of the company – holding between 12% and 17% of its shares. After the alleged improper transactions discussed below were discovered in 2011, and not dealt with to Mr. Rea's satisfaction, he and Rea Holdings sold their 9,910,009 common shares in 2012. Subsequently – two weeks before the motion to strike was heard, and after these proceedings had been commenced – they re-acquired approximately 0.1%, or 100,000, of Martinrea's outstanding shares.

[7] In substance, the statement of claim alleges that the Insider Defendants undertook a series of transactions and other activities that involved a breach of their fiduciary and other duties to Martinrea and resulted in the misappropriation of large amounts of Martinrea's corporate funds – allegedly $50 to $100 million –

for their own personal benefit (the “Improper Transactions”). The action seeks the recovery of these funds for Martinrea.

[8] The defendants 1530309 Ontario Limited (sometimes known as “IM”) and Martin Pathak are the moving parties and the respondents on the appeal. Mr. Pathak is the principal of IM. Neither he nor IM is a shareholder of Martinrea and Mr. Pathak has never been a director or officer of Martinrae. IM is a supplier of used auto parts.

[9] The respondents are implicated in the action because they are said to have aided and abetted the Insider Defendants in two particular aspects of the Improper Transactions. It is alleged: (i) that they sold used equipment to Martinrea over a 10-year period at prices well over market value and on terms unfair to Martinrea, and as a result of which some of the Insider Defendants received substantial kickbacks; and (ii) that a company controlled by them purchased a parcel of land from Martinrea in 2009 without an appropriate sale process and on terms unfair to Martinrea.

[10] In 2011, Mr. Rea became aware of some of the alleged Improper Transactions and brought them to the attention of the defendant Wildeboer (the Executive Chairman of Martinrea) and the defendant Rashid (head of the audit committee). Rashid was asked to, and did, prepare a report for the board of directors. The appellants say that the report was a complete “whitewash”. When

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Wildeboer protected Orlando (the President and CEO) by refusing to accept his resignation, the differences came to a head. In June 2012, Mr. Rea stepped down as Vice-Chairman and a director of Martinrea. He and Rea Holdings sold their shares.

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[11] In September 2013, this action was commenced.

Analysis

[12] The general issue raised on this appeal is whether a complainant may assert, by way of an oppression remedy proceeding, a claim that is by nature a derivative action for a wrong done solely to the corporation, thereby circumventing the requirement to obtain leave to commence a derivative action.

[13] Some understanding of how and why these two forms of statutory redress evolved will help in addressing this issue.

History

[14] At common law, minority shareholders in corporations had very little protection in the face of conduct by the majority (or by directors controlled by the majority) that negatively affected either the corporation itself or their interests as minority shareholders. This handicap was due to two well-entrenched common law principles of corporate law: the notion of a “corporate personality” and the “indoor management rule”. Both of these principles can be traced back to a

decision of now almost mythical stature – that of Vice-Chancellor Wigram in *Foss v. Harbottle* (1843), 67 E.R.189, 2 Hare 461 (Eng. V.C.).

[15] In law, a corporation is a legal entity distinct from its shareholders. It followed from this that shareholders were precluded from bringing their own action in respect of a wrong done to the corporation. Except as modified by the derivative action, the oppression remedy, and winding-up proceedings, this remains a governing principle in Canadian corporate law: see *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 59; *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2002), 61 O.R. (3d) 786 (C.A.). As Laskin J.A. put it, in *Meditrust*, at paras. 12-14:

> The rule in *Foss v. Harbottle* provides simply that a shareholder of a corporation — even a controlling shareholder or the sole shareholder — does not have a personal cause of action for a wrong done to the corporation. The rule respects a basic principle of corporate law: a corporation has a legal existence separate from that of its shareholders. See *Salomon v. Salomon & Co.* (1896), [1897] A.C. 22, 66 L.J. Ch. 35 (U.K. H.L.) A shareholder cannot be sued for the liabilities of the corporation and, equally, a shareholder cannot sue for the losses suffered by the corporation.
>
> The rule in *Foss v. Harbottle* also avoids multiple lawsuits. Indeed, without the rule, a shareholder would always be able to sue for harm to the corporation because any harm to the corporation indirectly harms the shareholders.
>
> *Foss v. Harbottle* was decided nearly 160 years ago but its continuing validity in Canada has recently been affirmed by the Supreme Court of Canada in Hercules

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> *Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) and by this court in *Martin v. Goldfarb* (1998), 163 D.L.R. (4th) 639 (Ont. C.A.).

[16] The companion indoor management rule has also played a significant role in restricting minority shareholders' rights to redress. At common law, if an act that was claimed to be wrongful could be ratified by the majority at a general meeting of shareholders, neither the corporation nor an individual shareholder could sue to redress the wrong. The rationale for this was that courts were reluctant to interfere in the internal management affairs of the corporation.

[17] It took over a century for legislative reforms to be put in place to temper the restrictive effect of these principles on minority shareholder rights. In the latter part of the 20th century, however, the two statutory forms of relief that are at the heart of this appeal – the derivative action and the oppression remedy – were created for this purpose.[1] It is noteworthy that they approached the problem in two different, although potentially overlapping, ways.

[18] The derivative action was designed to counteract the impact of *Foss v. Harbottle* by providing a "complainant" – broadly defined to include more than minority shareholders[2] – with the right to apply to the court for leave to bring an

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[1] In Canada, derivative action relief is embodied in s. 239 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"), and in various provincial business corporation statutes, such as the *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 245. The oppression remedy is provided for in s. 241 of the CBCA and s. 248 of the OBCA.

[2] Section 245 of the OBCA, for example, defines a "complainant" to mean:

action "in the name of or on behalf of a corporation … for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate": *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 246 ("OBCA"). It is an action for "corporate" relief, in the sense that the goal is to recover for wrongs done to the company itself. As Professor Welling has colourfully put it in his text, *Corporate Law in Canada: The Governing Principles*, 3rd ed. (Mudgeeraba: Scribblers Publishing, 2006), at p. 509, "[a] statutory representative action is the minority shareholder's sword to the majority's twin shields of corporate personality and majority rule."

[19] The oppression remedy, on the other hand, is designed to counteract the impact of *Foss v. Harbottle* by providing a "complainant" – the same definition – with the right to apply to the court, without obtaining leave, in order to recover for wrongs done to the individual complainant by the company or as a result of the affairs of the company being conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the complainant. The oppression remedy is a personal claim: *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2006), 79 O.R. (3d) 81 (C.A.), at para.

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a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

"Security" is earlier defined in s. 1 to mean a share or a debt obligation (e.g., a bond)

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112, leave to appeal refused, [2006] S.C.C.A. No. 77; *Hoet v. Vogel*, [1995] B.C.J. No. 621 (S.C.), at paras. 18-19.

[20] These two forms of redress frequently intersect, as might be expected. A wrongful act may be harmful to both the corporation and the personal interests of a complainant and, as a result, there has been considerable debate in the authorities and amongst legal commentators about the nature and utility of the distinction between the two. In the words of one commentator, "the distinction between derivative actions and oppression remedy claims remains murky": Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Canada Limited, 2004), at p. 443.

[21] Yet the statutory distinctions remain in effect.

The Parties' Positions

[22] The appellants submit that the distinction between the remedies has been significantly moderated and that a complainant is entitled to pursue an oppression remedy even where the wrong in question is a wrong in respect of the corporation, provided that the shareholder's reasonable expectations have been violated by means of conduct caught by the terms "oppression", "unfair prejudice" or "unfair disregard". They rely on the decision of the Supreme Court of Canada in *Re BCE Inc.*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 68, for this proposition. The rationale, they say, is that the oppression remedy provisions

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provide stakeholders with “a personal, statutory right” not to have their reasonable expectations violated in this manner.

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[23] The appellants stress that in *Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111, 89 O.R. (3d) 36, and *Jabalee v. Abalmark Inc.*, [1996] O.J. No. 2609 (C.A.), this Court acknowledged that there could be a degree of overlap between claims that could be made out as a derivative action and those that could fall under the oppression remedy, and that “the two are not mutually exclusive”: *Malata*, at para 30; *Jabalee*, at para. 5.

[24] The respondents submit, on the other hand, that the distinction between the two remedies remains, and for good reason. They accept – as did the motion judge – that there has been some relaxation in the approach to the commencement of oppression remedy actions in cases where the factual circumstances create an overlap between the two remedies, particularly in the case of small closely held corporations. But they contend that the distinction remains important – because of the leave requirement for derivative actions – in the case of publicly-held corporations such as Martinrea.

[25] In such cases, they argue, the leave requirement fulfills its important threefold purpose of (i) preventing strike suits, (ii) preventing meritless suits, and (iii) avoiding a multiplicity of proceedings – all of which may lead to the corporation incurring significant and unwarranted costs, concerns that are less

acute for closely-held corporations. Relying on *Malata* themselves, the respondents point to the importance Armstrong J.A. placed in that case on the fact that Malata was a closely held corporation (para. 38) and to his observation, at para. 39, that:

> [i]n disputes involving closely held corporations with relatively few shareholders … there is less reason to require the plaintiff to seek leave of the court. The small number of shareholders minimizes the risk of frivolous lawsuits against the corporation, thus weakening the main rationale for requiring a claim to proceed as a derivative action.

Discussion

[26] I accept that the derivative action and the oppression remedy are not mutually exclusive. Cases like *Malata* and *Jabalee* make it clear that there are circumstances where the factual underpinning will give rise to both types of redress and in which a complainant will nonetheless be entitled to proceed by way of oppression remedy. Other examples include: *Ontario (Securities Commission) v. McLaughlin*, [1987] O.J. No 1247 (H.C.J.); *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Gen. Div.); *C.I. Covington Fund Inc. v. White*, [2000] O.J. No. 4589 (S.C.), aff'd [2001] O.J. No. 3918 (Div. Ct.); *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.), at para. 526, leave to appeal refused, [2004] S.C.C.A. No. 291.

[27] However, I agree with the respondents that claims must be pursued by way of a derivative action after obtaining leave of the court where, as here, the claim

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asserted seeks to recover solely for wrongs done to a public corporation, the thrust of the relief sought is solely for the benefit of that corporation, and there is no allegation that the complainant's individualized personal interests have been affected by the wrongful conduct.

[28] It is true that the jurisprudence is inconsistent about how to treat cases where there is an overlap and that there has been considerable discussion amongst legal commentators about this and whether the distinction should be maintained. See, for example, the following texts and articles and the jurisprudence referred to therein: Koehnen, at pp. 440-448*;* Jeffrey G. MacIntosh, "The Oppression Remedy: Personal or Derivative?" (1991) 70 Can. Bar. Rev. 29; Edward M. Iacobucci and Kevin E. Davis, "Reconciling Derivative Claims and the Oppression Remedy" (2000) 12 S.C.L.R. 87.

[29] While this debate is interesting, it is not necessary to resolve it here. On my reading of the authorities, in the cases where an oppression claim has been permitted to proceed even though the wrongs asserted were wrongs to the corporation, those same wrongful acts have, for the most part, also directly affected the complainant in a manner that was different from the indirect effect of the conduct on similarly placed complainants. And most, if not all, involve small closely-held corporations not public companies.

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[30] *Waxman* is a good example. The company was a family scrap metal business. Some of the acts complained of, including the wrongful distribution of bonuses, could have been the subject of a derivative action, but it was not disputed on appeal that the complainant "was personally aggrieved by the distribution" and that it "was done at the expense of his interest in the company": para. 526.

[31] *Malata* – a case involving another closely-held company – is also a good example. The misappropriation of funds in that case affected not only the company (and therefore the indirect interests of all shareholders), but the direct interests of the minority shareholder as a creditor of the company.

[32] Here, however, on the facts pleaded, there is no overlap between the derivative action and the oppression remedy (once one goes beyond the boiler plate repetition of the statutory language from the OBCA describing the oppression remedy). The appellants are not asserting that their personal interests as shareholders have been adversely affected in any way other than the type of harm that has been suffered by all shareholders as a collectivity. Mr. Rea – the only director plaintiff – does not plead that the Improper Transactions have impacted his interest *qua* director.

[33] Since the creation of the oppression remedy, courts have taken a broad and flexible approach to its application, in keeping with the broad and flexible form of

relief it is intended to provide. However, the appellants' open-ended approach to the oppression remedy in circumstances where the facts support a derivative action on behalf of the corporation misses a significant point: the impugned conduct must harm the complainant personally, not just the body corporate, *i.e.*, the collectivity of shareholders as a whole.

[34] The oppression remedy is not available – as the appellants contend – simply because a complainant asserts a "reasonable expectation" (for example, that directors will conduct themselves with honesty and probity and in the best interests of the corporation) and the evidence supports that the reasonable expectation has been violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard". The impugned conduct must be "oppressive" of or "unfairly prejudicial" to, or "unfairly disregard" *the interests of the complainant*: OBCA, s. 248(2). No such conduct is pled here.

[35] That the harm must impact the interests of the complainant personally – giving rise to a personal action – and not simply the complainant's interests as a part of the collectivity of stakeholders as a whole - is consistent with the reforms put in place to attenuate the rigours of the rule in *Foss v. Harbottle*. The legislative response was to create *two* remedies, with two different rationales and two separate statutory foundations, not just one: a corporate remedy, and a personal or individual remedy.

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[36] The derivative action provides aggrieved minority stakeholders with the ability to pursue a cause of action on behalf of the corporation to redress wrongs done in respect of the corporation, provided leave is obtained from the court to do so. As Professor MacIntosh has observed:

> The corporation will be injured when all shareholders are affected equally, with none experiencing any special harm. By contrast, in a personal (or "direct") action, the harm has a differential impact on shareholders, whether the difference arises amongst members of different classes of shareholders or as between members of a single class. It has also been said that in a derivative action, the injury to shareholders is only *indirect*, that is, it arises only because the corporation is injured, and not otherwise. [See, for example, *Farnham v. Fingold*, [1973] 2 O.R. 132 (C.A.); *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. (2d) 216 (C.A.)].

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[37] The requirements for leave are straightforward and are set out in s. 246(2) of the OBCA: the directors must be given 15 days' notice of the intention to bring the application, and the court must be satisfied: (i) that the directors will not pursue the claim; (ii) that the complainant is acting in good faith; and (iii) that it appears to be in the best interests of the corporation that the action be brought. In this way the legislative goals of avoiding strike suits, meritless actions and a multiplicity of proceedings against the corporation – and the potentially unwarranted costs that accompany them – are strengthened. Although they have been the subject of some academic criticism,[3] these remain valid legislative

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[3] See, for example, Koehnen, at pp. 454; Iacobucci and Davis, at pp. 90-110.

objectives and concerns, in my view, particularly in the context of actions against publicly-traded corporations.

[38] Indeed, in para. 28 of their statement of claim the appellants themselves flagged Martinrea's potential exposure "to legal proceedings by each person or company that acquired or disposed of shares of Martinrea during the period in which the Improper Transactions took place." A judgment in a derivative action, however, if proceeded with and ultimately successful, will be binding on all shareholders.

[39] Much of the debate here focussed on *Malata* – this Court's most recent consideration of the relationship between derivative actions and the oppression remedy. Does it stand for the proposition, as the appellants assert, that oppression remedy claims and derivative action claims may be collapsed into an oppression remedy claim? Or, as the respondents say, does it stand for the proposition that the remedies may not be conflated when it is a public corporation that is involved? In my view, *Malata* stands for neither of these broad propositions and, in any event, is distinguishable from the present appeal.

[40] Like this case, *Malata* involved the alleged misappropriation of funds from the corporation – there, by a director, officer and major shareholder. Unlike this case, however, *Malata* involved a small closely-held corporation. The aggrieved minority shareholder was one of only three shareholders of the corporation and,

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significantly, was also a major creditor of the corporation. On those facts, there was clearly an overlap and coexistence between the wrong caused by the alleged misappropriation to the corporate collectivity and the wrong caused by it to the minority shareholder in its capacity as creditor because the misappropriation threatened the corporation's ability to pay its debt to the minority shareholder/creditor. Martinrea, however, is a large, widely-held public corporation and no type of personal wrong is evident.

[41] To be sure, there are bald allegations in the statement of claim that the Improper Transactions "caused significant damage to [Martinrea] *and its shareholders*" (para. 28, emphasis added) and that the defendants "have acted and continue to act in a manner that is oppressive, unfairly prejudicial to, and that unfairly disregards *the interests of the Plaintiffs and other Martinrea shareholders*" (para. 33, emphasis added). However, there is no particularized allegation of any wrong done to the interests of the plaintiffs themselves, *qua* shareholders or otherwise, as opposed to a wrong affecting the "corporate body", *i.e.*, the collectivity of shareholders as a whole.

[42] In their written and oral arguments, although not in their pleadings, the appellants make three submissions in an attempt to particularize the alleged harm to them individually, and thus bring the claim within the rubric of an oppression remedy. They assert first that the alleged misappropriations "precluded [them] from managing [their] investment[s] or exercising [their] voting

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rights in an informed manner"; secondly, that the failure to provide adequate disclosure of material information to shareholders has been recognized as oppressive conduct; and thirdly, that by reason of the director defendants' lack of candour with their fellow directors, "Mr. Rea lacked the full information needed to genuinely exercise his role in governing Martinrea." None of these allegations is specifically pleaded and none suffices to permit the appellants to cross the line – however "murky" that line may be – between the derivative reality of this action and its proposed oppression remedy illusion, in my opinion.

[43] "[M]anaging [their] investments and exercising [their] voting rights" in this context means exercising their role as shareholders in supervising management. The Supreme Court of Canada has held that "claims in respect of losses stemming from an alleged inability to oversee or supervise management are really derivative and not personal in nature": *Hercules Management*, at para. 62.

[44] It may be that, in some circumstances, the failure to provide proper disclosure of material information to shareholders can constitute oppressive conduct and, similarly, that in some circumstances wrongfully withholding information from a director may be "oppressive" to the director's ability to carry out his or her role in that capacity. However, no such pleading is asserted here. To the extent that the preparation of inaccurate financial statements and the lack of candour *vis-à-vis* fellow directors are asserted as facts in the statement of claim, they are pleaded as examples of the Insider Defendants' breach of

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fiduciary duty to the corporation, not as something that impacts the interests of the appellants in any individual manner other than what might affect the collectivity of the shareholders. Mr. Rea is the only plaintiff who was a director and he asserts no claim that his interests have been affected in that capacity. As pleaded, these wrongs are relevant as tools used to perpetrate the fraud against Martinrea, not as acts that have any particularized impact on any of the plaintiffs individually.

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[45] At its heart, the appellants' allegation involves the misappropriation of corporate property by the Insider Defendants, assisted in some cases by the respondents here (IM and Pashak) and others. The substantive remedy claimed is the disgorgement of the ill-gotten gains back to Martinrea.

[46] The misappropriation of corporate property was effected through the alleged Improper Transactions which in essence consisted of: (i) payment to the Insider Defendants of secret kickbacks and improper commissions in relation to services provided and equipment sold to Martinrea, as a result, at inflated prices; (ii) payments by Martinrea to third parties for construction, renovation and other services (including in one case the settlement of potential legal exposure) for the personal benefit of the Insider Defendants; and (iii) in the case of the respondents IM and Pashak, the purchase of used equipment by Martinrea at inflated prices (feeding kickbacks to the Insider Defendants) and the purchase of real estate in Kitchener by Martinrea from a related Pashak company, on terms

unfavourable to Martinrea. All of these allegations, if proved, will establish losses sustained by the corporation to its financial bottom line – *i.e.*, to the collectivity of shareholders as a whole – and not to any particular shareholder, including the appellants, individually.

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[47] For these reasons, I do not accept that the wrongs as pleaded in the statement of claim are wrongs other than wrongs done to the corporation that form the basis of a derivative action. As noted earlier, I do not see this as a case involving overlap between the oppression remedy and the derivative action.

Conclusion and Disposition

[48] I recognize that a party seeking to strike out a pleading under Rule 21.01(1)(b) must demonstrate that it is plain and obvious the claim discloses no reasonable cause of action. For these purposes, the facts as pleaded must be accepted as true, the pleading should be given a large and liberal interpretation and courts should not, at this stage of the proceedings, strike out claims that are novel or dispose of matters of law that are not fully settled in the jurisprudence: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at pp. 971, 973 and 990-991; *Falloncrest Financial Corp. v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.), at pp. 5-6.

[49] For the reasons outlined above, I am satisfied that the appellants' statement of claim does not disclose a reasonable cause of action based upon the

oppression remedy. Nor do I think it is a novel or unsettled principle of law that wrongs done solely to a corporation, for which remedies are sought on behalf of the corporation, give rise to a derivative action and require leave of the court before an action can be commenced to assert those claims. Where the facts may give rise to both a "corporate claim" and a "personal" oppression remedy claim – as *Malata* and the other cases referred to above illustrate – the question of whether an oppression remedy proceeding is available will have to be sorted out on a case by case basis. This task does not arise on the facts as pleaded here, however.

[50] Accordingly, I would dismiss the appeal.

[51] The respondents shall be entitled to their costs of the appeal, fixed in the amount of $20,000 inclusive of disbursements and all applicable taxes, as agreed.

Released: "K.M.W." May 26, 2015

"R.A. Blair J.A."
"I agree K.W. Weiler J.A."
"I agree Robert J. Sharpe J.A."

2015 ONCA 373 (CanLII)

Canadian Union of Public Employees, Local 79 *Appellant*

v.

City of Toronto and Douglas C. Stanley *Respondents*

and

Attorney General of Ontario *Intervener*

Indexed as: Toronto (City) *v.* C.U.P.E., Local 79

Neutral citation: 2003 SCC 63.

File No.: 28840.

2003: February 13; 2003: November 6.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour law — Arbitration — Dismissal without just cause — Evidence — Recreation instructor dismissed after being convicted of sexual assault — Conviction upheld on appeal — Arbitrator ruling that instructor had been dismissed without just cause — Whether union entitled to relitigate issue decided against employee in criminal proceedings — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

Judicial review — Standard of review — Labour arbitration — Recreation instructor dismissed after being convicted of sexual assault — Arbitrator ruling that instructor had been dismissed without just cause — Whether arbitrator entitled to revisit conviction — Whether correctness is appropriate standard of review — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

O worked as a recreation instructor for the respondent City. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-

Syndicat canadien de la fonction publique, section locale 79 *Appelant*

c.

Ville de Toronto et Douglas C. Stanley *Intimés*

et

Procureur général de l'Ontario *Intervenant*

Répertorié : Toronto (Ville) *c.* S.C.F.P., section locale 79

Référence neutre : 2003 CSC 63.

N^o du greffe : 28840.

2003 : 13 février; 2003 : 6 novembre.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit du travail — Arbitrage — Congédiement sans motif valable — Preuve — Instructeur en loisirs congédié après avoir été déclaré coupable d'agression sexuelle — Déclaration de culpabilité confirmée en appel — Arbitre ayant statué que l'instructeur avait été congédié sans motif valable — Le syndicat est-il habilité à remettre en cause une question tranchée à l'encontre de l'employé dans une instance criminelle? — Loi sur la preuve, L.R.O. 1990, ch. E.23, art. 22.1 — Loi sur les relations de travail, L.O. 1995, ch. 1, ann. A, art. 48.

Contrôle judiciaire — Norme de contrôle — Arbitrage en relations du travail — Instructeur en loisirs congédié après avoir été déclaré coupable d'agression sexuelle — Arbitre ayant statué que l'instructeur avait été congédié sans motif valable — L'arbitre est-il habilité à revenir sur la déclaration de culpabilité? — La norme de contrôle appropriée est-elle celle de la décision correcte? — Loi sur la preuve, L.R.O. 1990, ch. E.23, art. 22.1 — Loi sur les relations de travail, L.O. 1995, ch. 1, ann. A, art. 48.

O travaillait comme instructeur en loisirs pour la Ville intimée. Il a été accusé d'agression sexuelle contre un garçon confié à sa surveillance. Il a plaidé non coupable. Lors de son procès devant un juge seul, il a témoigné

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examined. The trial judge found that the complainant was credible and that O was not. He entered a conviction, which was affirmed on appeal. The City fired O a few days after his conviction. O grieved the dismissal. At the arbitration hearing, the City submitted the complainant's testimony from the criminal trial and the notes of O's supervisor, who had spoken to the complainant at the time. The complainant was not called to testify. O testified, claiming that he had never sexually assaulted the boy. The arbitrator ruled that the criminal conviction was admissible evidence, but that it was not conclusive as to whether O had sexually assaulted the boy. No fresh evidence was introduced. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that O had been dismissed without just cause. The Divisional Court quashed the arbitrator's ruling. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.: When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process. The doctrine engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute. It has been applied to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. The motive of the party who seeks to relitigate, and the capacity in which he or she does so, cannot be decisive factors in the application of the bar against relitigation. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted. From the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. Casting doubt over the validity of a criminal conviction is a very serious matter. Collateral attacks and relitigation are not appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy

et a subi un contre-interrogatoire. Le juge du procès a conclu que le plaignant était crédible, contrairement à O. Il a rendu un verdict de culpabilité, qui a par la suite été confirmé en appel. La Ville a congédié O quelques jours après le prononcé du verdict. O a déposé un grief contestant son congédiement. À l'audition du grief, la Ville a déposé en preuve le témoignage que le plaignant avait donné lors du procès criminel ainsi que les notes du superviseur de O, lequel avait rencontré le plaignant à l'époque. Le plaignant n'a pas été cité comme témoin. O a témoigné, affirmant qu'il n'avait jamais agressé sexuellement le garçon. L'arbitre a statué que la déclaration de culpabilité était recevable en preuve, mais qu'elle ne constituait pas une preuve concluante que O s'était livré à une agression sexuelle sur le garçon. Aucune nouvelle preuve n'a été présentée. L'arbitre a conclu que la présomption née de la déclaration de culpabilité avait été repoussée, et que O avait été congédié sans motif valable. La Cour divisionnaire a annulé la décision de l'arbitre. La Cour d'appel a confirmé cette décision.

Arrêt : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie et Arbour : Lorsqu'ils doivent décider si une déclaration de culpabilité, recevable *prima facie* en vertu de l'art. 22.1 de la *Loi sur la preuve* de l'Ontario, devrait être réfutée ou considérée comme concluante, les tribunaux font appel à la doctrine de l'abus de procédure pour déterminer si la remise en cause porterait atteinte au processus décisionnel judiciaire. La doctrine de l'abus de procédure fait intervenir le pouvoir inhérent du tribunal d'empêcher que sa procédure soit utilisée abusivement d'une manière qui aurait pour effet de discréditer l'administration de la justice. Elle a été appliquée pour empêcher la réouverture de litiges dans des circonstances où les exigences strictes de la préclusion découlant d'une question déjà tranchée n'étaient pas remplies, mais où la réouverture aurait néanmoins porté atteinte aux principes d'économie, de cohérence, de caractère définitif des instances et d'intégrité de l'administration de la justice. La raison pour laquelle la partie cherche à rouvrir le débat, et le titre auquel elle le fait, ne sauraient constituer des facteurs décisifs pour l'application de la règle interdisant la remise en question. Ce qui n'est pas permis, c'est d'attaquer un jugement en tentant de soulever de nouveau la question devant un autre forum. C'est l'accent correctement mis sur le processus plutôt que sur l'intérêt des parties qui révèle pourquoi il ne devrait pas y avoir remise en cause. D'un point de vue systémique, la remise en cause s'accompagne de graves effets préjudiciables et il faut s'en garder à moins que des circonstances n'établissent qu'elle est, dans les faits, nécessaire à la crédibilité et à l'efficacité du processus juridictionnel dans son ensemble. Mettre en

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result. The common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is no need to endorse a self-standing and independent "principle of finality" as either a separate doctrine or as an independent test to preclude relitigation.

doute la validité d'une déclaration de culpabilité est une action très grave. La contestation indirecte et la remise en cause ne constituent pas des moyens appropriés car elles imposent au processus juridictionnel des contraintes excessives et ne font rien pour garantir un résultat plus fiable. Les doctrines de la préclusion découlant d'une question déjà tranchée, de la contestation indirecte et de l'abus de procédure, reconnues en common law, répondent adéquatement aux préoccupations qui surgissent lorsqu'il faut pondérer le principe de l'irrévocabilité des jugements et celui de l'équité envers un justiciable particulier. Il n'est nul besoin d'ériger le principe de l'irrévocabilité en doctrine distincte ou critère indépendant pour interdire la remise en cause.

The appellant union was not entitled, either at common law or under statute, to relitigate the issue decided against the grievor in the criminal proceedings. The facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. O was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. There is nothing in this case that militates against the application of the doctrine of abuse of process to bar the relitigation of O's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the respondent City had established just cause for O's dismissal.

Le syndicat appelant n'était pas, en vertu de la common law ou d'une disposition législative, habilité à remettre en cause la question tranchée à l'encontre de l'employé dans l'instance criminelle. Les faits du présent pourvoi illustrent l'abus flagrant de procédure qui résulte de l'autorisation de ce type de remise en cause. O avait été déclaré coupable par un tribunal criminel et il avait épuisé toutes les voies d'appel. La déclaration de culpabilité était valide en droit, avec tous les effets juridiques en découlant. Il n'y a rien en l'espèce qui milite contre l'application de la doctrine de l'abus de procédure pour interdire la remise en cause de la déclaration de culpabilité de O. L'arbitre était juridiquement tenu de donner plein effet à la déclaration de culpabilité. L'erreur de droit qu'il a commise lui a fait tirer une conclusion manifestement déraisonnable. S'il avait bien compris la preuve et tenu compte des principes juridiques applicables, il n'aurait pu faire autrement que de conclure que la Ville intimée avait démontré l'existence d'un motif valable pour le congédiement de O.

Issue estoppel has no application in this case since the requirement of mutuality of parties has not been met. With respect to the collateral attack doctrine, the appellant does not seek to overturn the sexual abuse conviction itself, but rather contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct.

La préclusion découlant d'une question déjà tranchée ne s'applique pas en l'espèce étant donné que l'exigence de réciprocité n'a pas été remplie. En ce qui concerne la doctrine de la contestation indirecte, l'appelant ne cherche pas à faire infirmer la déclaration de culpabilité pour agression sexuelle, mais conteste simplement, dans le cadre d'une demande différente comportant des conséquences juridiques différentes, le bien-fondé de cette déclaration.

Per LeBel and Deschamps JJ.: As found by the majority, this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. There was also agreement that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law involving the interpretation of the arbitrator's constituent statute,

Les juges LeBel et Deschamps : Comme le concluent les juges majoritaires, il convient de régler ce pourvoi en fonction de la doctrine de l'abus de procédure, et non des doctrines plus restreintes et plus techniques de la contestation indirecte ou de la préclusion découlant d'une question déjà tranchée (*issue estoppel*). Il y a également accord avec l'opinion majoritaire selon laquelle, lorsqu'une déclaration de culpabilité est remise en cause dans le cadre d'une procédure de grief, la norme

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an external statute, and a complex body of common law rules and conflicting jurisprudence dealing with relitigation, an issue at the heart of the administration of justice. The arbitrator's determination in this case that O's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to O's conviction. His failure to do so was sufficient to render his ultimate decision that O had been dismissed without just cause — a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard — patently unreasonable, according to the jurisprudence of the Court.

Because of growing concerns with the ways in which the standards of review currently available within the pragmatic and functional approach are conceived of and applied, the administrative law aspects of this case require further discussion. The patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. Certain fundamental legal questions — for instance constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation — typically fall to be decided on the correctness standard. Not all questions of law, however, must be reviewed under a standard of correctness. Resolving general legal questions may be an important component of the work of some administrative adjudicators. In many instances, the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. If the general question of law is closely connected to the adjudicator's core area of expertise, the decision will typically be entitled to deference.

In reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the correct result. To pass a review for patent unreasonableness, a decision must be one that can be rationally supported. It would be wrong for a reviewing court to intervene in decisions that are incorrect, rather than limiting its intervention to those decisions that lack a rational foundation. If this occurs, the line between correctness on the one hand, and patent unreasonableness, on the other, becomes blurred. The boundaries between

de contrôle applicable est celle de la décision correcte. Cette question de droit exigeait l'interprétation de la loi constitutive de l'arbitre, d'une loi non constitutive ainsi que d'un ensemble complexe de règles de common law et d'une jurisprudence contradictoire ayant trait à la remise en cause, question qui est au cœur de l'administration de la justice. La décision de l'arbitre qui permettrait de remettre la déclaration de culpabilité de O en cause pendant l'examen du grief n'était pas correcte. Légalement, l'arbitre devait donner pleinement effet à la déclaration de culpabilité de O. L'omission de le faire a suffi pour rendre la décision ultime portant que O avait été congédié sans motif valable — décision ressortissant entièrement au domaine d'expertise de l'arbitre et donc révisable selon une norme commandant la déférence — manifestement déraisonnable suivant la jurisprudence de la Cour.

En raison des préoccupations croissantes liées à la manière dont sont conçues et appliquées les normes de contrôle qu'offre actuellement l'analyse pragmatique et fonctionnelle, il est opportun d'approfondir l'analyse des aspects du pourvoi relevant du droit administratif. À l'heure actuelle, la norme de la décision manifestement déraisonnable n'offre pas aux cours de justice des paramètres suffisamment clairs pour contrôler les décisions des tribunaux administratifs. Certaines questions de droit fondamentales — notamment en ce qui concerne la Constitution et les droits de la personne, de même que les libertés civiles, ainsi que d'autres questions revêtant une importance centrale pour le système juridique dans son ensemble, comme celle de la remise en cause — commandent généralement l'application de la norme de la décision correcte. Toute décision sur une question de droit, cependant, n'est pas assujettie à la norme de la décision correcte. Le règlement de questions de droit générales peut constituer un aspect important de la tâche dévolue à certains tribunaux administratifs. Dans bien des cas, la norme de contrôle appropriée à l'application des règles générales de la common law ou du droit civil par un tribunal spécialisé ne devrait pas être la norme de la décision correcte mais plutôt celle de la décision raisonnable. Si la question de droit générale est étroitement liée au domaine d'expertise fondamentale du décideur, sa décision fera généralement l'objet de déférence.

La cour appelée à contrôler une décision selon la norme actuelle du manifestement déraisonnable n'a pas à déterminer la décision correcte. Pour résister à l'analyse selon la norme du manifestement déraisonnable, la décision doit avoir un fondement rationnel. La cour de révision aurait tort de modifier une décision incorrecte, et non seulement une décision sans fondement rationnel. Si cela se produit, la ligne de démarcation entre la norme de la décision correcte, d'une part, et la norme de la décision manifestement déraisonnable, d'autre part, s'obscursit.

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patent unreasonableness and reasonableness *simpliciter* are even less clear and approaches to sustain a workable distinction between them raise their own problems. In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? In summary, the current framework exhibits several drawbacks. These include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficulty caused at times by the interplay between patent unreasonableness and correctness.

The role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously. Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds ensures that they are fair.

Administrative law has developed considerably over the last 25 years. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

La frontière entre le caractère manifestement déraisonnable et le caractère raisonnable *simpliciter* est encore moins claire, et les tentatives pour établir une distinction valable entre elles comportent leurs propres difficultés. En fin de compte, la question essentielle demeure la même pour les deux normes : la décision du tribunal était-elle conforme à la raison? En résumé, le cadre actuel présente plusieurs inconvénients, dont les difficultés conceptuelles et pratiques découlant du chevauchement entre la norme du manifestement déraisonnable et celle du raisonnable *simpliciter*, de même que la difficulté résultant parfois de l'interaction entre la norme du manifestement déraisonnable et celle de la décision correcte.

La cour appelée à déterminer la norme de contrôle doit rester fidèle à la volonté du législateur d'investir le tribunal administratif du pouvoir de rendre la décision. Elle doit en outre respecter le principe fondamental selon lequel, dans une société où prime le droit, le pouvoir ne doit pas être exercé de manière arbitraire. Le contrôle judiciaire axé sur le fond vise à déterminer si la décision du tribunal administratif peut se justifier rationnellement, et celui axé sur la procédure, si elle est équitable.

Le droit administratif a connu un développement considérable au cours des 25 dernières années. Cette évolution, qui témoigne d'une grande déférence envers les décideurs administratifs et reconnaît l'importance de leur rôle, a soulevé certaines difficultés ou préoccupations. Il restera à examiner, dans une affaire qui s'y prête, la solution qu'il conviendrait d'apporter à ces difficultés. Les tribunaux devraient-ils passer à un système de contrôle judiciaire comportant deux normes, celle de la décision corrrecte et une norme révisée et unifiée de raisonnabilité? Devrions-nous tenter de définir plus clairement la nature et la portée de chaque norme ou repenser leur relation et leur application? Voilà peut-être une partie de la tâche qui attend les cours de justice : construire à partir de l'évolution récente tout en s'appuyant sur la tradition juridique qui a façonné le cadre des règles actuelles de droit en matière de contrôle judiciaire.

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[1998] 1 S.C.R. 982; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890; *Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382; *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644; *Hao v. Canada (Minister of Citizenship and Immigration)* (2000), 184 F.T.R. 246; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

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APPEAL from a judgment of the Ontario Court of Appeal (2001), 55 O.R. (3d) 541, 205 D.L.R. (4th) 280, 149 O.A.C. 213, 45 C.R. (5th) 354, 37 Admin. L.R. (3d) 40, 2002 CLLC ¶220-014, [2001] O.J. No. 3239 (QL), affirming a judgment of the Divisional Court (2000), 187 D.L.R. (4th) 323, 134 O.A.C. 48, 23 Admin. L.R. (3d) 72, 2000 CLLC ¶220-038, [2000] O.J. No. 1570 (QL). Appeal dismissed.

Douglas J. Wray and *Harold F. Caley*, for the appellant.

Jason Hanson, *Mahmud Jamal* and *Kari M. Abrams*, for the respondent the City of Toronto.

No one appeared for the respondent Douglas C. Stanley.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (2001), 55 O.R. (3d) 541, 205 D.L.R. (4th) 280, 149 O.A.C. 213, 45 C.R. (5th) 354, 37 Admin. L.R. (3d) 40, 2002 CLLC ¶220-014, [2001] O.J. No. 3239 (QL), qui a confirmé un jugement de la Cour divisionnaire (2000), 187 D.L.R. (4th) 323, 134 O.A.C. 48, 23 Admin. L.R. (3d) 72, 2000 CLLC ¶220-038, [2000] O.J. No. 1570 (QL). Pourvoi rejeté.

Douglas J. Wray et *Harold F. Caley*, pour l'appelant.

Jason Hanson, *Mahmud Jamal* et *Kari M. Abrams*, pour l'intimée la Ville de Toronto.

Personne n'a comparu pour l'intimé Douglas C. Stanley.

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Sean Kearney, *Mary Gersht* and *Meredith Brown*, for the intervener.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ. was delivered by

Arbour J. —

I. Introduction

1 Can a person convicted of sexual assault, and dismissed from his employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place? This is essentially the issue raised in this appeal.

2 Like the Court of Appeal for Ontario and the Divisional Court, I have come to the conclusion that the arbitrator may not revisit the criminal conviction. Although my reasons differ somewhat from those of the courts below, I would dismiss the appeal.

II. Facts

3 Glenn Oliver worked as a recreation instructor for the respondent City of Toronto. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. He called several defence witnesses, including character witnesses. The trial judge found that the complainant was credible and that Oliver was not. He entered a conviction, which was later affirmed on appeal. He sentenced Oliver to 15 months in jail, followed by one year of probation.

4 The respondent City of Toronto fired Oliver a few days after his conviction, and Oliver grieved his dismissal. At the hearing, the City of Toronto submitted the boy's testimony from the criminal trial and the notes of Oliver's supervisor, who had spoken to the boy at the time. The City did not call the boy to

Sean Kearney, *Mary Gersht* et *Meredith Brown*, pour l'intervenant.

Version française du jugement de la juge en chef McLachlin et des juges Gonthier, Iacobucci, Major, Bastarache, Binnie et Arbour rendu par

La juge Arbour —

I. Introduction

Une personne déclarée coupable d'agression sexuelle et congédiée par son employeur pour cette raison peut-elle être réintégrée dans ses fonctions par un arbitre qui conclut, eu égard à la preuve dont il dispose, qu'il n'y a pas eu d'agression sexuelle? C'est essentiellement la question que pose le présent pourvoi.

Comme la Cour d'appel de l'Ontario et la Cour divisionnaire, je conclus qu'un arbitre ne peut réexaminer une déclaration de culpabilité. Je suis donc d'avis de rejeter le pourvoi, bien que pour des motifs qui diffèrent quelque peu de ceux des juridictions inférieures.

II. Les faits

Glenn Oliver travaillait comme instructeur en loisirs pour la Ville de Toronto, intimée en l'instance. Il a été accusé d'agression sexuelle contre un jeune garçon confié à sa surveillance, et il a plaidé non coupable. Lors de son procès devant un juge seul, il a témoigné et a subi un contre-interrogatoire. Il a cité plusieurs témoins en défense, dont des témoins de moralité. Le juge du procès a conclu que le plaignant était crédible mais non Oliver. Il a rendu un verdict de culpabilité, qui a par la suite été confirmé en appel. Il a condamné Oliver à une peine d'emprisonnement de 15 mois et à un an de probation.

La Ville de Toronto intimée a congédié Oliver quelques jours après le prononcé du verdict, et Oliver a déposé un grief contestant son congédiement. À l'audition du grief, la Ville a déposé en preuve le témoignage que le jeune garçon avait donné lors du procès criminel ainsi que les notes du

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testify. Oliver again testified on his own behalf and claimed that he had never sexually assaulted the boy.

superviseur d'Oliver, lequel avait rencontré le jeune garçon à l'époque, mais elle n'a pas cité le garçon comme témoin. Encore une fois, Oliver a témoigné et a affirmé qu'il n'avait pas commis d'agression sexuelle contre le jeune garçon.

5

The arbitrator ruled that the criminal conviction was admissible as *prima facie* but not conclusive evidence that Oliver had sexually assaulted the boy. No evidence of fraud nor any fresh evidence unavailable at trial was introduced in the arbitration. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that Oliver had been dismissed without just cause.

L'arbitre a déterminé que la déclaration de culpabilité était recevable à titre de preuve *prima facie* mais qu'elle ne constituait pas une preuve concluante qu'Oliver s'était livré à une agression sexuelle sur le garçon. On n'a présenté à l'audition aucune preuve de fraude ni aucun nouvel élément de preuve non disponible au procès. L'arbitre a conclu que la présomption née de la déclaration de culpabilité avait été repoussée et qu'Oliver avait été congédié sans motif valable.

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III. Procedural History

III. Historique des procédures judiciaires

A. *Superior Court of Justice (Divisional Court)* (2000), 187 D.L.R. (4th) 323

A. *Cour supérieure de justice (Cour divisionnaire)* (2000), 187 D.L.R. (4th) 323

6

At Divisional Court the application for judicial review was granted and the decision of the arbitrator was quashed. The Divisional Court heard this case and *Ontario v. O.P.S.E.U.* at the same time. (*Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64, is being released concurrently by this Court.) O'Driscoll J. found that while s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23, applied to all the arbitrations, relitigation of the cases was barred by the doctrines of collateral attack, issue estoppel and abuse of process. The court noted that criminal convictions are valid judgments that cannot be collaterally attacked at a later arbitration (paras. 74-79). With respect to issue estoppel, under which an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud, the court found that relitigation was also prevented, rejecting the appellant's argument that there had been no privity because the union, and not the grievor, had filed the grievance. The court also held that the doctrine of abuse of process, which denies a collateral attack upon a final decision of another court where the party had "a full opportunity of contesting the decision", applied (paras. 81 and 90). Finally, O'Driscoll J. found that whether the standard of review was correctness or patent unreasonableness in each

La Cour divisionnaire a accueilli la demande de contrôle judiciaire et annulé la décision de l'arbitre. Elle a entendu cette affaire en même temps que l'affaire *Ontario c. S.E.E.F.P.O.* (*Ontario c. S.E.E.F.P.O.*, [2003] 3 R.C.S. 149, 2003 CSC 64, dont jugement est rendu simultanément par la Cour.) Le juge O'Driscoll a déterminé que bien que l'art. 22.1 de la *Loi sur la preuve*, L.R.O. 1990, ch. E.23, s'appliquât à tous les arbitrages, la remise en cause était interdite par les doctrines de la contestation indirecte, de la préclusion découlant d'une question déjà tranchée (*issue estoppel*) et de l'abus de procédure. Il a fait observer que les déclarations de culpabilité constituent des jugements valides qui ne peuvent faire l'objet de contestation indirecte dans le cadre d'un arbitrage subséquent (par. 74-79). Relativement à la doctrine de la préclusion découlant d'une question déjà tranchée, en vertu de laquelle la décision rendue contre une partie est à l'abri des contestations indirectes à moins que de nouveaux éléments de preuve déterminants soient présentés ou que la fraude soit établie, le juge a statué qu'elle interdisait elle aussi la remise en cause, et il a rejeté l'argument de l'appelant selon lequel il n'y avait pas de connexité d'intérêts parce que le syndicat, non l'employé, avait déposé le grief. Le juge a également statué que la doctrine de l'abus

case, the standard for judicial review had been met (para. 86).

de procédure, laquelle empêche la contestation indirecte de la décision d'un autre tribunal par une partie qui [TRADUCTION] « a eu l'entière possibilité de contester la décision », s'appliquait en l'espèce (par. 81 et 90). Enfin, le juge O'Driscoll a conclu que dans chaque cas il avait été satisfait à la norme de contrôle, qu'il s'agisse de la norme de la décision correcte ou de celle de la décision manifestement déraisonnable (par. 86).

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B. *Court of Appeal for Ontario* (2001), 55 O.R. (3d) 541

B. *Cour d'appel de l'Ontario* (2001), 55 O.R. (3d) 541

7 Doherty J.A. for the court held that because the crux of the issue was whether the Canadian Union of Public Employees (CUPE or the union) was permitted to relitigate the issue decided in the criminal trial, and because this analysis "turned on [the arbitrator's] understanding of the common law rules and principles governing the relitigation of issues finally decided in a previous judicial proceeding", the appropriate standard of review was correctness (paras. 22 and 38).

Rendant jugement pour la cour, le juge Doherty a statué que, comme il s'agissait essentiellement de déterminer si le Syndicat canadien de la fonction publique (SCFP ou le syndicat) pouvait remettre en cause la question tranchée dans le procès criminel et que cette analyse [TRADUCTION] « reposait sur l'interprétation [par l'arbitre] des règles et principes de la common law relatifs à la remise en cause de questions ayant donné lieu à une décision définitive dans une instance antérieure », la norme de contrôle applicable était la norme de la décision correcte (par. 22 et 38).

8 Doherty J.A. concluded that issue estoppel did not apply. Even if the union was the employee's privy, the respondent City of Toronto had played no role in the criminal proceeding and had no relationship to the Crown. He also found that describing the appellant union's attempt to relitigate the employee's culpability as a collateral attack on the order of the court did not assist in determining whether relitigation could be permitted. Commenting that the phrase "abuse of process" was perhaps best limited to describe those cases where the plaintiff has instigated litigation for some improper purpose, Doherty J.A. went on to consider what he called "the finality principle" in considerable depth.

Le juge Doherty a conclu que la doctrine de la préclusion découlant d'une question déjà tranchée ne s'appliquait pas. Même s'il existait un lien de droit entre le syndicat et l'employé, la Ville de Toronto intimée n'avait joué aucun rôle dans le procès criminel et n'avait aucun lien avec le ministère public. Il a également conclu que pour déterminer si la remise en cause était permise, il n'était guère utile d'assimiler la tentative du syndicat appelant de débattre à nouveau de la culpabilité de l'employé à une contestation indirecte de l'ordonnance du tribunal. Puis, affirmant qu'il valait peut-être mieux limiter l'emploi des mots « abus de procédure » aux cas où les demandeurs engagent des poursuites judiciaires pour des motifs illégitimes, il a entrepris l'examen approfondi de ce qu'il a appelé [TRADUCTION] « le principe de l'irrévocabilité ».

9 Doherty J.A. dismissed the appeal on the basis of this principle. He held that the *res judicata* jurisprudence required a court to balance the importance of finality, which reduces uncertainty and inconsistency in results, and which serves to conserve the

Le juge Doherty a rejeté l'appel en se fondant sur ce principe. Il a statué que suivant la jurisprudence sur l'autorité de la chose jugée, les tribunaux devaient mettre en balance l'importance de l'irrévocabilité — qui réduit l'incertitude et les résultats

resources of both the parties and the judiciary, with the "search for justice in each individual case" (para. 94). Doherty J.A. held that the following approach should be taken when weighing finality claims against an individual litigant's claim to access to justice (at para. 100):

- Does the *res judicata* doctrine apply?
- If the doctrine applies, can the party against whom it applies demonstrate that the justice of the individual case should trump finality concerns?
- If the doctrine does not apply, can the party seeking to preclude relitigation demonstrate that finality concerns should be given paramountcy over the claim that justice requires relitigation?

Ultimately, Doherty J.A. dismissed the appeal, concluding that "finality concerns must be given paramountcy over CUPE's claim to an entitlement to relitigate Oliver's culpability" (para. 102). He so concluded because there was no suggestion of fraud at the criminal trial, because the underlying charges were serious enough that the employee was likely to have litigated them to the fullest, and because there was no new evidence presented at arbitration (paras. 103-108).

IV. Relevant Statutory Provisions

Evidence Act, R.S.O. 1990, c. E.23

22.1 (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,

(a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or

(b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.

contradictoires tout en permettant d'économiser les ressources des parties et de l'appareil judiciaire — et [TRADUCTION] « la recherche de la justice dans chaque affaire » (par. 94). Il a exposé les questions auxquelles il fallait répondre lorsqu'il s'agit de pondérer la prétention à l'irrévocabilité et l'accès d'un justiciable particulier à la justice (au par. 100) :

[TRADUCTION]

- La doctrine de la chose jugée s'applique-t-elle?
- Si la doctrine s'applique, la partie contre qui elle s'applique peut-elle démontrer que la recherche de la justice devrait l'emporter sur le principe de l'irrévocabilité?
- Si la doctrine ne s'applique pas, la partie qui cherche à empêcher la remise en cause peut-elle démontrer que le principe de l'irrévocabilité devrait l'emporter sur la prétention voulant que la justice exige la remise en cause?

10 En fin de compte, le juge Doherty a rejeté l'appel, concluant que [TRADUCTION] « les considérations relatives à l'irrévocabilité doivent l'emporter sur le droit allégué du SCFP de remettre en cause la culpabilité d'Oliver » (par. 102). Il a tiré cette conclusion parce qu'il n'y avait pas eu d'allégation que le procès criminel était entaché de fraude, parce que les accusations en cause étant graves, il était probable que l'employé leur avait opposé la meilleure défense possible, et parce qu'aucun nouvel élément de preuve n'avait été présenté lors de l'arbitrage (par. 103-108).

IV. Les dispositions législatives applicables

11 *Loi sur la preuve*, L.R.O. 1990, ch. E.23

22.1 (1) La preuve qu'une personne a été déclarée coupable ou libérée au Canada à l'égard d'un acte criminel constitue la preuve, en l'absence de preuve contraire, que l'acte criminel a été commis par la personne si, selon le cas :

a) il n'a pas été interjeté appel de la déclaration de culpabilité ou de la libération et le délai d'appel est expiré;

b) il a été interjeté appel de la déclaration de culpabilité ou de la libération, mais l'appel a été rejeté ou a fait l'objet d'un désistement et aucun autre appel n'est prévu.

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(2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.

(3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A

48. (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

V. Analysis

A. *Standard of Review*

12 My colleague LeBel J. discusses at length our jurisprudence on standards of review. He reviews concerns and criticisms about the three standard system of judicial review. Given that these issues were not argued before us in this case, and without the benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis. (See this Court's unanimous decisions of *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20.)

13 The Court of Appeal properly applied the functional and pragmatic approach as delineated in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (see also

(2) Le paragraphe (1) s'applique que la personne déclarée coupable ou libérée soit une partie à l'instance ou non.

(3) Pour l'application du paragraphe (1), un certificat énonçant seulement la substance et l'effet de l'accusation et de la déclaration de culpabilité ou de la libération, et omettant la partie de forme, qui se présente comme étant signé par l'officier ayant la garde des archives du tribunal qui a déclaré le contrevenant coupable ou qui l'a libéré, ou par son adjoint, constitue une preuve suffisante de la déclaration de culpabilité ou de la libération de la personne, une fois prouvé que la personne est bien celle désignée sur le certificat comme ayant été déclarée coupable ou libérée, sans qu'il soit nécessaire d'établir l'authenticité de la signature ni la qualité officielle de la personne qui paraît être le signataire.

Loi de 1995 sur les relations de travail, L.O. 1995, ch. 1, ann. A

48. (1) Chaque convention collective contient une disposition sur le règlement, par voie de décision arbitrale définitive et sans interruption du travail, de tous les différends entre les parties que soulèvent l'interprétation, l'application, l'administration ou une prétendue violation de la convention collective, y compris la question de savoir s'il y a matière à arbitrage.

V. Analyse

A. *La norme de contrôle*

Mon collègue le juge LeBel examine en détail la jurisprudence de notre Cour concernant les normes de contrôle. Il passe en revue les préoccupations et critiques que soulève le système de contrôle judiciaire à triple norme. Ces questions n'ayant pas été débattues devant nous en l'espèce et, sans l'éclairage qu'apporterait un véritable débat contradictoire sur ce point, je ne souhaite pas formuler de commentaires sur l'opportunité de s'écarter du cadre d'analyse des normes de contrôle que nous avons récemment réitéré. (Voir les arrêts unanimes de notre Cour *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, et *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20.)

La Cour d'appel a bien appliqué les principes de l'analyse pragmatique et fonctionnelle énoncés dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S.

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Dr. Q, *supra*), to determine the extent to which the legislature intended that courts should review the tribunals' decisions.

982 (voir aussi *Dr Q*, précité), pour déterminer l'intention du législateur quant à l'étendue du contrôle judiciaire des décisions des tribunaux administratifs.

14

Doherty J.A. was correct to acknowledge patent unreasonableness as the general standard of review of an arbitrator's decision as to whether just cause has been established in the discharge of an employee. However, and as he noted, the same standard of review does not necessarily apply to every ruling made by the arbitrator in the course of the arbitration. This follows the distinction drawn by Cory J. for the majority in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, where he said, at para. 39:

> It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard. . . . An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result. [Emphasis added.]

Le juge Doherty a correctement déterminé que la norme de la décision manifestement déraisonnable est la norme générale de contrôle applicable à la décision d'un arbitre sur la question de savoir si l'existence d'un motif valable de congédiement a été établie. Comme il l'a signalé, toutefois, les décisions que les arbitres ont à rendre au cours d'un arbitrage n'appellent pas nécessairement toutes la même norme de contrôle. Cette remarque va dans le sens de la distinction établie par le juge Cory, s'exprimant au nom des juges majoritaires, dans l'arrêt *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487, où il a dit, au par. 39 :

> Il a été statué à plusieurs reprises que les connaissances et l'expertise que possède un conseil d'arbitrage en matière d'interprétation d'une convention collective ne s'étendent habituellement pas à l'interprétation de mesures législatives extrinsèques. Les conclusions d'un conseil sur l'interprétation d'une loi ou de la common law peuvent généralement faire l'objet d'un examen selon la norme de la décision correcte. [. . .] Il peut y avoir dérogation à cette règle dans des cas où la loi est intimement liée au mandat du tribunal et où celui-ci est souvent appelé à l'examiner. [Je souligne.]

15

In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she

En l'espèce, le caractère raisonnable de la décision de l'arbitre de réintégrer l'employé dans ses fonctions dépend du bien-fondé de sa prémisse selon laquelle il n'était pas lié par la déclaration de culpabilité, prémisse qui reposait sur son analyse de règles complexes de common law et de décisions contradictoires. Le droit en matière de remise en cause de questions ayant fait l'objet de décisions judiciaires définitives antérieures n'est pas seulement complexe; il joue également un rôle central dans l'administration de la justice. Bien interprétées et bien appliquées, les doctrines de l'autorité de la chose jugée et de l'abus de procédure règlent les interactions entre les différents décideurs judiciaires. Ces règles et principes exigent des décideurs qu'ils réalisent un équilibre entre l'irrévocabilité, l'équité, l'efficacité et l'autorité des décisions judiciaires. L'application de ces règles, doctrines et principes

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must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 21.

échappe clairement au domaine d'expertise des arbitres du travail qui peuvent devoir y faire appel. Lorsque cela se produit, les arbitres doivent trancher correctement la question de droit posée. Une analyse incorrecte peut suffire à entraîner un résultat manifestement déraisonnable. Ces observations ont récemment été réitérées par le juge Iacobucci dans l'arrêt *Parry Sound (District), Conseil d'administration des services sociaux c. S.E.E.F.P.O., section locale 324*, [2003] 2 R.C.S. 157, 2003 CSC 42, par. 21.

16 Therefore I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

La Cour d'appel avait donc raison, selon moi, de statuer que l'arbitre devait décider correctement si le SCFP était, en vertu de la common law ou d'une disposition législative, habilité à remettre en cause la question tranchée à l'encontre de l'employé dans l'instance criminelle.

B. *Section 22.1 of Ontario's Evidence Act*

B. *L'article 22.1 de la Loi sur la preuve de l'Ontario*

17 Section 22.1 of the Ontario *Evidence Act* is of limited assistance to the disposition of this appeal. It provides that proof that a person has been convicted of a crime is proof, "in the absence of evidence to the contrary", that the crime was committed by that person.

L'article 22.1 de la *Loi sur la preuve* de l'Ontario n'est pas d'un grand secours pour trancher le présent pourvoi. Il énonce que la preuve qu'une personne a été déclarée coupable d'un acte criminel fait preuve, « en l'absence de preuve contraire », que l'acte criminel a été commis par cette personne.

18 As Doherty J.A. correctly pointed out, at para. 42, s. 22.1 contemplates that the validity of a conviction may be challenged in a subsequent proceeding, but the section says nothing about the circumstances in which such challenge is or is not permissible. That issue is determined by the application of such common law doctrines as *res judicata*, issue estoppel, collateral attack and abuse of process. Section 22.1 speaks of the admissibility of the fact of the conviction as proof of the truth of its content, and speaks of its conclusive effect if unchallenged. As a rule of evidence, the section addresses in part the hearsay rule, by making the conviction — the finding of another court — admissible for the truth of its content, as an exception to the inadmissibility of hearsay (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at p. 120; *Phipson on Evidence* (14th ed. 1990), at paras. 33-94 and 33-95).

Comme le juge Doherty le souligne avec raison (au par. 42), l'art. 22.1 prévoit que la validité d'une déclaration de culpabilité peut être contestée dans une instance subséquente, mais il est muet sur les circonstances susceptibles de permettre ou non une telle contestation. Ce sont les doctrines de common law relatives à l'autorité de la chose jugée, à la préclusion découlant d'une question déjà tranchée, à la contestation indirecte et à l'abus de procédure qui règlent cette question. L'article 22.1 pose le principe de la recevabilité de la déclaration de culpabilité comme preuve de son contenu et établit son caractère probant en l'absence de réfutation. En tant que règle de preuve, cette disposition touche en partie au ouï-dire, en ce qu'elle établit la recevabilité de la déclaration de culpabilité — la conclusion d'un autre tribunal — comme preuve de son contenu, par dérogation à la règle interdisant le ouï-dire (D. M. Paciocco et L. Stuesser, *The Law of Evidence* (3e éd. 2002), p. 120; *Phipson on Evidence* (14e éd. 1990), par. 33-94 et 33-95).

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19

Here, however, the admissibility of the conviction is not in issue. Section 22.1 renders the proof of the conviction admissible. The question is whether it can be rebutted by "evidence to the contrary". There are circumstances in which evidence will be admissible to rebut the presumption that the person convicted committed the crime, in particular where the conviction in issue is that of a non-party. There are also circumstances in which no such evidence may be tendered. If either issue estoppel or abuse of process bars the relitigation of the facts essential to the conviction, then no "evidence to the contrary" may be tendered to displace the effect of the conviction. In such a case, the conviction is conclusive that the person convicted committed the crime.

En l'espèce, toutefois, la recevabilité de la déclaration de culpabilité n'est pas en cause : la déclaration de culpabilité est recevable en preuve en vertu de l'art. 22.1. Il faut cependant déterminer si elle peut être réfutée par une « preuve contraire ». Il y a des circonstances où des éléments de preuve visant à réfuter la présomption que la personne déclarée coupable a commis le crime sont recevables, en particulier lorsque la déclaration concerne une personne autre qu'une partie, mais il y a également des circonstances où la présentation de tels éléments de preuve n'est pas permise. Si la doctrine de la préclusion découlant d'une question déjà tranchée ou encore celle de l'abus de procédure interdisent la remise en cause des faits essentiels de la déclaration de culpabilité, aucune « preuve contraire » ne pourra en écarter l'effet. La déclaration de culpabilité constitue alors une preuve concluante que la personne qui y est visée a commis le crime.

20

This interpretation is consistent with the rule of interpretation that legislation is presumed not to depart from general principles of law without an express indication to that effect. This presumption was reviewed and applied by Iacobucci J. in *Parry Sound*, *supra*, at para 39. Section 22.1 reflected the law established in the leading Canadian case of *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (Ont. H.C.), at p. 264, aff'd (1984), 48 O.R. (2d) 266 (C.A.), wherein after a thorough review of Canadian and English jurisprudence, Osler J. held that a criminal conviction is admissible in subsequent civil litigation as *prima facie* proof that the convicted individual committed the alleged act, "subject to rebuttal by the plaintiff on the merits". However, the common law also recognized that the presumption of guilt established by a conviction is rebuttable only where the rebuttal does not constitute an abuse of the process of the court (*Demeter* (H.C.), *supra*, at p. 265; *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529 (H.L.), at p. 541; see also *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 (C.A.), at p. 22, *per* Blair J.A.). Section 22.1 does not change this; the legislature has not explicitly displaced the common law

Cette interprétation est conforme à la règle d'interprétation posant qu'en l'absence d'indication expresse au contraire la loi est présumée ne pas s'écarter des principes généraux de droit. Dans *Parry Sound*, précité, par. 39, le juge Iacobucci a analysé et appliqué cette présomption. L'article 22.1 codifie le principe établi dans la décision canadienne clé *Demeter c. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (H.C. Ont.), p. 264, conf. par (1984), 48 O.R. (2d) 266 (C.A.), où après un examen approfondi de la jurisprudence canadienne et anglaise, le juge Osler a statué qu'une déclaration de culpabilité est recevable dans une instance civile subséquente comme preuve *prima facie* que la personne qui y est mentionnée a commis l'acte allégué, [TRADUCTION] « sous réserve de réfutation au fond ». Toutefois, la common law reconnaît également que la présomption de culpabilité établie par une déclaration de culpabilité ne peut être repoussée que lorsque la réfutation ne constitue pas un abus de procédure (*Demeter* (H.C.), précité, p. 265; *Hunter c. Chief Constable of the West Midlands Police*, [1982] A.C. 529 (H.L.), p. 541; voir aussi *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 (C.A.), p. 22, le juge Blair). L'article 22.1 ne change rien à cette situation; le législateur n'a pas explicitement écarté

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doctrines and the rebuttal is consequently subject to them.

21 The question therefore is whether any doctrine precludes in this case the relitigation of the facts upon which the conviction rests.

C. *The Common Law Doctrines*

22 Much consideration was given in the decisions below to the three related common law doctrines of issue estoppel, abuse of process and collateral attack. Each of these doctrines was considered as a possible means of preventing the union from relitigating the criminal conviction of the grievor before the arbitrator. Although both the Divisional Court and the Court of Appeal concluded that the union could not relitigate the guilt of the grievor as reflected in his criminal conviction, they took different views of the applicability of the different doctrines advanced in support of that conclusion. While the Divisional Court concluded that relitigation was barred by the collateral attack rule, issue estoppel and abuse of process, the Court of Appeal was of the view that none of these doctrines as they presently stand applied to bar the rebuttal. Rather, it relied on a self-standing "finality principle". I think it is useful to disentangle these various rules and doctrines before turning to the applicable one here. I stress at the outset that these common law doctrines are interrelated and in many cases more than one doctrine may support a particular outcome. Even though both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process, the three are not always entirely interchangeable.

(1) Issue Estoppel

23 Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided

les doctrines de common law et, par conséquent, la réfutation y est assujettie.

Il faut donc examiner si l'application d'une de ces doctrines interdit en l'espèce la remise en cause des faits qui fondent la déclaration de culpabilité.

C. *Les doctrines de common law*

Les décisions des juridictions inférieures, en l'espèce, ont traité abondamment des trois doctrines de common law connexes que sont la préclusion découlant d'une question déjà tranchée, l'abus de procédure et la contestation indirecte. On a vu dans chacune de ces doctrines un moyen possible d'empêcher le syndicat de remettre en cause devant l'arbitre la déclaration de culpabilité de l'employé. Bien que la Cour divisionnaire et la Cour d'appel aient toutes deux conclu que le syndicat ne pouvait débattre à nouveau de la culpabilité attestée par la condamnation, elles ont exprimé des vues divergentes sur l'applicabilité des différentes doctrines invoquées à l'appui de cette conclusion. La Cour divisionnaire s'est dite d'avis que la remise en cause était interdite par les doctrines de la contestation indirecte, de la préclusion découlant d'une question déjà tranchée et de l'abus de procédure, tandis que la Cour d'appel, estimant qu'aucune de ces doctrines ne pouvaient, dans l'état où elles se trouvent, avoir pour effet d'empêcher la réfutation, s'est plutôt appuyée sur le principe autonome de « l'irrévocabilité ». Je crois utile de démêler ces diverses règles et doctrines avant d'examiner celle qui s'applique en l'espèce. Je souligne d'entrée de jeu que ces doctrines de common law sont interreliées et que souvent plus d'une doctrine permettra d'arriver à un résultat particulier. Même si la préclusion découlant d'une question déjà tranchée et la contestation indirecte peuvent être toutes deux considérées comme des applications particulières de la doctrine plus large de l'abus de procédure, les trois ne sont pas toujours entièrement interchangeables.

(1) La préclusion découlant d'une question déjà tranchée

La préclusion découlant d'une question déjà tranchée est un volet du principe de l'autorité de la chose jugée (l'autre étant la préclusion fondée

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in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, *per* Binnie J.). The final requirement, known as "mutuality", has been largely abandoned in the United States and has been the subject of much academic and judicial debate there as well as in the United Kingdom and, to some extent, in this country. (See G. D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623, at pp. 648-51.) In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.

sur la cause d'action), qui interdit de soumettre à nouveau aux tribunaux des questions déjà tranchées dans une instance antérieure. Pour que le tribunal puisse accueillir la préclusion découlant d'une question déjà tranchée, trois conditions préalables doivent être réunies : (1) la question doit être la même que celle qui a été tranchée dans la décision antérieure; (2) la décision judiciaire antérieure doit avoir été une décision finale; (3) les parties dans les deux instances doivent être les mêmes ou leurs ayants droit (*Danyluk c. Ainsworth Technologies Inc.*, [2001] 2 R.C.S. 460, 2001 CSC 44, par. 25 (le juge Binnie)). La dernière exigence, à laquelle on a donné le nom de « réciprocité », a été largement abandonnée aux États-Unis et, dans ce pays ainsi qu'au Royaume-Uni, elle a suscité un ample débat en doctrine et en jurisprudence, comme elle l'a fait dans une certaine mesure ici (voir G. D. Watson, « Duplicative Litigation : Issue Estoppel, Abuse of Process and the Death of Mutuality » (1990), 69 *R. du B. can.* 623, p. 648-651). Compte tenu des conclusions différentes tirées par les tribunaux inférieurs sur l'applicabilité de la préclusion découlant d'une question déjà tranchée, je crois utile d'examiner ce débat d'un peu plus près.

24

The first two requirements of issue estoppel are met in this case. The final requirement of mutuality of parties has not been met. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto, Oliver's employer. It is unnecessary to decide whether Oliver and CUPE should reasonably be viewed as privies for the purpose of the application of the mutuality requirement since it is clear that the Crown, acting as prosecutor in the criminal case, is not privy with the City of Toronto, nor would it be with a provincial, rather than a municipal, employer (as in the *Ontario v. O.P.S.E.U.* case, released concurrently).

Les deux premières exigences de la préclusion découlant d'une question déjà tranchée sont remplies en l'espèce. La dernière, celle de la réciprocité, ne l'est pas. Dans la poursuite criminelle initiale, le litige opposait Sa Majesté la Reine du chef du Canada et Glenn Oliver. Dans l'arbitrage, les parties étaient le SCFP et la Ville de Toronto, l'employeur d'Oliver. Il n'est pas nécessaire, pour l'application de l'exigence de la réciprocité, de décider si l'on peut raisonnablement conclure à l'existence d'un rapport d'auteur à ayant droit entre Oliver et le SCFP, puisqu'il est clair qu'il n'en n'existe pas entre la Couronne, en sa qualité de poursuivant dans l'instance criminelle, et la Ville de Toronto, et qu'il n'y en aurait pas non plus s'il s'agissait d'un employeur provincial plutôt que municipal (comme dans le pourvoi connexe *Ontario c. S.E.E.F.P.O.*).

25

There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. In his article, Professor Watson, *supra*, argues that explicitly abolishing the mutuality requirement,

De nombreux auteurs ont critiqué l'exigence de la réciprocité en matière de préclusion découlant d'une question déjà tranchée. Dans son article, le professeur Watson, *loc. cit.*, soutient que l'abolition

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as has been done in the United States, would both reduce confusion in the law and remove the possibility that a strict application of issue estoppel may work an injustice. The arguments made by him and others (see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000)), urging Canadian courts to abandon the mutuality requirement have been helpful in articulating a principled approach to the bar against relitigation. In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.

26 In his very useful review of the abandonment of the mutuality requirement in the United States, Professor Watson, at p. 631, points out that mutuality was first relaxed when issue estoppel was used defensively:

> The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action, unless the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to permit preclusion. The rationale is that P should not be allowed to relitigate an issue already lost by simply changing defendants . . . .

27 Professor Watson then exposes the additional difficulties that arise if the mutuality requirement is removed when issue estoppel is raised offensively, as was done by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). He describes the offensive use of non mutual issue estoppel as follows (at p. 631):

> The power of this offensive non-mutual issue estoppel doctrine is illustrated by single event disaster cases, such as an airline crash. Assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. Offensive non-mutual issue estoppel permits P2 through P20, *etc.*, now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence. The rationale is that if Airline fully and fairly litigated the issue of its negligence in action #1 it has had its day in court; it has had due

explicite de cette condition, comme aux États-Unis, réduirait la confusion juridique et supprimerait la possibilité que l'application stricte de la doctrine conduise à une injustice. Les arguments que cet auteur et d'autres (voir aussi D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000)) ont mis de l'avant pour exhorter les tribunaux canadiens à abandonner l'exigence de la réciprocité ont contribué à l'élaboration des principes fondant l'interdiction de la remise en cause. Je suis toutefois d'avis que notre droit comporte les outils appropriés et qu'il n'y a pas lieu de modifier l'exigence de la réciprocité, comme le nécessiterait la présente affaire.

Dans l'étude très éclairante qu'il a consacrée à l'abandon de l'exigence de la réciprocité aux États-Unis, le professeur Watson signale, à la p. 631, que la condition a d'abord cessé d'être exigée lorsque la préclusion était invoquée en défense :

> [TRADUCTION] L'utilisation défensive de la préclusion lorsqu'il n'y a pas réciprocité est simple. Si P, n'ayant pas eu gain de cause dans une poursuite l'ayant opposé à D1, poursuit ensuite D2 pour la même question, D2 peut invoquer en défense la préclusion découlant de la précédente poursuite, à moins que l'instance n'ait pas offert l'entière possibilité de débattre équitablement de la question ou qu'en raison d'autres facteurs il soit injuste ou déraisonnable de permettre la préclusion. Le raisonnement est que P ne devrait pas être autorisé à intenter de nouveau un procès qu'il a déjà perdu simplement en changeant de défendeur . . .

Le professeur Watson expose ensuite les difficultés qui surgissent si l'on abandonne l'exigence de la réciprocité lorsque la préclusion découlant d'une question déjà tranchée est invoquée en demande, comme l'a fait la Cour suprême des États-Unis dans *Parklane Hosiery Co. c. Shore*, 439 U.S. 322 (1979). Il décrit ainsi l'utilisation offensive de la préclusion (à la p. 631) :

> [TRADUCTION] La force de cette doctrine offensive de la préclusion sans exigence de réciprocité est illustrée par les instances afférentes à des désastres résultant d'une cause unique, comme un écrasement d'avion. Supposons que P1 poursuit le transporteur aérien pour négligence dans l'exploitation de l'appareil et que le tribunal lui donne raison. La préclusion offensive sans réciprocité permet alors à une succession de P de poursuivre le transporteur et de plaider que la question de la négligence a déjà été tranchée. Cela, parce que si le transporteur aérien

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process and it should not be permitted to re-litigate the negligence issue. However, the court in *Parklane* realized that in order to ensure fairness in the operation of offensive non-mutual issue estoppel the doctrine has to be subject to qualifications.

Properly understood, our case could be viewed as falling under this second category — what would be described in U.S. law as "non-mutual offensive preclusion". Although technically speaking the City of Toronto is not the "plaintiff" in the arbitration proceedings, the City wishes to take advantage of the conviction obtained by the Crown against Oliver in a different, prior proceeding to which the City was not a party. It wishes to preclude Oliver from relitigating an issue that he fought and lost in the criminal forum. U.S. law acknowledges the peculiar difficulties with offensive use of non-mutual estoppel. Professor Watson explains, at pp. 632-33:

First, the court acknowledged that the effects of non-mutuality differ depending on whether issue estoppel is used offensively or defensively. While defensive preclusion helps to reduce litigation offensive preclusion, by contrast, encourages potential plaintiffs not to join in the first action. "Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment". Thus, without some limit, non-mutual offensive preclusion would increase rather than decrease the total amount of litigation. To meet this problem the *Parklane* court held that preclusion should be denied in action #2 "where a plaintiff could easily have joined in the earlier action".

Second, the court recognized that in some circumstances to permit non-mutual preclusion "would be unfair to the defendant" and the court referred to specific situations of unfairness: (a) the defendant may have had little incentive to defend vigorously the first action, that

a équitablement pu opposer une défense entière à l'allégation de négligence dans la poursuite nº 1, il a eu la possibilité d'être entendu, il a bénéficié de l'application régulière de la loi et ne devrait pas être autorisé à remettre en cause la question de la négligence. Dans *Parklane*, la cour s'est toutefois rendu compte que pour statuer en toute équité sur l'utilisation offensive de la préclusion sans exigence de réciprocité, il fallait apporter des réserves à la doctrine.

28

Ainsi comprise, la présente espèce pourrait être classée dans la seconde catégorie — ce qu'en droit américain on appellerait la [TRADUCTION] « préclusion offensive sans exigence de réciprocité ». En effet, bien que strictement parlant la Ville de Toronto ne soit pas « en demande » dans l'arbitrage, elle cherche à bénéficier de la déclaration de culpabilité que le ministère public a obtenue contre Oliver dans une poursuite distincte antérieure à laquelle la Ville n'était pas partie. Elle souhaite empêcher Oliver de débattre à nouveau d'une question qu'il a contestée au cours de la poursuite criminelle et sur laquelle il n'a pas eu gain de cause. Le droit américain reconnaît les difficultés particulières que pose cette catégorie. Le professeur Watson explique ce qui suit aux p. 632-633 :

[TRADUCTION] Premièrement, la cour a reconnu que la disparition de l'exigence de la réciprocité entraînait des effets différents selon que la préclusion découlant d'une question déjà tranchée était invoquée en demande ou en défense. Lorsque le moyen est invoqué en défense, il contribue à limiter les litiges, mais invoqué en demande, il encourage plutôt les demandeurs potentiels à ne pas prendre part à la première action. « Puisqu'un demandeur peut invoquer un jugement antérieur prononcé contre un défendeur, mais qu'il n'est pas lié par un jugement antérieur donnant gain de cause au défendeur, il sera plus enclin à opter pour l'attentisme dans l'espoir que la première action intentée par un autre demandeur produira un jugement favorable. » Si le moyen n'est pas assorti de limites, la préclusion offensive sans exigence de réciprocité risque donc d'accroître et non de réduire le nombre de litiges. Pour résoudre ce problème, la cour a statué, dans *Parklane*, qu'il conviendrait de rejeter la préclusion dans l'action nº 2 « lorsqu'un demandeur aurait aisément pu se joindre à l'action antérieure ».

Deuxièmement, la cour a reconnu que dans certaines circonstances, « il serait injuste pour le défendeur » de recevoir la préclusion sans exigence de réciprocité, et elle a donné des exemples de situations inéquitables : a) il est possible que la partie défenderesse n'ait pas été très

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is, if she was sued for small or nominal damages, particularly if future suits were not foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favour of the defendant; or (c) the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.

In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

29 It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency; and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.

30 For example, there is little relevance to the concern about the "wait and see" plaintiff, the "free

motivée à présenter une défense vigoureuse à la première action si, par exemple, le montant de dommages-intérêts réclamé était minime ou symbolique, en particulier s'il était peu prévisible que des actions subséquentes soient intentées, b) la préclusion en demande peut être injuste si le jugement invoqué est lui-même incompatible avec un ou plusieurs jugements antérieurs rendus en faveur de la partie défenderesse, c) la deuxième action offre à la partie défenderesse des moyens procéduraux dont elle ne disposait pas dans la première et qui pourraient facilement entraîner un résultat différent, par exemple lorsque la partie défenderesse a dû présenter sa défense devant un forum peu propice où elle ne pouvait citer de témoins ou lorsqu'elle jouissait de possibilités beaucoup moindres de communication de la preuve dans la première action.

En définitive, la cour a statué qu'en règle générale les affaires où un demandeur aurait facilement pu se porter codemandeur à la première action ou lorsque, pour les raisons susmentionnées ou pour d'autres, l'application du moyen en demande serait injuste pour la partie défenderesse, le juge de première instance ne devrait pas autoriser le recours à la préclusion offensive.

Il ressort clairement du passage précédent que la doctrine américaine de la préclusion découlant d'une question déjà tranchée, sans exigence de réciprocité, n'est pas d'application automatique, comme le démontrent les éléments discrétionnaires susceptibles d'entraîner le rejet de ce moyen. L'expérience américaine indique que l'abandon de l'exigence de la réciprocité suscite une double préoccupation : (1) l'application de la préclusion doit être suffisamment encadrée et prévisible pour assurer l'efficacité, et (2) elle doit comporter assez de souplesse pour empêcher les injustices. Selon moi, c'est ce qu'offre la doctrine de l'abus de procédure, en particulier dans des affaires mettant en cause une déclaration de culpabilité relative à un acte criminel grave, comme la présente espèce. Dans de tels cas, les véritables préoccupations, que la Cour d'appel a exposées avec justesse dans ses motifs, ne se rattachent pas tant à la réciprocité qu'à l'intégrité et à la cohérence de l'administration de la justice. Ce sera souvent le cas lorsque la préclusion reposera sur une conclusion prononcée en matière criminelle où beaucoup des préoccupations traditionnelles relatives à la réciprocité perdent de leur importance.

Par exemple, la notion du demandeur « attentiste » et « opportuniste » qui évite délibérément

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rider" who will deliberately avoid the risk of joining the original litigation, but will later come forward to reap the benefits of the victory obtained by the party who should have been his co-plaintiff. No such concern can ever arise when the original action is in a criminal prosecution. Victims cannot, even if they wanted to, "join in" the prosecution so as to have their civil claim against the accused disposed of in a single trial. Nor can employers "join in" the criminal prosecution to have their employee dismissed for cause.

de prendre le risque de se joindre à la poursuite initiale mais qui cherche plus tard à profiter de la victoire obtenue par la partie qui aurait dû être sa codemanderesse, a peu de pertinence. Il n'y a pas lieu de craindre que cela se produise lorsque la première instance est une poursuite criminelle. Même si elles le voulaient, les victimes ne pourraient se porter partie à la poursuite criminelle de façon à ce que leur action civile contre l'accusé soit jugée dans un même procès. Les employeurs ne sont pas admis non plus à participer à la poursuite criminelle pour que leur employé soit par la même occasion congédié pour motif valable.

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31

On the other hand, even though no one can join the prosecution, the prosecutor as a party represents the public interest. He or she represents a collective interest in the just and correct outcome of the case. The prosecutor is said to be a minister of justice who has nothing to win or lose from the outcome of the case but who must ensure that a just and true verdict is rendered. (See Law Society of Upper Canada, *Rules of Professional Conduct* (2000), Commentary Rule 4.01(3), at p. 61; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Lemay v. The King*, [1952] 1 S.C.R. 232, at pp. 256-57, *per* Cartwright J.; and *R. v. Banks*, [1916] 2 K.B. 621 (C.C.A.), at p. 623.) The mutuality requirement of the doctrine of issue estoppel, which insists that only the Crown and its privies be precluded from relitigating the guilt of the accused, is hardly reflective of the true role of the prosecutor.

Par contre, malgré le fait que personne ne peut se joindre à la poursuite criminelle, le poursuivant, en tant que partie, représente l'intérêt public. Il représente un intérêt collectif dans le règlement juste et régulier de la poursuite. On le considère comme un ministre de la justice qui n'a rien à gagner ni à perdre dans l'issue des procès mais qui doit veiller à ce que les tribunaux rendent des verdicts justes et bien fondés. (Voir Barreau du Haut-Canada, *Code de déontologie* (2000), règle 4.01(3) et le commentaire afférent, p. 62; *R. c. Regan*, [2002] 1 R.C.S. 297, 2002 CSC 12; *Lemay c. The King*, [1952] 1 R.C.S. 232, p. 256-257, le juge Cartwright; et *R. c. Banks*, [1916] 2 K.B. 621 (C.C.A.), p. 623.) L'exigence de réciprocité de la doctrine de la préclusion découlant d'une question déjà tranchée, qui veut que seul le ministère public et ses ayants droit soient irrecevables à remettre en cause la culpabilité de l'accusé, ne rend guère compte du vrai rôle du poursuivant.

32

As the present case illustrates, the primary concerns here are about the integrity of the criminal process and the increased authority of a criminal verdict, rather than some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple "vexation". For these reasons, I see no need to reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the

Comme l'illustre la présente espèce, ce sont l'intégrité du système de justice criminel et l'autorité accrue du verdict de culpabilité qui sont les considérations primordiales, et non certaines des préoccupations plus traditionnelles de la préclusion découlant d'une question déjà tranchée où l'accent est mis sur les intérêts des parties, comme les dépens et les « incidents vexatoires » multiples. Pour ces motifs, il n'y a à mon sens aucune nécessité en l'espèce de supprimer ou d'assouplir l'exigence de la réciprocité, établie depuis longtemps, et je conclurais que

arbitrator amounted to a collateral attack on the verdict of the criminal court.

la préclusion découlant d'une question déjà tranchée n'est pas applicable. Se pose maintenant la question de savoir si la décision de l'arbitre équivalait à une contestation indirecte du verdict du tribunal criminel.

(2) Collateral Attack

(2) La contestation indirecte

33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, the rule against collateral attack

> 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.

Thus, in *Wilson*, *supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction". Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk*, *supra*, at para. 20, as follows: "that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in

La règle interdisant les contestations indirectes rend irrecevables les actions visant l'infirmation de déclarations de culpabilité par des tribunaux n'ayant pas compétence en cette matière. Comme la Cour l'a affirmé dans l'arrêt *Wilson c. La Reine*, [1983] 2 R.C.S. 594, p. 599, cette règle est

> un principe fondamental établi depuis longtemps [selon lequel] une ordonnance rendue par une cour compétente est valide, concluante et a force exécutoire, à moins d'être infirmée en appel ou légalement annulée. De plus, la jurisprudence établit très clairement qu'une telle ordonnance ne peut faire l'objet d'une attaque indirecte; l'attaque indirecte peut être décrite comme une attaque dans le cadre de procédures autres que celles visant précisément à obtenir l'infirmation, la modification ou l'annulation de l'ordonnance ou du jugement.

Ainsi, la Cour a jugé, dans *Wilson*, précité, qu'un juge d'une juridiction inférieure n'avait pas compétence pour examiner la validité d'une autorisation d'écoute électronique délivrée par une cour supérieure. D'autres décisions jurisprudentielles constituant l'assise de cette règle avaient aussi pour contexte des tentatives de faire infirmer des décisions d'autres tribunaux et non une simple remise en cause des faits de l'espèce. Dans *R. c. Sarson*, [1996] 2 R.C.S. 223, par. 35, notre Cour a statué qu'en raison de la règle interdisant les contestations indirectes, le recours en *habeas corpus* par lequel un détenu contestait une déclaration de culpabilité fondée sur une disposition législative subséquemment jugée inconstitutionnelle ne pouvait être accueilli parce que l'affaire du détenu n'était plus « en cours » et que celui-ci « était détenu conformément au jugement d'un tribunal compétent ». De la même façon, la Cour a jugé, dans l'arrêt *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706, que le propriétaire d'une mine qui avait décidé de ne pas suivre le processus administratif d'appel applicable relativement à une amende pour pollution n'était pas admis à contester la validité de la

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subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

pénalité devant un tribunal judiciaire parce que la loi prévoyait que les appels étaient entendus par un tribunal administratif. Dans l'arrêt *Danyluk*, précité, par. 20, le juge Binnie a défini la règle prohibant les contestations indirectes comme « la règle selon laquelle l'ordonnance rendue par un tribunal compétent ne doit pas être remise en cause dans des procédures subséquentes, sauf celles prévues par la loi dans le but exprès de contester l'ordonnance » (je souligne).

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34

Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

Chacune des affaires susmentionnées soulève la question du tribunal compétent pour connaître de contestations relatives au jugement lui-même. En l'espèce, toutefois, le syndicat ne cherche pas à faire infirmer la déclaration de culpabilité pour agression sexuelle, mais conteste simplement, dans le cadre d'une demande différente comportant des conséquences juridiques différentes, le bien-fondé de cette déclaration. Il s'agit d'une attaque implicite du bien-fondé factuel de la décision, non pas de la contestation de la validité juridique de celle-ci, puisqu'elle est manifestement valide. Les « contestations indirectes » prohibées constituent un abus du processus judiciaire. Or, comme la règle qui prohibe les contestations indirectes met l'accent sur la contestation de l'ordonnance elle-même et de ses effets juridiques, la meilleure façon d'aborder la question en l'espèce me paraît être de recourir directement à la doctrine de l'abus de procédure.

(3) Abuse of Process

(3) L'abus de procédure

35

Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:

> . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of

Les juges disposent, pour empêcher les abus de procédure, d'un pouvoir discrétionnaire résiduel inhérent. L'abus de procédure a été décrit, en common law, comme consistant en des procédures « injustes au point qu'elles sont contraires à l'intérêt de la justice » (*R. c. Power*, [1994] 1 R.C.S. 601, p. 616) et en un traitement « oppressif » (*R. c. Conway*, [1989] 1 R.C.S. 1659, p. 1667). La juge McLachlin (plus tard Juge en chef) l'a défini de la façon suivante dans l'arrêt *R. c. Scott*, [1990] 3 R.C.S. 979, p. 1007 :

> . . . l'abus de procédure peut avoir lieu si : (1) les procédures sont oppressives ou vexatoires; et (2) elles violent les principes fondamentaux de justice sous-jacents au sens de l'équité et de la décence de la société. La première

oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

condition, à savoir que les poursuites sont oppressives ou vexatoires, se rapporte au droit de l'accusé d'avoir un procès équitable. Cependant, la notion fait aussi appel à l'intérêt du public à un régime de procès justes et équitables et à la bonne administration de la justice.

36

The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway*, *supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 33.

La doctrine de l'abus de procédure s'applique dans des contextes juridiques divers. Le traitement injuste ou oppressif d'un accusé peut priver le ministère public du droit de continuer les poursuites relatives à une accusation : *Conway*, précité, p. 1667. Dans l'arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 R.C.S. 307, 2000 CSC 44, notre Cour a statué qu'un délai déraisonnable causant un préjudice grave peut constituer un abus de procédure. Lorsque la *Charte canadienne des droits et libertés* est invoquée, la doctrine de l'abus de procédure reconnue en common law est subsumée sous les principes de la *Charte* de telle sorte que les principes de l'abus de procédure et les recours constitutionnels empiètent souvent les uns sur les autres (*R. c. O'Connor*, [1995] 4 R.C.S. 411). La doctrine continue néanmoins de trouver application comme réparation non fondée sur la *Charte* : *États-Unis d'Amérique c. Shulman*, [2001] 1 R.C.S. 616, 2001 CSC 21, par. 33.

37

In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

Dans le contexte qui nous intéresse, la doctrine de l'abus de procédure fait intervenir [TRADUCTION] « le pouvoir inhérent du tribunal d'empêcher que ses procédures soient utilisées abusivement, d'une manière [. . .] qui aurait [. . .] pour effet de discréditer l'administration de la justice » (*Canam Enterprises Inc. c. Coles* (2000), 51 O.R. (3d) 481 (C.A.), par. 55, le juge Goudge, dissident, approuvé par [2002] 3 R.C.S. 307, 2002 CSC 63). Le juge Goudge a développé la notion de la façon suivante aux par. 55 et 56 :

> [TRADUCTION] La doctrine de l'abus de procédure engage le pouvoir inhérent du tribunal d'empêcher que ses procédures soient utilisées abusivement, d'une manière qui serait manifestement injuste envers une partie au litige, ou qui aurait autrement pour effet de discréditer l'administration de la justice. C'est une doctrine souple qui ne s'encombre pas d'exigences particulières telles que la notion d'irrecevabilité (voir *House of Spring Gardens Ltd. c. Waite*, [1990] 3 W.L.R. 347, p. 358, [1990] 2 All E.R. 990 (C.A.).

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One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

Un cas d'application de l'abus de procédure est lorsque le tribunal est convaincu que le litige a essentiellement pour but de rouvrir une question qu'il a déjà tranchée. [Je souligne.]

Ainsi qu'il ressort du commentaire du juge Goudge, les tribunaux canadiens ont appliqué la doctrine de l'abus de procédure pour empêcher la réouverture de litiges dans des circonstances où les exigences strictes de la préclusion découlant d'une question déjà tranchée (généralement les exigences de lien de droit et de réciprocité) n'étaient pas remplies, mais où la réouverture aurait néanmoins porté atteinte aux principes d'économie, de cohérence, de caractère définitif des instances et d'intégrité de l'administration de la justice. (Voir par exemple *Franco c. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. c. Stevenson*, [1986] 5 W.W.R. 21 (C.A. Sask.); et *Bjarnarson c. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (B.R. Man.), conf. par (1987), 21 C.P.C. (2d) 302 (C.A. Man.).) Cette application a suscité des critiques, certains disant que la doctrine de l'abus de procédure pour remise en cause n'est ni plus ni moins que la doctrine générale de la préclusion découlant d'une question déjà tranchée, sans exigence de réciprocité, à laquelle il manque les importantes conditions que les tribunaux américains ont reconnues comme parties intégrantes de la doctrine (Watson, *loc. cit.*, p. 624-625).

38

It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application

Certes, la doctrine de l'abus de procédure a débordé des stricts paramètres du principe de l'autorité de la chose jugée tout en lui empruntant beaucoup de ses fondements et quelques-unes de ses restrictions. D'aucuns la voient davantage comme une doctrine auxiliaire, élaborée en réaction aux règles établies de la préclusion (découlant d'une question déjà tranchée ou fondée sur la cause d'action), que comme une doctrine indépendante (Lange, *op. cit.*, p. 344). Les raisons de principes étayant la doctrine de l'abus de procédure pour remise en cause sont identiques à celles de la préclusion découlant d'une question déjà tranchée (Lange, *op. cit.*, p. 347-348) :

[TRADUCTION] Les deux raisons de principe, savoir qu'un litige puisse avoir une fin et que personne ne puisse être tracassé deux fois par la même cause d'action, ont

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of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

été invoquées comme principes fondant l'application de la doctrine de l'abus de procédure pour remise en cause. D'autres principes ont également été invoqués : la préservation des ressources des tribunaux et des parties, le maintien de l'intégrité du système judiciaire afin d'éviter les résultats contradictoires et la protection du principe du caractère définitif des instances si important pour la bonne administration de la justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *Hunter*, *supra*, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.). The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning, M.R., endorsed non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court", but held that the proper characterization of the matter was through non-mutual issue estoppel.

L'énoncé classique de la doctrine moderne de l'abus de procédure et de ses liens avec l'autorité de la chose jugée se trouve dans la décision *Hunter*, précitée, confirmant *McIlkenny c. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.). Il s'agissait d'une poursuite en dommages-intérêts pour préjudice corporel intentée par les six hommes reconnus coupables de l'explosion de deux pubs de Birmingham. Ils prétendaient avoir été battus par la police pendant leur interrogatoire. Les demandeurs avaient soulevé le même grief lors du procès criminel, mais le juge et le jury avaient conclu que les confessions avaient été volontaires et que la police n'avait pas eu recours à la violence. Lord Denning, M.R., de la Cour d'appel, a appliqué la préclusion découlant d'une question déjà tranchée, sans exigence de réciprocité, et a statué que le jugement antérieur empêchait l'examen de la question de savoir si la police avait usé de violence, même si cette question était invoquée contre un nouvel adversaire. Signalant que dans des affaires analogues, les tribunaux avaient parfois refusé d'autoriser une partie à soulever de nouveau une question parce qu'il s'agissait d'un abus de procédure, lord Denning a estimé que le principe applicable était plutôt celui de la préclusion découlant d'une question déjà tranchée, sans exigence de réciprocité.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

La Chambre des lords, statuant en appel, n'a pas endossé la tentative de lord Denning de modifier le principe de la préclusion découlant d'une question déjà tranchée, mais elle est parvenue à une conclusion identique en appliquant la doctrine de l'abus de procédure. Lord Diplock s'est exprimé en ces termes, à la p. 541 :

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in

> [TRADUCTION] L'abus de procédure illustré en l'espèce est l'introduction d'une instance devant un tribunal judiciaire dans le but d'attaquer indirectement une décision définitive rendue contre le demandeur par un autre tribunal compétent dans une instance antérieure, où le

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previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

demandeur a eu l'entière possibilité de contester la décision devant le tribunal qui l'a rendue.

41 It is important to note that a public inquiry after the civil action of the six accused in *Hunter*, *supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), at pp. 304 *et seq*.). In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517-18). Although safeguards must be put in place for the protection of the innocent, and, more generally, to ensure the trustworthiness of court findings, continuous re-litigation is not a guarantee of factual accuracy.

Il importe de signaler qu'une enquête publique instituée après la poursuite civile intentée par les six accusés dans l'affaire *Hunter*, précitée, a donné lieu à la conclusion que les aveux des accusés de Birmingham avaient été obtenus par suite de brutalités policières (voir *R. c. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), p. 304 et suiv.). À mon avis, cela ne saurait justifier d'alléger les mécanismes procéduraux mis en place pour assurer le caractère définitif des instances en matière criminelle. Notre Cour et d'autres tribunaux ont reconnu l'existence du risque d'erreur judiciaire (voir *États-Unis c. Burns*, [2001] 1 R.C.S. 283, 2001 CSC 7, par. 1; et *R. c. Bromley* (2001), 151 C.C.C. (3d) 480 (C.A.T.-N.), p. 517-518). Bien qu'il faille prévoir des garanties pour protéger les innocents et, de façon plus générale, pour inspirer confiance dans les décisions judiciaires, la remise en cause perpétuelle n'est pas pour autant garante de l'exactitude factuelle.

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *Hunter*, *supra*, at p. 536.)

L'attrait de la doctrine de l'abus de procédure provient de ce qu'elle n'est pas alourdie par les exigences précises du principe de l'autorité de la chose jugée tout en ménageant le pouvoir discrétionnaire d'empêcher la remise en cause de litiges et ce, essentiellement dans le but de préserver l'intégrité du processus judiciaire. (Voir les motifs du juge Doherty, par. 65; voir également *Demeter* (H.C.), précité, p. 264, et *Hunter*, précité, p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe*, *supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter*, *supra*, and *Demeter*, *supra*), the focus is less

Ceux qui critiquent cette doctrine font valoir que l'utilisation de l'abus de procédure à la place de la préclusion brouille la vraie question sans rien ajouter d'autre qu'une vague impression de pouvoir discrétionnaire. Je ne partage pas cette vue. À tout le moins dans des circonstances comme celles de la présente espèce, c'est-à-dire une tentative de remettre en cause une déclaration de culpabilité, j'estime que cette doctrine répond beaucoup mieux aux véritables enjeux. Dans tous ses cas d'application, la doctrine de l'abus de procédure vise essentiellement à préserver l'intégrité de la fonction judiciaire. Qu'elle ait pour effet de priver le ministère public du droit de continuer la poursuite à cause de délais inacceptables (voir *Blencoe*, précité), ou d'empêcher

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on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

une partie civile de faire appel aux tribunaux à mauvais escient (voir *Hunter*, précité, et *Demeter*, précité), l'accent est mis davantage sur l'intégrité du processus décisionnel judiciaire comme fonction de l'administration de la justice que sur l'intérêt des parties. Dans une affaire comme la présente espèce, c'est cette préoccupation qui commande d'interdire la remise en cause, plus que toute perception d'injustice envers une partie qui serait de nouveau appelée à faire la preuve de ses prétentions, par exemple. Cela compris, il est plus facile d'établir les paramètres de la doctrine et de définir les principes applicables à l'exercice du pouvoir discrétionnaire.

44 The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

Le processus décisionnel judiciaire, et l'importance d'en préserver l'intégrité, ont été bien décrits par le juge Doherty. Voici ce qu'on peut lire au par. 74 de ses motifs :

> [TRADUCTION] Dans ses diverses manifestations, le processus décisionnel judiciaire vise à rendre justice. Par processus décisionnel judiciaire, j'entends les divers tribunaux judiciaires ou administratifs auxquels il faut s'adresser pour le règlement des litiges. Lorsque la même question est soulevée devant divers tribunaux, la qualité des décisions rendues au terme du processus judiciaire se mesure non par rapport au résultat particulier obtenu de chaque forum, mais par le résultat final découlant des divers processus. Par justice, j'entends l'équité procédurale, l'obtention du résultat approprié dans chaque affaire et la perception plus générale que l'ensemble du processus donne des résultats cohérents, équitables et exacts.

45 When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

Lorsqu'ils doivent décider si une déclaration de culpabilité, recevable *prima facie* en vertu de l'art. 22.1 de la *Loi sur la preuve* de l'Ontario, devrait être réfutée ou considérée comme concluante, les tribunaux font appel à la doctrine de l'abus de procédure pour déterminer si la remise en cause porterait atteinte au processus décisionnel judiciaire défini précédemment. Lorsque l'accent est correctement mis sur l'intégrité du processus, la raison pour laquelle la partie cherche à rouvrir le débat ou sa qualité de défendeur plutôt que de demandeur dans le nouveau litige ne sauraient constituer des facteurs décisifs pour l'application de la règle interdisant la remise en question.

46 Thus, in the case at bar, it matters little whether Oliver's motive for relitigation was primarily to

En l'espèce, il importe donc peu qu'Oliver veuille principalement rouvrir le débat pour être réengagé et

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secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity. Reliance on *Hunter*, *supra*, and on *Demeter* (H.C.), *supra*, for the purpose of enhancing the importance of motive is misplaced. It is true that in both cases the parties wishing to relitigate had made it clear that they were seeking to impeach their earlier convictions. But this is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

non pour contester sa déclaration de culpabilité afin d'en attaquer la validité. Il n'y a pas lieu ici d'invoquer les arrêts *Hunter* et *Demeter* (H.C.), précités, pour souligner l'importance de la raison de la remise en cause. Il était certes évident, dans les deux affaires, que les parties cherchant à rouvrir le débat voulaient faire casser leur déclaration de culpabilité, mais cela a peu d'importance dans l'application de la doctrine de l'abus de procédure. Il n'est pas illégitime en soi de vouloir attaquer un jugement; la loi permet de poursuivre cet objectif par divers mécanismes de révision comme l'appel ou le contrôle judiciaire. De fait, la possibilité de faire réviser un jugement constitue un aspect important du principe de l'irrévocabilité des décisions. Une décision est irrévocable ou définitive et elle lie les parties seulement lorsque tous les recours possibles en révision sont épuisés ou ont été abandonnés. Ce qui n'est pas permis, c'est d'attaquer un jugement en tentant de soulever de nouveau la question devant un autre forum. Par conséquent, les raisons animant la partie ont peu ou pas d'importance.

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There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the "plaintiff" in the arbitration procedure. But the City of Toronto used Oliver's criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

Il n'y a pas de raison non plus de restreindre l'application de la doctrine de l'abus de procédure aux seuls cas où la remise en cause est le fait du demandeur. La désignation des parties au second litige peut masquer la situation réelle. En l'espèce, par exemple, indépendamment des formalités de la procédure de grief, qui d'Oliver et de son syndicat ou de la Ville de Toronto faudrait-il considérer comme à l'origine du différend en matière de travail? D'un point de vue formaliste, c'est le syndicat qui est la partie demanderesse dans la procédure d'arbitrage, mais c'est la Ville qui a invoqué la déclaration de culpabilité d'Oliver comme motif de congédiement. Du point de vue de l'intégrité du processus juridictionnel, toutefois, je ne vois pas quelle différence il y a entre caractériser Oliver comme demandeur ou le caractériser comme défendeur relativement à la remise en cause de sa déclaration de culpabilité.

48

The appellant relies on *Re Del Core*, *supra*, to suggest that the abuse of process doctrine only applies to plaintiffs. *Re Del Core*, however, provided no majority opinion as to whether and when public policy would preclude relitigation of issues

L'appelant invoque *Re Del Core*, précité, à l'appui de sa prétention que la doctrine de l'abus de procédure ne s'applique qu'aux demandeurs. Dans cet arrêt, toutefois, les juges majoritaires ne se sont pas prononcés sur la question de savoir dans quelles

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determined in a criminal proceeding. For one, Blair J.A. did not limit the circumstances in which relitigation would amount to an abuse of process to those cases in which a person convicted sought to relitigate the validity of his conviction in subsequent proceedings which he himself had instituted (at p. 22):

> The right to challenge a conviction is subject to an important qualification. A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so. . . . Courts have rejected attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. The ambit of this qualification remains to be determined . . . . [Emphasis added.]

49 While the authorities most often cited in support of a court's power to prevent relitigation of decided issues in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against that person (namely *Demeter* (H.C.), *supra*, and *Hunter*, *supra*; see also *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (H.C.), *Franco*, *supra*, at paras. 29-31), there is no reason in principle why these rules should be limited to such specific circumstances. Several cases have applied the doctrine of abuse of process to preclude defendants from relitigating issues decided against them in a prior proceeding. See for example *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215 (H.C.), at p. 218, aff'd without reference to this point (1978), 18 O.R. (2d) 714 (C.A.); *Bomac*, *supra*, at pp. 26-27; *Bjarnarson*, *supra*, at p. 39; *Germscheid v. Valois* (1989), 68 O.R. (2d) 670 (H.C.); *Simpson v. Geswein* (1995), 25 C.C.L.T. (2d) 49 (Man. Q.B.), at p. 61; *Roenisch v. Roenisch* (1991), 85 D.L.R. (4th) 540 (Alta. Q.B.), at p. 546; *Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C.S.C.), at p. 438; *Canadian Tire Corp. v. Summers* (1995), 23 O.R. (3d) 106 (Gen. Div.), at p. 115; see also

circonstances, le cas échéant, l'intérêt public peut empêcher la remise en question de conclusions formulées dans une instance criminelle. Le juge Blair, notamment, n'a pas limité les circonstances permettant de conclure à l'abus de procédure aux seules affaires où une personne déclarée coupable cherche à remettre en question la validité de cette déclaration dans une instance subséquente qu'elle-même a engagée (à la p. 22) :

> [TRADUCTION] Le droit de contester une déclaration de culpabilité est assorti d'une importante réserve. Une personne visée par une déclaration de culpabilité ne peut tenter de prouver que la déclaration était erronée lorsque dans les circonstances cela constituerait un abus de procédure. [. . .] Les tribunaux ont rejeté les tentatives de remettre en cause les questions mêmes qui avaient été examinées au procès criminel, dans les cas où ils estimaient que l'instance civile constituait une contestation indirecte de la déclaration de culpabilité. La portée de cette réserve reste à déterminer . . . [Je souligne.]

S'il est vrai que la jurisprudence le plus souvent citée à l'appui du pouvoir des tribunaux d'empêcher la remise en cause de questions sur lesquelles il a déjà été statué, lorsque la préclusion découlant d'une question déjà tranchée n'est pas applicable, se rapporte à des affaires où une personne déclarée coupable a intenté une action civile dans le but d'attaquer une conclusion formulée dans l'instance criminelle (savoir *Demeter* (H.C.), précité, et *Hunter*, précité; voir aussi *Q. c. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (H.C.), et *Franco*, précité, par. 29-31), il n'existe aucune raison de principe pour que ce droit ne s'exerce que dans ces circonstances. Les tribunaux ont appliqué la doctrine de l'abus de procédure à plusieurs reprises pour empêcher un défendeur de remettre en cause des conclusions formulées contre lui dans une instance antérieure. Voir notamment *Nigro c. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215 (H.C.), p. 218, conf. sans mention de ce point par (1978), 18 O.R. (2d) 714 (C.A.); *Bomac*, précité, p. 26-27; *Bjarnarson*, précité, p. 39; *Germscheid c. Valois* (1989), 68 O.R. (2d) 670 (H.C.); *Simpson c. Geswein* (1995), 25 C.C.L.T. (2d) 49 (B.R. Man.), p. 61; *Roenisch c. Roenisch* (1991), 85 D.L.R. (4th) 540 (B.R. Alb.), p. 546; *Saskatoon Credit Union, Ltd. c. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (C.S.C.-B.), p. 438; *Canadian Tire*

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P. M. Perell, "Res Judicata and Abuse of Process" (2001), 24 *Advocates' Q.* 189, at pp. 196-97; and Watson, *supra*, at pp. 648-51.

Corp. c. Summers (1995), 23 O.R. (3d) 106 (Div. gén.), p. 115; voir aussi P. M. Perell, « Res Judicata and Abuse of Process » (2001), 24 *Advocates Q.* 189, p. 196-197; et Watson, *loc. cit.*, p. 648-651.

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It has been argued that it is difficult to see how mounting a defence can be an abuse of process (see M. Teplitsky, "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective", in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002* (2002), vol. I, 279). A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue (Watson, *supra*, at p. 633). Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.

Des auteurs ont soutenu qu'il est difficile de concevoir comment le fait de se défendre peut constituer un abus de procédure (voir M. Teplitsky, « Prior Criminal Convictions : Are They Conclusive Proof? An Arbitrator's Perspective », dans K. Whitaker et autres, dir., *Labour Arbitration Yearbook 2001-2002* (2002), vol. I, 279). On donne souvent comme raison d'être du principe de l'autorité de la chose jugée qu'une partie ne devrait pas être tracassée deux fois pour la même cause d'action, c'est-à-dire qu'on ne devrait pas lui imposer le fardeau de débattre une autre fois de la même question (Watson, *loc. cit.*, p. 633). Bien sûr, un défendeur peut se réjouir d'avoir une autre occasion de mettre en cause une question tranchée contre lui. C'est l'accent correctement mis sur le processus plutôt que sur l'intérêt des parties qui révèle pourquoi il ne devrait pas y avoir remise en cause dans un tel cas.

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Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

La doctrine de l'abus de procédure s'articule autour de l'intégrité du processus juridictionnel et non autour des motivations ou de la qualité des parties. Il convient de faire trois observations préliminaires à cet égard. Premièrement, on ne peut présumer que la remise en cause produira un résultat plus exact que l'instance originale. Deuxièmement, si l'instance subséquente donne lieu à une conclusion similaire, la remise en cause aura été un gaspillage de ressources judiciaires et une source de dépenses inutiles pour les parties sans compter les difficultés supplémentaires qu'elle aura pu occasionner à certains témoins. Troisièmement, si le résultat de la seconde instance diffère de la conclusion formulée à l'égard de la même question dans la première, l'incohérence, en soi, ébranlera la crédibilité de tout le processus judiciaire et en affaiblira ainsi l'autorité, la crédibilité et la vocation à l'irrévocabilité.

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In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that

La révision de jugements par la voie normale de l'appel, en revanche, accroît la confiance dans le résultat final et confirme l'autorité du processus ainsi que l'irrévocabilité de son résultat. D'un

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from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.

point de vue systémique, il est donc évident que la remise en cause s'accompagne de graves effets préjudiciables et qu'il faut s'en garder à moins que des circonstances n'établissent qu'elle est, dans les faits, nécessaire à la crédibilité et à l'efficacité du processus juridictionnel dans son ensemble. Il peut en effet y avoir des cas où la remise en cause pourra servir l'intégrité du système judiciaire plutôt que lui porter préjudice, par exemple : (1) lorsque la première instance est entachée de fraude ou de malhonnêteté, (2) lorsque de nouveaux éléments de preuve, qui n'avaient pu être présentés auparavant, jettent de façon probante un doute sur le résultat initial, (3) lorsque l'équité exige que le résultat initial n'ait pas force obligatoire dans le nouveau contexte. C'est ce que notre Cour a dit sans équivoque dans l'arrêt *Danyluk*, précité, par. 80.

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, *supra*, at para. 51; *Franco*, *supra*, at para. 55).

Les facteurs discrétionnaires qui visent à empêcher que la préclusion découlant d'une question déjà tranchée ne produise des effets injustes, jouent également en matière d'abus de procédure pour éviter de pareils résultats indésirables. Il existe de nombreuses circonstances où l'interdiction de la remise en cause, qu'elle découle de l'autorité de la chose jugée ou de la doctrine de l'abus de procédure, serait source d'inéquité. Par exemple, lorsque les enjeux de l'instance initiale ne sont pas assez importants pour susciter une réaction vigoureuse et complète alors que ceux de l'instance subséquente sont considérables, l'équité commande de conclure que l'autorisation de poursuivre la deuxième instance servirait davantage l'administration de la justice que le maintien à tout prix du principe de l'irrévocabilité. Une incitation insuffisante à opposer une défense, la découverte de nouveaux éléments de preuve dans des circonstances appropriées, ou la présence d'irrégularités dans le processus initial, tous ces facteurs peuvent l'emporter sur l'intérêt qu'il y a à maintenir l'irrévocabilité de la décision initiale (*Danyluk*, précité, par. 51; *Franco*, précité, par. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended

Ces considérations revêtent une pertinence particulière s'agissant de la tentative de remettre en cause une déclaration de culpabilité. Mettre en doute la validité d'une déclaration de culpabilité est une action très grave et, dans un cas comme celui qui nous intéresse, il est inévitable que la conclusion de

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or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

l'arbitre ait précisément cet effet, qu'il ait été voulu ou non. L'administration de la justice doit disposer de tous les moyens légitimes propres à prévenir les déclarations de culpabilité injustifiées et à y remédier s'il s'en présente. La contestation indirecte et la remise en cause, toutefois, ne constituent pas des moyens appropriés, selon moi, car elles imposent au processus juridictionnel des contraintes excessives et ne font rien pour garantir un résultat plus fiable.

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In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent "finality principle" either as a separate doctrine or as an independent test to preclude relitigation.

Compte tenu de ce qui précède, il est clair que les doctrines de la préclusion découlant d'une question déjà tranchée, de la contestation indirecte et de l'abus de procédure, reconnues en common law, répondent adéquatement aux préoccupations qui surgissent lorsqu'il faut pondérer le principe de l'irrévocabilité des jugements et celui de l'équité envers un justiciable particulier. Il n'est donc nul besoin, comme l'a fait la Cour d'appel, d'ériger le principe de l'irrévocabilité en doctrine distincte ou critère indépendant pour interdire la remise en cause.

D. *Application of Abuse of Process to Facts of the Appeal*

D. *L'application de la doctrine de l'abus de procédure en l'espèce*

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I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. Yet as pointed out by Doherty J.A. (at para. 84):

À mon avis, les faits de la présente espèce illustrent l'abus flagrant de procédure qui résulte de l'autorisation de ce type de remise en cause. L'employé avait été déclaré coupable par un tribunal criminel et il avait épuisé toutes les voies d'appel. La déclaration de culpabilité était valide en droit, avec tous les effets juridiques en découlant. Pourtant, comme l'a signalé le juge Doherty (au par. 84) :

> Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of

> [TRADUCTION] Même si l'arbitre s'est défendu d'avoir examiné le bien-fondé de la décision du juge Ferguson, c'est exactement ce qu'il a fait. Il est impossible de ne pas conclure, à la lecture des motifs de l'arbitre, qu'il avait la conviction que l'instance criminelle était entachée de graves erreurs et qu'Oliver avait été condamné à tort. Cette conclusion tirée à l'occasion d'une instance à laquelle la poursuite n'était pas même partie ne peut que porter atteinte à l'intégrité du système de justice criminel. Tout observateur sensé se demanderait comment il se peut qu'un tribunal ait conclu hors de tout doute raisonnable qu'Oliver était coupable, et qu'après confirmation du verdict par la Cour d'appel, il soit déterminé, dans une autre instance, qu'il n'a pas commis cette même agression. Cet observateur ne comprendrait pas non plus qu'Oliver

sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

ait pu à bon droit être reconnu coupable d'agression sexuelle contre le plaignant et condamné à quinze mois d'emprisonnement, mais qu'une autre instance donne lieu à la conclusion qu'il n'a pas commis l'agression sexuelle et qu'il doit être réintégré dans des fonctions où des jeunes comme le plaignant seraient placés sous sa surveillance.

57 As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise.

Ces décisions contradictoires mettraient inévitablement la Ville de Toronto dans une situation où une personne condamnée pour agression sexuelle est rétablie dans un emploi qui la met en contact avec des jeunes très vulnérables comme la victime de l'agression dont elle a été déclarée coupable. On peut supposer que cela induirait le public informé et sensé à évaluer le bien-fondé de l'un ou l'autre des jugements relatifs à la culpabilité de l'employé. L'autorité et l'irrévocabilité des décisions de justice visent précisément à éliminer la nécessité d'un tel exercice.

58 In addition, the arbitrator is considerably less well equipped than a judge presiding over a criminal court — or the jury —, guided by rules of evidence that are sensitive to a fair search for the truth, an exacting standard of proof and expertise with the very questions in issue, to come to a correct disposition of the matter. Yet the arbitrator's conclusions, if challenged, may give rise to a less searching standard of review than that of the criminal court judge. In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process to bar the relitigation of the grievor's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the City of Toronto had established just cause for Oliver's dismissal.

De plus, l'arbitre est beaucoup moins en mesure de rendre une décision correcte sur la culpabilité que le juge présidant une instance criminelle — ou que le jury —, qui dispose pour le guider de règles de preuve axées sur la recherche équitable de la vérité ainsi que d'une norme de preuve exigeante, et qui a l'expérience des questions en cause. Qui plus est, la norme de contrôle applicable aux conclusions de l'arbitre, en cas de contestation, est moins exigeante que celle qui s'applique aux décisions des juges de cours criminelles. Bref, il n'y a rien, dans une affaire comme la présente espèce, qui milite contre l'application de la doctrine de l'abus de procédure pour interdire la remise en cause de la déclaration de culpabilité de l'employé. L'arbitre était juridiquement tenu de donner plein effet à la déclaration de culpabilité. L'erreur de droit qu'il a commise lui a fait tirer une conclusion manifestement déraisonnable. S'il avait bien compris la preuve et tenu compte des principes juridiques applicables, il n'aurait pu faire autrement que de conclure que la Ville de Toronto avait démontré l'existence d'un motif valable pour le congédiement d'Oliver.

VI. Disposition

VI. Dispositif

59 For these reasons, I would dismiss the appeal with costs.

Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens.

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The reasons of LeBel and Deschamps JJ. were delivered by

LeBel J. —

I. Introduction

60 I have had the benefit of reading Arbour J.'s reasons and I concur with her disposition of the case. I agree that this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. I also agree that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law requiring an arbitrator to interpret not only the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, but also the *Evidence Act*, R.S.O. 1990, c. E.23, as well as to rule on the applicability of a number of common law doctrines dealing with relitigation, an issue that is, as Arbour J. notes, at the heart of the administration of justice. Finally, I agree that the arbitrator's determination in this case that Glenn Oliver's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to Oliver's conviction. His failure to do so was sufficient to render his ultimate decision that Oliver had been dismissed without just cause — a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard — patently unreasonable, according to the jurisprudence of our Court.

61 While I agree with Arbour J.'s disposition of the appeal, I am of the view that the administrative law aspects of this case require further discussion. In my concurring reasons in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R.

Version française des motifs des juges LeBel et Deschamps rendus par

Le juge LeBel —

I. Introduction

J'ai pris connaissance des motifs de la juge Arbour et je souscris au dispositif qu'elle propose dans le présent pourvoi. Je conviens que le sort de ce pourvoi doit être réglé en fonction de l'abus de procédure, et non des principes plus restreints et plus techniques de la contestation indirecte ou de la préclusion découlant d'une question déjà tranchée (*issue estoppel*). Je conviens également que la norme de contrôle appropriée est celle de la décision correcte, à l'égard de la question de la remise en cause d'une déclaration de culpabilité dans le cadre d'une procédure de grief. La nature de cette question de droit demandait de l'arbitre qu'il interprète non seulement la *Loi de 1995 sur les relations de travail*, L.O. 1995, ch. 1, ann. A, mais aussi la *Loi sur la preuve*, L.R.O. 1990, ch. E.23, et qu'il statue sur l'applicabilité d'un certain nombre de principes de common law portant sur la remise en cause de questions déjà décidées dans le cadre d'un litige antérieur. Comme le fait remarquer la juge Arbour, ce problème se situe au cœur de l'administration de la justice. Enfin, je conviens que la décision de l'arbitre qui permettait de remettre la déclaration de culpabilité de Glenn Oliver en cause pendant l'examen du grief n'était pas correcte. Légalement, l'arbitre devait donner pleinement effet à cette déclaration de culpabilité. L'omission de le faire a suffi pour rendre manifestement déraisonnable, suivant la jurisprudence de notre Cour, la décision finale selon laquelle Oliver avait été congédié sans motif valable — une décision qui ressortissait entièrement au domaine d'expertise de l'arbitre et devait donc faire l'objet d'un contrôle selon une norme commandant la déférence.

Même si je suis d'accord avec la conclusion de la juge Arbour en l'espèce, j'estime opportun d'approfondir l'examen des aspects du pourvoi relevant du droit administratif. Dans mes motifs concourants dans *Chamberlain c. Surrey School*

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710, 2002 SCC 86, I raised concerns about the appropriateness of treating the pragmatic and functional methodology as an overarching analytical framework for substantive judicial review that must be applied, without variation, in all administrative law contexts, including those involving non-adjudicative decision makers. In certain circumstances, such as those at issue in *Chamberlain* itself, applying this methodological approach in order to determine the appropriate standard of review may in fact obscure the real issue before the reviewing court.

District No. 36, [2002] 4 R.C.S. 710, 2002 CSC 86, j'ai soulevé quelques inquiétudes quant au caractère approprié d'une approche qui traiterait la méthode pragmatique et fonctionnelle comme cadre d'analyse fondamental destiné à s'appliquer sans flexibilité lors du contrôle judiciaire sur le fond dans toutes les affaires de droit administratif, y compris celles relatives à la décision d'une instance non juridictionnelle. Dans certaines circonstances, comme celles de *Chamberlain*, le recours à ce cadre d'analyse pour circonscrire la norme de contrôle appropriée risque d'occulter la véritable question que doit trancher la cour de justice chargée du contrôle.

62 In the instant appeal and the appeal in *Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64, released concurrently, both of which involve judicial review of adjudicative decision makers, my concern is not with the applicability of the pragmatic and functional approach itself. Having said this, I would note that in a case such as this one, where the question at issue is so clearly a question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, it is unnecessary for the reviewing court to perform a detailed pragmatic and functional analysis in order to reach a standard of review of correctness. Indeed, in such circumstances reviewing courts should avoid adopting a mechanistic approach to the determination of the appropriate standard of review, which risks reducing the pragmatic and functional analysis from a contextual, flexible framework to little more than a *pro forma* application of a checklist of factors (see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, at para. 149; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26; *Chamberlain*, *supra*, at para. 195, *per* LeBel J.).

Dans le présent pourvoi et *Ontario c. S.E.E.F.P.O.*, [2003] 3 R.C.S. 149, 2003 CSC 64, sur lesquels statue simultanément notre Cour et qui portent tous deux sur le contrôle judiciaire de la décision d'une instance juridictionnelle, je ne suis pas préoccupé par l'applicabilité de l'analyse pragmatique et fonctionnelle proprement dite. Cependant, lorsque, comme en l'espèce, la question en litige constitue si clairement une question de droit, à la fois, d'une importance capitale pour le système juridique dans son ensemble et étrangère au domaine d'expertise de l'arbitre, il devient inutile qu'une cour se livre à une analyse pragmatique et fonctionnelle détaillée pour identifier une norme de contrôle fondée sur la décision correcte. En pareilles circonstances, pour déterminer la norme de contrôle applicable, la cour doit en fait éviter d'adopter une démarche rigide. En effet, celle-ci risquerait de réduire l'analyse pragmatique et fonctionnelle et le cadre souple et contextuel qu'elle offre à la vérification et à l'application pure et simple d'une liste de facteurs prédéterminés (voir *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29, par. 149; *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 26; *Chamberlain*, précité, par. 195, le juge LeBel).

63 The more particular concern that emerges out of this case and *Ontario v. O.P.S.E.U.* relates to what in my view is growing criticism with the ways in which the standards of review currently available within the

La présente espèce et le pourvoi connexe *Ontario c. S.E.E.F.P.O.* soulèvent une question plus particulière, celle des préoccupations croissantes liées à la manière dont sont conçues et appliquées les normes

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pragmatic and functional framework are conceived of and applied. Academic commentators and practitioners have raised some serious questions as to whether the conceptual basis for each of the existing standards has been delineated with sufficient clarity by this Court, with much of the criticism directed at what has been described as "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* (see, for example, D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 26; J. G. Cowan, "The Standard of Review: The Common Sense Evolution?", paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003, at p. 28; F. A. V. Falzon, "Standard of Review on Judicial Review or Appeal", in *Administrative Justice Review Background Papers: Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia* (2002), at pp. 32-33). Reviewing courts too, have occasionally expressed frustration over a perceived lack of clarity in this area, as the comments of Barry J. in *Miller v. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.), at para. 27, illustrate:

> In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all.

64 The Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law. It is true that the parties to this appeal made no submissions putting into question the standards of review jurisprudence. Nevertheless, at times, an in-depth discussion or review of the state of the law may become necessary despite the absence of particular

de contrôle qu'offre actuellement l'analyse pragmatique et fonctionnelle. Des auteurs et avocats ont affirmé douter sérieusement que notre Cour ait exposé de manière suffisamment claire le fondement théorique de chacune des normes existantes. Une bonne partie de leurs critiques vise ce qu'ils ont qualifié de confusion « épistémologique » qui entourerait la relation entre le manifestement déraisonnable et le raisonnable *simpliciter* (voir, par exemple, D. J. Mullan, « Recent Developments in Standard of Review », dans l'Association du Barreau canadien (Ontario), *Taking the Tribunal to Court : A Practical Guide for Administrative Law Practitioners* (2000), p. 26; J. G. Cowan, « The Standard of Review : The Common Sense Evolution? », exposé présenté initialement à la rencontre de la section du droit administratif, Association du Barreau de l'Ontario, 21 janvier 2003, p. 28; F. A. V. Falzon, « Standard of Review on Judicial Review or Appeal », dans *Administrative Justice Review Background Papers : Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia* (2002), p. 32-33). Les cours de justice chargées de contrôles ont parfois également exprimé de la frustration à l'égard de ce qu'elles perçoivent comme un manque apparent de clarté dans ce domaine, comme l'illustrent les propos du juge Barry dans *Miller c. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52 (C.S.T.-N. (1re inst.)), par. 27 :

> [TRADUCTION] Tenter de comprendre les distinctions établies par la cour entre la décision « manifestement déraisonnable », « raisonnable » ou « correcte » s'apparente parfois à observer un jongleur maniant trois objets transparents. Selon l'éclairage, à certains moments l'on croit apercevoir les objets. Mais à d'autres, l'on ne voit rien et l'on se demande en fait s'il y a vraiment trois objets distincts.

La Cour ne peut rester insensible aux préoccupations ou critiques constantes de la communauté juridique concernant l'état de la jurisprudence canadienne dans une partie importante du droit. Il est vrai que les parties au présent pourvoi n'ont pas présenté d'observations qui remettaient en cause la jurisprudence en matière de normes de contrôle. Il n'en reste pas moins qu'à l'occasion une analyse ou un examen en profondeur de l'état du droit

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representations in a specific case. Given its broad application, the law governing the standards of review must be predictable, workable and coherent. Parties to litigation often have no personal stake in assuring the coherence of our standards of review jurisprudence as a whole and the consistency of their application. Their purpose, understandably, is to show how the positions they advance conform with the law as it stands, rather than to suggest improvements of that law for the benefit of the common good. The task of maintaining a predictable, workable and coherent jurisprudence falls primarily on the judiciary, preferably with, but exceptionally without, the benefit of counsel. I would add that, although the parties made no submissions on the analysis that I propose to undertake in these reasons, they will not be prejudiced by it.

peut s'avérer nécessaire malgré l'absence d'observations particulières dans une espèce donnée. Étant donné leur vaste domaine d'application, les règles de droit qui régissent les normes de contrôle doivent être prévisibles, pratiques et cohérentes. Les parties à un litige n'ont souvent aucun intérêt personnel à assurer la cohérence globale de notre jurisprudence en matière de normes de contrôle et l'uniformité de son application. Leur objectif, bien compréhensible, consiste à démontrer en quoi les positions qu'elles avancent sont conformes aux règles de droit telles qu'elles existent, et non de suggérer des améliorations à ces règles pour le bénéfice du bien commun. La tâche d'assurer le caractère prévisible, pratique et cohérent de la jurisprudence incombe en premier lieu aux juges, tâche qu'ils accomplissent de préférence avec, mais exceptionnellement sans le concours des avocats. J'ajouterais que, même si les parties n'ont pas présenté d'observations sur l'analyse que je me propose d'entreprendre dans les présents motifs, elles n'en subiront aucun préjudice.

65 In this context, this case provides an opportunity to reevaluate the contours of the various standards of review, a process that in my view is particularly important with respect to patent unreasonableness. To this end, I review below:

– the interplay between correctness and patent unreasonableness both in the instant case and, more broadly, in the context of judicial review of adjudicative decision makers generally, with a view to elucidating the conflicted relationship between these two standards; and,

– the distinction between patent unreasonableness and reasonableness *simpliciter*, which, despite a number of attempts at clarification, remains a nebulous one.

Dans ce contexte, le présent pourvoi nous offre l'occasion de réévaluer les contours des différentes normes de contrôle, ce qui s'impose particulièrement, selon moi, à l'égard de la norme du manifestement déraisonnable. J'examinerai donc :

– l'interaction entre la décision correcte et la décision manifestement déraisonnable, tant en l'espèce que dans le contexte du contrôle judiciaire de la décision d'une instance juridictionnelle en général, afin de clarifier la relation conflictuelle entre ces deux normes;

– la distinction entre le manifestement déraisonnable et le raisonnable *simpliciter*, qui demeure nébuleuse malgré bien des tentatives d'explication.

66 As the analysis that follows indicates, the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less

Comme le confirme l'analyse qui suit, à l'heure actuelle, la norme de la décision manifestement déraisonnable n'offre pas aux cours de justice des paramètres suffisamment clairs pour contrôler les décisions des tribunaux administratifs. Dès le début, la norme du manifestement déraisonnable a parfois été confondue, de manière préoccupante, avec ce qui devrait être son antithèse, la norme de la décision correcte. En outre, il devient de plus en plus

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deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed.

II. Analysis

A. *The Two Standards of Review Applicable in This Case*

Two standards of review are at issue in this case, and the use of correctness here requires some preliminary discussion. As I noted in brief above, certain fundamental legal questions — for instance, constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation — typically fall to be decided on a correctness standard. Indeed, in my view, it will rarely be necessary for reviewing courts to embark on a comprehensive application of the pragmatic and functional approach in order to reach this conclusion. I would not, however, want either my comments in this regard or the majority reasons in this case to be taken as authority for the proposition that correctness is the appropriate standard whenever arbitrators or other specialized administrative adjudicators are required to interpret and apply general common law or civil law rules. Such an approach would constitute a broad expansion of judicial review under a standard of correctness and would significantly impede the ability of administrative adjudicators, particularly in complex and highly specialized fields such as labour law, to develop original solutions to legal problems, uniquely suited to the context in which they operate. In my opinion, in many instances the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. I now turn to a brief discussion of the rationale behind this view.

difficile de distinguer la norme de ce qui est réputé représenter sa contrepartie, commandant une moins grande déférence, la norme de la décision raisonnable *simpliciter*. Il reste à voir comment il est possible de résoudre ces difficultés.

II. Analyse

A. *Les deux normes de contrôle applicables en l'espèce*

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Deux normes de contrôle entrent en jeu en l'espèce, et certaines précisions s'imposent au préalable sur l'application de la norme de la décision correcte. Comme je l'ai déjà signalé brièvement, certaines questions de droit fondamentales — notamment en ce qui concerne la Constitution et les droits de la personne, de même que les libertés civiles, ainsi que d'autres questions revêtant une importance centrale pour le système juridique dans son ensemble, comme celle de la remise en cause — commandent généralement l'application de la norme de la décision correcte. À mon avis, la cour de justice chargée du contrôle devra rarement se livrer à l'analyse pragmatique et fonctionnelle de manière exhaustive pour conclure en ce sens. Je ne voudrais pas, cependant, que l'on déduise de mes propos à ce sujet ou des motifs des juges majoritaires en l'espèce qu'il faut appliquer la norme de la décision correcte chaque fois qu'un arbitre ou une autre instance administrative spécialisée est appelé à interpréter et à appliquer les règles générales de la common law ou du droit civil. S'il en allait ainsi, le contrôle judiciaire selon la norme de la décision correcte verrait sa portée s'accroître sensiblement. Une telle approche rendrait les tribunaux administratifs moins aptes, spécialement dans des domaines complexes et très spécialisés comme le droit du travail, à apporter à un problème juridique une solution originale particulièrement adaptée au contexte. À mon sens, dans bien des cas, la norme de contrôle appropriée à l'application des règles générales de la common law et du droit civil par un tribunal spécialisé ne devrait pas être la norme de la décision correcte mais plutôt celle de la décision raisonnable. De brèves explications s'imposent.

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(1) The Correctness Standard of Review

68 This Court has repeatedly stressed the importance of judicial deference in the context of labour law. Labour relations statutes typically bestow broad powers on arbitrators and labour boards to resolve the wide range of problems that may arise in this field and protect the decisions of these adjudicators by privative clauses. Such legislative choices reflect the fact that, as Cory J. noted in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 35, the field of labour relations is "sensitive and volatile" and "[i]t is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding" (see also *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 ("*PSAC*"), at pp. 960-61; and *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 565, 2001 SCC 47, at para. 32). The application of a standard of review of correctness in the context of judicial review of labour adjudication is thus rare.

69 While in this case and in *Ontario v. O.P.S.E.U.* I agree that correctness is the appropriate standard of review for the arbitrator's decision on the relitigation question, I think it necessary to sound a number of notes of caution in this regard. It is important to stress, first, that while the arbitrator was required to be correct on this question of law, this did not open his decision as a whole to review on a correctness standard (see *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48). The arbitrator was entitled to deference in the determination of whether Oliver was dismissed without just cause. To say that, in the circumstances of this case, the arbitrator's incorrect decision on the question of law affected the overall reasonableness of his decision, is very different from saying that the arbitrator's finding on the ultimate

(1) La norme de la décision correcte

Notre Cour a à maintes reprises souligné l'importance de la déférence judiciaire dans le domaine du droit du travail. En général, les lois régissant les relations de travail confèrent aux arbitres et aux commissions ou conseils des relations de travail de larges pouvoirs pour le règlement de la vaste gamme de problèmes susceptibles de se poser dans ce domaine et elles font bénéficier les décisions de ces instances de la protection d'une clause privative. Si le législateur en a décidé ainsi c'est que, comme l'a signalé le juge Cory dans *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487, par. 35, le domaine des relations de travail est « délicat et explosif » et « [i]l est essentiel de disposer d'un moyen de pourvoir à la prise de décisions rapides, par des experts du domaine sensibles à la situation, décisions qui peuvent être considérées définitives par les deux parties » (voir également *Canada (Procureur général) c. Alliance de la fonction publique du Canada*, [1993] 1 R.C.S. 941 (« *AFPC* »), p. 960-961; *Ivanhoe inc. c. TUAC, section locale 500*, [2001] 2 R.C.S. 565, 2001 CSC 47, par. 32). Il est donc rare qu'une cour de justice appelée à contrôler une décision en matière de relations de travail applique la norme de la décision correcte.

En l'espèce et dans *Ontario c. S.E.E.F.P.O.*, je conviens qu'il y a lieu d'appliquer la norme de la décision correcte à la décision de l'arbitre relative à la remise en cause de la déclaration de la culpabilité, mais un certain nombre de mises en garde me paraissent indispensables. Tout d'abord, même si l'arbitre était tenu de rendre une décision correcte relativement à cette question de droit, ceci n'entraînait pas pour autant l'application d'un contrôle fondé sur la norme de la décision correcte à l'ensemble de sa décision (voir *Société Radio-Canada c. Canada (Conseil des relations du travail)*, [1995] 1 R.C.S. 157, par. 48). La déférence s'imposait à l'égard de la décision de l'arbitre sur l'existence d'un motif de congédiement valable dans le cas d'Oliver. Dire que, compte tenu des faits de l'espèce, la décision incorrecte de l'arbitre concernant la question de

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question of just cause had to be correct. To fail to make this distinction would be to risk "substantially expand[ing] the scope of reviewability of administrative decisions, and unjustifiably so" (see *Canadian Broadcasting Corp.*, *supra*, at para. 48).

droit a eu une incidence sur le caractère raisonnable de l'ensemble de sa décision diffère sensiblement de l'affirmation selon laquelle la décision de l'arbitre sur la question ultime du congédiement injustifié devait être correcte. L'absence d'une telle distinction risque de provoquer un « élargissement considérable et injustifié des possibilités de contrôler les décisions administratives » (voir *Société Radio-Canada*, précité, par. 48).

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Second, it bears repeating that the application of correctness here is very much a product of the nature of this particular legal question: determining whether relitigating an employee's criminal conviction is permissible in an arbitration proceeding is a question of law involving the interpretation of the arbitrator's constitutive statute, an external statute, and a complex body of common law rules and conflicting jurisprudence. More than this, it is a question of fundamental importance and broad applicability, with serious implications for the administration of justice as a whole. It is, in other words, a question that engages the expertise and essential role of the courts. It is not a question on which arbitrators may be said to enjoy any degree of relative institutional competence or expertise. As a result, it is a question on which the arbitrator must be correct.

Deuxièmement, il importe de rappeler que, en l'espèce, l'application de la norme de la décision correcte est intimement liée à la nature de cette question de droit en particulier : la déclaration de culpabilité d'un employé peut-elle être remise en cause dans le cadre d'un arbitrage? Cette question de droit exigeait l'interprétation de la loi constitutive de l'instance administrative, une mesure législative extrinsèque, ainsi que d'un ensemble complexe de règles de common law et d'une jurisprudence contradictoire. Qui plus est, il s'agit d'une question d'une importance fondamentale, de grande portée et susceptible d'avoir de graves répercussions sur l'administration de la justice dans son ensemble. En d'autres termes, cette question mettait en jeu l'expertise et le rôle essentiel des cours de justice. L'on ne saurait prétendre que le décideur jouit à son égard d'une quelconque compétence ou expertise institutionnelle relative. Par conséquent, sa décision doit être correcte sur ce point.

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This Court has been very careful to note, however, that not all questions of law must be reviewed under a standard of correctness. As a prefatory matter, as the Court has observed, in many cases it will be difficult to draw a clear line between questions of fact, mixed fact and law, and law; in reality, such questions are often inextricably intertwined (see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 37; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 37). More to the point, as Bastarache J. stated in *Pushpanathan*, *supra*, "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention"

Cependant, notre Cour s'est montrée très prudente en signalant que toute décision sur une question de droit n'était pas assujettie à la norme de la décision correcte. Tout d'abord, comme notre Cour l'a fait observer, dans bien des cas il est difficile d'établir une ligne de démarcation claire entre une question de fait, une question mixte de fait et de droit et une question de droit; en fait, ces questions sont souvent inextricablement liées (voir *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, par. 37; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 37). De manière encore plus précise, comme l'a écrit le juge Bastarache dans *Pushpanathan*, précité, « il peut convenir de faire preuve d'un degré élevé de retenue même à l'égard de pures questions de

(para. 37). The critical factor in this respect is expertise.

droit, si d'autres facteurs de l'analyse pragmatique et fonctionnelle semblent indiquer que cela correspond à l'intention du législateur » (par. 37). Le facteur crucial à cet égard demeure l'expertise.

72 As Bastarache J. noted in *Pushpanathan*, *supra*, at para. 34, once a "broad relative expertise has been established", this Court has been prepared to show "considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation": see, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, and *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324. This Court has also held that, while administrative adjudicators' interpretations of external statutes "are generally reviewable on a correctness standard", an exception to this general rule may occur, and deference may be appropriate, where "the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result": see *Toronto (City) Board of Education*, *supra*, at para. 39; *Canadian Broadcasting Corp.*, *supra*, at para. 48. And, perhaps most importantly in light of the issues raised by this case, the Court has held that deference may be warranted where an administrative adjudicator has acquired expertise through its experience in the application of a general common or civil law rule in its specialized statutory context: see *Ivanhoe*, *supra*, at para. 26; L'Heureux-Dubé J. (dissenting) in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600, endorsed in *Pushpanathan*, *supra*, at para. 37.

Comme le juge Bastarache l'a signalé dans *Pushpanathan*, précité, par. 34, « une fois établie l'expertise relative », notre Cour s'est montrée disposée à faire preuve « de beaucoup de retenue même dans des cas faisant jouer des questions très générales d'interprétation de la loi, si le texte en cause est la loi constitutive du tribunal » : voir par exemple *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, et *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324. Notre Cour a par ailleurs statué que même si les interprétations de mesures législatives intrinsèques par les tribunaux administratifs « peuvent généralement faire l'objet d'un examen selon la norme de la décision correcte », des exceptions peuvent exister à cette règle générale et la déférence peut s'imposer lorsque « la loi est intimement liée au mandat du tribunal et [que] celui-ci est souvent appelé à l'examiner » : voir *Conseil de l'éducation de Toronto (Cité)*, précité, par. 39; *Société Radio-Canada*, précité, par. 48. Et, ce qui importe peut-être davantage à la lumière des questions que soulève le présent pourvoi, notre Cour a décidé que la déférence peut s'imposer lorsque, avec le temps, le tribunal administratif a acquis une expertise dans l'application d'une règle générale de common law ou de droit civil dans son domaine spécialisé : voir *Ivanhoe*, précité, par. 26; la juge L'Heureux-Dubé (dissidente), dans *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554, p. 599-600, motifs approuvés dans *Pushpanathan*, précité, par. 37.

73 In the field of labour relations, general common and civil law questions are often closely intertwined with the more specific questions of labour law. Resolving general legal questions may thus be an important component of the work of some administrative adjudicators in this field. To subject all such decisions to correctness review would be to expand the scope of judicial review considerably beyond what the legislature intended, fundamentally undermining the ability of labour adjudicators to develop

Dans le domaine des relations de travail, les questions générales relevant de la common law et du droit civil se trouvent souvent étroitement imbriquées avec celles qui relèvent plus particulièrement du droit du travail. Le règlement de questions de droit générales peut donc constituer un aspect important de la tâche dévolue à certains tribunaux administratifs dans ce domaine. L'assujettissement de toutes ces décisions à la norme de décision correcte donnerait au contrôle judiciaire une portée

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a body of jurisprudence that is tailored to the specialized context in which they operate.

beaucoup plus grande que celle voulue par le législateur, ce qui affaiblirait fondamentalement la capacité des tribunaux du travail à développer une jurisprudence adaptée à ce domaine spécialisé.

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Where an administrative adjudicator must decide a general question of law in the course of exercising its statutory mandate, that determination will typically be entitled to deference (particularly if the adjudicator's decisions are protected by a privative clause), inasmuch as the general question of law is closely connected to the adjudicator's core area of expertise. This was essentiality the holding of this Court in *Ivanhoe*, *supra*. In *Ivanhoe*, after noting the presence of a privative clause, Arbour J. held that, while the question at issue involved both civil and labour law, the labour commissioners and the Labour Court were entitled to deference because "they have developed special expertise in this regard which is adapted to the specific context of labour relations and which is not shared by the courts" (para. 26; see also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890). This appeal does not represent a departure from this general principle.

Lorsqu'un tribunal administratif doit trancher une question de droit générale dans l'accomplissement de son mandat légal, sa décision fera généralement l'objet de déférence (surtout en présence d'une clause privative), pour autant que la question soit étroitement liée au domaine d'expertise fondamentale du tribunal. C'est ce qu'a essentiellement conclu notre Cour dans *Ivanhoe*, précité, où, après avoir relevé l'existence d'une clause privative, la juge Arbour a ajouté que, même si la question en litige relevait tant du droit civil que du droit du travail, les commissaires du travail et le tribunal du travail avaient droit à la déférence judiciaire parce qu'ils « ont développé [. . .] une expertise particulière en la matière, adaptée au contexte spécifique des relations de travail, qui n'est pas partagée par les cours de justice » (par. 26; voir également *Pasiechnyk c. Saskatchewan (Workers' Compensation Board)*, [1997] 2 R.C.S. 890). Dans le présent pourvoi, notre Cour ne déroge pas à ce principe général.

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The final note of caution that I think must be sounded here relates to the application of two standards of review in this case. This Court has recognized on a number of occasions that it may, in certain circumstances, be appropriate to apply different standards of deference to different decisions taken by an administrative adjudicator in a single case (see *Pushpanathan*, *supra*, at para. 49; *Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71, at para. 58, *per* Bastarache and LeBel JJ., dissenting). This case provides an example of one type of situation where this may be the proper approach. It involves a fundamental legal question falling outside the arbitrator's area of expertise. This legal question, though foundational to the decision as a whole, is easily differentiated from a second question on which the arbitrator was entitled to deference: the determination of whether there was just cause for Oliver's dismissal.

La dernière mise en garde qui s'impose selon moi a trait à l'application de deux normes de contrôle en l'espèce. Notre Cour a reconnu à un certain nombre d'occasions que les différentes décisions d'un tribunal administratif dans une affaire donnée peuvent commander différents degrés de déférence, selon les circonstances (voir *Pushpanathan*, précité, par. 49; *Macdonell c. Québec (Commission d'accès à l'information)*, [2002] 3 R.C.S. 661, 2002 CSC 71, par. 58, les juges Bastarache et LeBel, dissidents). Ce pourrait être le cas dans la présente affaire où l'arbitre a statué sur une question de droit fondamentale échappant à son domaine d'expertise. Cette question de droit, malgré son caractère fondamental pour l'appréciation de la décision dans son ensemble, se distingue aisément d'une deuxième question pour laquelle la décision de l'arbitre appelait la déférence : Oliver a-t-il été congédié pour un motif valable?

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However, as I have noted above, the fact that the question adjudicated by the arbitrator in this case can

Toutefois, je le répète, même si la question tranchée par l'arbitre en l'espèce peut se scinder en

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be separated into two distinct issues, one of which is reviewable on a correctness standard, should not be taken to mean that this will often be the case. Such cases are rare; the various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator's decision as an integrated whole.

deux questions distinctes dont l'une peut faire l'objet d'un contrôle judiciaire fondé sur la norme de la décision correcte, cela n'arrive que rarement. Les divers éléments qui sous-tendent une décision ont plus de chance d'être inextricablement liés les uns aux autres, en particulier dans un domaine complexe comme celui des relations de travail, de sorte que la cour de justice chargée du contrôle doit considérer que la décision du tribunal forme un tout.

(2) The Patent Unreasonableness Standard of Review

(2) La norme de la décision manifestement déraisonnable

77 In these reasons, I explore the way in which patent unreasonableness is currently functioning, having regard to the relationships between this standard and both correctness and reasonableness *simpliciter*. My comments in this respect are intended to have application in the context of judicial review of adjudicative administrative decision making.

Dans les présents motifs, je me penche sur la manière dont le critère de la décision manifestement déraisonnable s'applique à l'heure actuelle, compte tenu des liens existant entre cette norme et celles de la décision correcte et de la décision raisonnable *simpliciter*. Mes observations à cet égard valent dans le contexte du contrôle judiciaire de la décision d'une instance administrative de nature juridictionnelle.

(a) *The Definitions of Patent Unreasonableness*

a) *Les définitions du caractère manifestement déraisonnable*

78 This Court has set out a number of definitions of "patent unreasonableness", each of which is intended to indicate the high degree of deference inherent in this standard of review. There is some overlap between the definitions and they are often used in combination. I would characterize the two main definitional strands as, first, those that emphasize the magnitude of the defect necessary to render a decision patently unreasonable and, second, those that focus on the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it.

Notre Cour a donné un certain nombre de définitions du « caractère manifestement déraisonnable », chacune d'elles devant indiquer le degré élevé de déférence inhérent à cette norme de contrôle. L'on observe un chevauchement entre les définitions, qui sont souvent combinées les unes aux autres. Elles appartiennent à deux catégories principales. La première met l'accent sur l'importance du défaut requis pour qu'une décision soit manifestement déraisonnable. La deuxième insiste sur le caractère « flagrant ou évident » du défaut et, par conséquent, sur le caractère plus ou moins envahissant du contrôle nécessaire à sa mise au jour.

79 In considering the leading definitions, I would place in the first category Dickson J.'s (as he then was) statement in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*CUPE*"), that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation" (p. 237). Cory J.'s characterization in *PSAC*, *supra*, of patent unreasonableness as a "very strict test",

Pour analyser les principales définitions, je mettrais dans la première catégorie celle du juge Dickson (plus tard Juge en chef) dans *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227 (« *SCFP* ») : une décision n'est manifestement déraisonnable que si elle est « déraisonnable au point de ne pouvoir rationnellement s'appuyer sur la législation pertinente »

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which will only be met where a decision is "clearly irrational, that is to say evidently not in accordance with reason" (pp. 963-64), would also fit into this category (though it could, depending on how it is read, be placed in the second category as well).

(p. 237). Dans *AFPC*, précité, le juge Cory qualifie la norme de la décision manifestement déraisonnable de « critère très strict », qui n'est respecté que lorsqu'une décision est « clairement irrationnelle, c'est-à-dire, de toute évidence non conforme à la raison » (p. 963-964). Cette définition appartient également à la première catégorie (bien qu'elle puisse également faire partie de la seconde, selon l'interprétation qu'on en fait).

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In the second category, I would place Iacobucci J.'s description in *Southam*, *supra*, of a patently unreasonable decision as one marred by a defect that is characterized by its "immediacy or obviousness": "If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57).

Figure dans la seconde catégorie la définition proposée par le juge Iacobucci dans *Southam*, précité, savoir une décision entachée, de manière « flagrante ou évidente » d'un défaut : « Si le défaut est manifeste au vu des motifs du tribunal, la décision de celui-ci est alors manifestement déraisonnable. Cependant, s'il faut procéder à un examen ou à une analyse en profondeur pour déceler le défaut, la décision est alors déraisonnable mais non manifestement déraisonnable » (par. 57).

81

More recently, in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, Iacobucci J. characterized a patently unreasonable decision as one that is "so flawed that no amount of curial deference can justify letting it stand", drawing on both of the definitional strands that I have identified in formulating this definition. He wrote, at para. 52:

In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

Plus récemment, dans *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20, le juge Iacobucci a qualifié de manifestement déraisonnable la décision qui est « à ce point viciée qu'aucun degré de déférence judiciaire ne peut justifier de la maintenir », en faisant appel aux deux catégories susmentionnées pour concevoir cette définition. Voici ses commentaires à ce propos (au par. 52) :

Dans *Southam*, précité, par. 57, la Cour explique que la différence entre une décision déraisonnable et une décision manifestement déraisonnable réside « dans le caractère flagrant ou évident du défaut ». Autrement dit, dès qu'un défaut manifestement déraisonnable a été relevé, il peut être expliqué simplement et facilement, de façon à écarter toute possibilité réelle de douter que la décision est viciée. La décision manifestement déraisonnable a été décrite comme étant « clairement irrationnelle » ou « de toute évidence non conforme à la raison » (*Canada (procureur général) c. Alliance de la Fonction publique du Canada*, [1993] 1 R.C.S. 941, p. 963-964, le juge Cory; *Centre communautaire juridique de l'Estrie c. Sherbrooke (Ville)*, [1996] 3 R.C.S. 84, par. 9-12, le juge Gonthier). Une décision qui est manifestement déraisonnable est à ce point viciée qu'aucun degré de déférence judiciaire ne peut justifier de la maintenir.

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Similarly, in *C.U.P.E. v. Ontario*, *supra*, Binnie J. yoked together the two definitional strands, describing a patently unreasonable decision as "one whose defect is 'immedia[te] and obviou[s]' (*Southam*, *supra*, at para. 57), and so flawed in terms of implementing the legislative intent that no amount of curial deference can properly justify letting it stand (*Ryan*, *supra*, at para. 52)" (para. 165 (emphasis added)).

De même, dans *S.C.F.P. c. Ontario*, précité, le juge Binnie a lié les deux catégories en qualifiant de décision manifestement déraisonnable « celle qui comporte un défaut "flagrant et évident" (*Southam*, précité, par. 57) et qui est à ce point viciée, pour ce qui est de mettre à exécution l'intention du législateur, qu'aucun degré de déférence judiciaire ne peut justifier logiquement de la maintenir (*Ryan*, précité, par. 52) » (par. 165 (je souligne)).

83

It has been suggested that the Court's various formulations of the test for patent unreasonableness are "not independent, alternative tests. They are simply ways of getting at the single question: What makes something patently unreasonable?" (*C.U.P.E. v. Ontario*, *supra*, at para. 20, *per* Bastarache J., dissenting). While this may indeed be the case, I nonetheless think it important to recognize that, because of what are in some ways subtle but nonetheless quite significant differences between the Court's various answers to this question, the parameters of "patent unreasonableness" are not as clear as they could be. This has contributed to the growing difficulties in the application of this standard that I discuss below.

L'on a suggéré à propos des différentes formulations du critère par notre Cour qu'« [i]l s'[agissait] non pas de critères indépendants ou de rechange, mais simplement de façons d'exprimer la seule question qui se pose : qu'est-ce qui fait qu'une chose est manifestement déraisonnable? » (*S.C.F.P. c. Ontario*, précité, par. 20, le juge Bastarache, dissident). Bien que ce puisse être effectivement le cas, il me paraît néanmoins important de reconnaître que, en raison de ce qui constitue, sous certains rapports, des différences subtiles, mais quand même assez importantes entre les diverses réponses de notre Cour à cette question, les paramètres du « manifestement déraisonnable » ne sont pas aussi clairs qu'ils pourraient l'être. Ce qui a contribué à rendre de plus en plus difficile l'application de cette norme, ce sur quoi je me penche ci-après.

(b) *The Interplay Between the Patent Unreasonableness and Correctness Standards*

b) *L'interaction entre la norme du manifestement déraisonnable et celle de la décision correcte*

84

As I observed in *Chamberlain*, *supra*, the difference between review on a standard of correctness and review on a standard of patent unreasonableness is "intuitive and relatively easy to observe" (*Chamberlain*, *supra*, at para. 204, *per* LeBel J.). These standards fall on opposite sides of the existing spectrum of curial deference, with correctness entailing an exacting review and patent unreasonableness leaving the issue in question to the near exclusive determination of the decision maker (see *Dr. Q*, *supra*, at para. 22). Despite the clear conceptual boundary between these two standards, however, the distinction between them is not always as readily discernable in practice as one would expect.

Comme je l'ai fait remarquer dans *Chamberlain*, précité, la différence entre le contrôle selon la norme de la décision correcte et le contrôle selon la norme de la décision manifestement déraisonnable est « intuitive et relativement facile à constater » (*Chamberlain*, précité, par. 204, le juge LeBel). Ces normes se situent aux deux extrémités de l'échelle de la déférence judiciaire, un contrôle judiciaire serré s'imposant dans le cas de la première et la question étant laissée à l'appréciation quasi exclusive du décideur dans le cas de la seconde (voir *Dr Q*, précité, par. 22). Malgré la frontière conceptuelle qui sépare clairement ces deux normes, en pratique, il n'est pas toujours aussi facile que l'on pourrait le croire de les distinguer.

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(i) Patent Unreasonableness and Correctness in Theory

In terms of understanding the interplay between patent unreasonableness and correctness, it is of interest that, from the beginning, there seems to have been at least some conceptual uncertainty as to the proper breadth of patent unreasonableness review. In *CUPE*, *supra*, Dickson J. offered two characterizations of patent unreasonableness that tend to pull in opposite directions (see D. J. Mullan, *Administrative Law* (2001), at p. 69; see also H. W. MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 281, at pp. 285-86).

Professor Mullan explains that, on the one hand, Dickson J. rooted review for patent unreasonableness in the recognition that statutory provisions are often ambiguous and thus may allow for multiple interpretations; the question for the reviewing court is whether the adjudicator's interpretation is one that can be "rationally supported by the relevant legislation" (*CUPE*, *supra*, at p. 237). On the other hand, Dickson J. also invoked an idea of patent unreasonableness as a threshold defined by certain nullifying errors, such as those he had previously enumerated in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382 ("*Nipawin*"), at p. 389, and in *CUPE*, *supra*, at p. 237:

. . . acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

Curiously, as Mullan notes, this list "repeats the list of 'nullifying' errors that Lord Reid laid out in the landmark House of Lords' judgment" in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969]

(i) La norme de la décision manifestement déraisonnable et celle de la décision correcte, en théorie

85 Pour comprendre l'interaction entre la norme du manifestement déraisonnable et celle de la décision correcte, il vaut la peine de signaler que, dès le début, il semble avoir existé, à tout le moins, un certain degré d'incertitude conceptuelle quant à la juste portée du contrôle selon la norme de la décision manifestement déraisonnable. Dans *SCFP*, précité, le juge Dickson a défini le caractère manifestement déraisonnable de deux manières, qui tendaient à orienter la mise en application de ce critère dans des directions opposées (voir D. J. Mullan, *Administrative Law* (2001), p. 69; voir également H. W. MacLauchlan, « Transforming Administrative Law : The Didactic Role of the Supreme Court of Canada » (2001), 80 *R. du B. can.* 281, p. 285-286).

86 Le professeur Mullan explique que, d'une part, le juge Dickson a justifié le contrôle visant à faire ressortir le caractère manifestement déraisonnable par le fait que les dispositions législatives sont souvent ambiguës et peuvent donc se prêter à de multiples interprétations; la question que doit poser la cour est de savoir si l'interprétation du tribunal peut « rationnellement s'appuyer sur la législation pertinente » (*SCFP*, précité, p. 237). D'autre part, le juge Dickson a également assimilé la décision manifestement déraisonnable à une décision entachée de certaines erreurs emportant annulation, comme celles qu'il avait auparavant énumérées dans *Union internationale des employés des services, local n° 333 c. Nipawin District Staff Nurses Association*, [1975] 1 R.C.S. 382 (« *Nipawin* »), p. 389, et *SCFP*, précité, p. 237 :

. . . le fait d'agir de mauvaise foi, de fonder la décision sur des données étrangères à la question, d'omettre de tenir compte de facteurs pertinents, d'enfreindre les règles de la justice naturelle ou d'interpréter erronément les dispositions du texte législatif de façon à entreprendre une enquête ou répondre à une question dont il n'est pas saisi.

87 Curieusement, comme le fait observer Mullan, cette énumération [TRADUCTION] « reprend la liste des erreurs emportant annulation que lord Reid a dressée dans l'arrêt de principe de la

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2 A.C. 147. *Anisminic* "is usually treated as the foundation case in establishing in English law the reviewability of all issues of law on a correctness basis" (emphasis added), and, indeed, the Court "had cited with approval this portion of Lord Reid's judgment and deployed it to justify judicial intervention in a case described as the 'high water mark of activist' review in Canada: *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*", [1970] S.C.R. 425 (see Mullan, *Administrative Law*, *supra*, at pp. 69-70; see also *National Corn Growers*, *supra*, at p. 1335, *per* Wilson J.).

Chambre des lords » *Anisminic Ltd. c. Foreign Compensation Commission*, [1969] 2 A.C. 147. Cet arrêt [TRADUCTION] « est habituellement considéré comme fondamental, en droit anglais, pour ce qui est de l'assujettissement de toutes les décisions relatives à une question de droit au contrôle selon la norme de la décision correcte » (je souligne). En fait, notre Cour [TRADUCTION] « a cité en l'approuvant cet extrait des motifs de lord Reid et l'a invoqué pour justifier l'intervention judiciaire dans une affaire qualifiée de "point culminant" du contrôle "activiste" au Canada : *Metropolitan Life Insurance Co. c. International Union of Operating Engineers, Local 796* », [1970] R.C.S. 425 (voir Mullan, *Administrative Law*, *op. cit.*, p. 69-70; voir également *National Corn Growers*, précité, p. 1335, la juge Wilson).

88 In characterizing patent unreasonableness in *CUPE*, then, Dickson J. simultaneously invoked a highly deferential standard (choice among a range of reasonable alternatives) and a historically interventionist one (based on the presence of nullifying errors). For this reason, as Mullan acknowledges, "it is easy to see why Dickson J.'s use of [the quotation from *Anisminic*] is problematic" (Mullan, *Administrative Law*, *supra*, at p. 70).

Dans *SCFP*, pour caractériser la norme du manifestement déraisonnable, le juge Dickson a ensuite invoqué simultanément un degré élevé de déférence (choix parmi un ensemble de solutions raisonnables possibles) et une attitude historiquement interventionniste (fondée sur l'existence d'erreurs emportant annulation). C'est pourquoi, pour citer Mullan, [TRADUCTION] « il est facile de comprendre que le renvoi à *Anisminic* soit problématique » (Mullan, *Administrative Law*, *op. cit.*, p. 70).

89 If Dickson J.'s reference to *Anisminic* in *CUPE*, *supra*, suggests some ambiguity as to the intended scope of "patent unreasonableness" review, later judgments also evidence a somewhat unclear relationship between patent unreasonableness and correctness in terms of establishing and, particularly, applying the methodology for review under the patent unreasonableness standard. The tension in this respect is rooted, in part, in differing views of the premise from which patent unreasonableness review should begin. A useful example is provided by *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 ("*Paccar*").

Si, dans *SCFP*, précité, le renvoi du juge Dickson à *Anisminic* suggère la présence d'une certaine ambiguïté quant à la portée prévue du contrôle selon la norme du manifestement déraisonnable, des jugements ultérieurs ont également fait ressortir l'existence d'un rapport quelque peu problématique entre cette norme et celle de la décision correcte pour ce qui est de l'établissement et, surtout, de l'application de la démarche que commande la norme du manifestement déraisonnable. La tension à cet égard tient en partie à des désaccords sur l'hypothèse de départ du contrôle selon la norme du manifestement déraisonnable. *CAIMAW c. Paccar of Canada Ltd.*, [1989] 2 R.C.S. 983 (« *Paccar* »), en est un bon exemple.

90 In *Paccar*, Sopinka J. (Lamer J. (as he then was) concurring) described the proper approach under the patent unreasonableness standard as

Dans *Paccar*, le juge Sopinka (motifs concourants du juge Lamer (plus tard Juge en chef)) a dit que, dans le cadre de la démarche appropriée

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one in which the reviewing court first queries whether the administrative adjudicator's decision is correct: "curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness" (p. 1018). As Mullan has observed, this approach to patent unreasonableness raises concerns in that it not only conflicts "with the whole notion espoused by Dickson J. in [*CUPE*, *supra*] of there often being no single correct answer to statutory interpretation problems but it also assumes the primacy of the reviewing court over the agency or tribunal in the delineation of the meaning of the relevant statute" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20).

pour l'application de la norme du manifestement déraisonnable, la cour de justice se demande tout d'abord si la décision du tribunal administratif est correcte : « la retenue judiciaire n'entre en jeu que si la cour de justice est en désaccord avec le tribunal administratif. Ce n'est qu'à ce moment-là qu'il est nécessaire de se demander si l'erreur (ainsi découverte) est raisonnable ou déraisonnable » (p. 1018). Comme Mullan le fait observer, cette démarche soulève des inquiétudes en ce que non seulement elle est entièrement incompatible [TRADUCTION] « avec la position du juge Dickson dans [*SCFP*, précité], savoir qu'il arrive souvent qu'un problème d'interprétation législative n'appelle pas qu'une seule solution, mais elle suppose également la prépondérance de la cour de justice sur l'organisme ou le tribunal administratif lorsqu'il s'agit de circonscrire la portée des dispositions en cause » (Mullan, « Recent Developments in Standard of Review », *loc. cit.*, p. 20).

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In my view, this approach presents additional problems as well. Reviewing courts may have difficulty ruling that "an error has been committed but . . . then do[ing] nothing to correct that error on the basis that it was not as big an error as it could or might have been" (see Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20; see also D. J. Mullan, "Of Chaff Midst the Corn: American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review" (1991), 45 Admin. L.R. 264, at pp. 269-70). Furthermore, starting from a finding that the adjudicator's decision is incorrect may colour the reviewing court's subsequent assessment of the reasonableness of competing interpretations (see M. Allars, "On Deference to Tribunals, With Deference to Dworkin" (1994), 20 *Queen's L.J.* 163, at p. 187). The result is that the critical distinction between that which is, in the court's eyes, "incorrect" and that which is "not rationally supportable" is undermined.

À mon avis, cette démarche comporte des difficultés supplémentaires. Il peut être difficile pour une cour de justice de conclure qu'[TRADUCTION] « une erreur a été commise [. . .] et de s'abstenir de la corriger au motif qu'elle n'est pas aussi importante qu'elle aurait pu l'être » (voir Mullan, « Recent Developments in Standard of Review », *loc. cit.*, p. 20; voir également D. J. Mullan, « Of Chaff Midst the Corn : American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review » (1991), 45 Admin. L.R. 264, p. 269-270). De plus, conclure tout d'abord que la décision du tribunal est incorrecte peut orienter l'analyse subséquente visant à déterminer si d'autres interprétations sont raisonnables (voir M. Allars, « On Deference to Tribunals, With Deference to Dworkin » (1994), 20 *Queen's L.J.* 163, p. 187). La distinction cruciale entre ce qui, de l'avis de la cour de justice, est « incorrect » et ce qui « n'est pas rationnellement défendable » est alors compromise.

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The alternative approach is to leave the "correctness" of the adjudicator's decision undecided (see Allars, *supra*, at p. 197). This is essentially the approach that La Forest J. (Dickson C.J.

L'autre solution veut que la cour de justice s'abstienne de décider si la décision du tribunal administratif est « correcte » (voir Allars, *loc. cit.*, p. 197). Il s'agit essentiellement de la

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concurring) took to patent unreasonableness in *Paccar*, *supra*. He wrote, at pp. 1004 and 1005:

The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it.

. . .

I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is "correct" in the sense that it is the decision I would have reached had the proceedings been before this Court on their merits. It is sufficient to say that the result arrived at by the Board is not patently unreasonable.

93 It is this theoretical view that has, at least for the most part, prevailed. As L'Heureux-Dubé J. observed in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 ("*CUPE, Local 301*"), "this Court has stated repeatedly, in assessing whether administrative action is patently unreasonable, the goal is not to review the decision or action on its merits but rather to determine whether it is patently unreasonable, given the statutory provisions governing the particular body and the evidence before it" (para. 53). Patent unreasonableness review, in other words, should not "become an avenue for the court's substitution of its own view" (*CUPE, Local 301*, *supra*, at para. 59; see also *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at pp. 771 and 774-75).

94 This view was recently forcefully rearticulated in *Ryan*, *supra*. Iacobucci J. wrote, at paras. 50-51:

[W]hen deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. . . . The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.

démarche préconisée par le juge La Forest (motifs concourants du juge en chef Dickson) dans *Paccar*, précité. Il a dit aux p. 1004 et 1005 :

Les cours de justice doivent prendre soin de vérifier si la décision du tribunal a un fondement rationnel plutôt que de se demander si elles sont d'accord avec celle-ci.

. . .

J'estime qu'il n'est pas nécessaire de déterminer de façon concluante si la décision de la Commission est « juste » en ce sens que c'est la décision à laquelle je serais parvenu si la cause avait été entendue quant au fond par notre Cour. Il suffit de dire que le résultat auquel la Commission est arrivée n'est pas manifestement déraisonnable.

Cette thèse, du moins pour l'essentiel, l'a emporté. Comme l'a fait remarquer la juge L'Heureux-Dubé dans *Syndicat canadien de la fonction publique, section locale 301 c. Montréal (Ville)*, [1997] 1 R.C.S. 793 (« *SCFP, section locale 301* »), « notre Cour l'a mentionné à plusieurs reprises, lorsqu'on évalue si une action de nature administrative est manifestement déraisonnable, l'objectif n'est pas de réviser la décision ou l'action quant au fond mais plutôt de déterminer si elle est manifestement déraisonnable, étant donné les dispositions législatives régissant ce conseil en particulier et la preuve présentée devant lui » (par. 53). En d'autres termes, l'application de la norme du manifestement déraisonnable ne doit pas « devenir un moyen pour permettre à une cour de justice de substituer sa propre opinion » (*SCFP, section locale 301*, précité, par. 59; voir également *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 R.C.S. 756, p. 771 et 774-775).

Récemment, notre Cour a reformulé ce point de vue avec fermeté dans *Ryan*, précité, par la voix du juge Iacobucci (aux par. 50-51) :

[L]orsqu'elle décide si une mesure administrative est déraisonnable, la cour ne doit à aucun moment se demander ce qu'aurait été la décision correcte. [. . .] La norme de la décision raisonnable n'implique pas que l'instance décisionnelle dispose simplement d'une « marge d'erreur » par rapport à ce que la cour estime être la solution correcte.

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. . . Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

Though Iacobucci J.'s comments here were made in relation to reasonableness *simpliciter*, they are also applicable to the more deferential standard of patent unreasonableness.

. . . À la différence d'un examen selon la norme de la décision correcte, il y a souvent plus d'une seule bonne réponse aux questions examinées selon la norme de la décision raisonnable. [. . .] Même dans l'hypothèse où il y aurait une réponse meilleure que les autres, le rôle de la cour n'est pas de tenter de la découvrir lorsqu'elle doit décider si la décision est déraisonnable.

Même si le juge Iacobucci a tenu ces propos en liaison avec la norme de la décision raisonnable *simpliciter*, ils s'appliquent également à la norme de la décision manifestement déraisonnable, qui commande une plus grande déférence.

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I think it important to emphasize that neither the case at bar, nor the companion case of *Ontario v. O.P.S.E.U.*, should be misinterpreted as a retreat from the position that in reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the "correct" result. In each of these cases, there were <u>two</u> standards of review in play: there was a fundamental legal question on which the adjudicators were subject to a standard of correctness — whether the employees' criminal convictions could be relitigated — and there was a question at the core of the adjudicators' expertise on which they were subject to a standard of patent unreasonableness — whether the employees had been dismissed for just cause. As Arbour J. has outlined, the adjudicators' failure to decide the fundamental relitigation question correctly was sufficient to lead to a patently unreasonable outcome. Indeed, in circumstances such as those at issue in the case at bar, this cannot but be the case: the adjudicators' incorrect decisions on the fundamental legal question provided the entire foundation on which their legal analyses, and their conclusions as to whether the employees were dismissed with just cause, were based. To pass a review for patent unreasonableness, a decision must be one that can be "<u>rationally supported</u>"; this standard cannot be met where, as here, what supports the adjudicator's decision — indeed, what that decision is wholly premised on — is a legal determination that the adjudicator was required, but failed, to decide correctly. To say, however, that in such circumstances a decision will be patently unreasonable — a conclusion that flows from the applicability of <u>two separate</u> standards of review — is very different from suggesting

Il me paraît important de préciser que ni les présents motifs ni ceux de l'arrêt connexe *Ontario c. S.E.E.F.P.O.* n'entendent déroger au principe voulant que la cour appelée à contrôler une décision selon la norme actuelle du manifestement déraisonnable n'ait pas à déterminer la décision « correcte ». Dans chacun de ces pourvois, <u>deux</u> normes de contrôle étaient en cause : la norme de la décision correcte s'appliquait à une question de droit fondamentale — les déclarations de culpabilité des employés pouvaient-elles être remises en cause — et celle de la décision manifestement déraisonnable s'appliquait à une question relevant de l'expertise même du tribunal — les employés avaient-ils été congédiés pour un motif valable. Comme l'a estimé la juge Arbour, l'omission des arbitres de trancher correctement la question fondamentale de la remise en cause était suffisante pour conclure au caractère manifestement déraisonnable de leurs décisions. En effet, dans des circonstances comme celles de la présente espèce, il ne peut en être qu'ainsi : les décisions incorrectes que les arbitres ont rendues relativement à la question de droit fondamentale ont entièrement fondé leurs analyses juridiques, de même que leurs conclusions quant à savoir si les employés avaient été congédiés pour un motif valable. Pour résister à l'analyse selon la norme du manifestement déraisonnable, la décision doit avoir un <u>fondement rationnel</u>; ce critère ne peut être respecté lorsque, comme en l'espèce, ce qui fonde la décision du décideur — et la sous-tend de fait en entier — est une conclusion de droit qui aurait dû être tirée correctement, ce qui n'a pas été le cas. Cependant, l'affirmation qu'en pareils cas une décision sera manifestement déraisonnable — une conclusion qui découle

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that a reviewing court, before applying the standard of patent unreasonableness, must first determine whether the adjudicator's decision is (in)correct or that in applying patent unreasonableness the court should ask itself at any point in the analysis what the correct decision would be. In other words, the application of patent unreasonableness itself is not, and should not be, understood to be predicated on a finding of incorrectness, for the reasons that I discussed above.

(ii) Patent Unreasonableness and Correctness in Practice

96 While the Court now tends toward the view that La Forest J. articulated in *Paccar*, at p. 1004 — "courts must be careful [under a standard of patent unreasonableness] to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it" — the tension between patent unreasonableness and correctness has not been completely resolved. Slippage between the two standards is still evident at times in the way in which patent unreasonableness is applied.

97 In analyzing a number of recent cases, commentators have pointed to both the intensity and the underlying character of the review in questioning whether the Court is applying patent unreasonableness in a manner that is in fact deferential. In this regard, the comments of Professor Lorne Sossin on the application of patent unreasonableness in *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, are illustrative:

> Having established that deference was owed to the statutory interpretation of the Board, the Court proceeded to dissect its interpretation. The majority was of the view that the Board had misconstrued the term "constructive lay-off" and had failed to place sufficient emphasis on the terms of the collective agreement. The majority reasons convey clearly why the Court would adopt a different approach to the Board. They are less clear as to why the Board's approach lacked a rational foundation. Indeed,

de l'applicabilité de deux normes de contrôle distinctes — diffère sensiblement de la proposition que, avant d'appliquer la norme du manifestement déraisonnable, la cour doive décider si la décision du tribunal est correcte ou non ou que, pour appliquer cette norme, la cour doive chercher, au cours de son analyse, à déterminer la décision correcte. En d'autres mots, pour les motifs exposés précédemment, l'application de la norme du manifestement déraisonnable ne saurait reposer sur la conclusion que la décision est incorrecte.

(ii) La norme de la décision manifestement déraisonnable et celle de la décision correcte, en pratique

Bien que notre Cour incline désormais à partager l'avis du juge La Forest dans *Paccar*, p. 1004 — « [l]es cours de justice doivent prendre soin [pour l'application de la norme du manifestement déraisonnable] de vérifier si la décision du tribunal a un fondement rationnel plutôt que de se demander si elles sont d'accord avec celle-ci » —, le problème de la tension entre la norme du manifestement déraisonnable et celle de la décision correcte n'a pas été entièrement résolu. Le glissement de l'une à l'autre ressort encore parfois de la manière dont est appliquée la norme de la décision manifestement déraisonnable.

Après avoir analysé un certain nombre de décisions récentes, les observateurs ont signalé l'intensité et le caractère fondamental du contrôle en se demandant si notre Cour appliquait la norme de la décision manifestement déraisonnable en faisant preuve, dans les faits, de déférence. Je cite, à titre d'exemple, les observations du professeur Lorne Sossin sur l'application de ce critère dans *Canada Safeway Ltd. c. SDGMR, section locale 454*, [1998] 1 R.C.S. 1079 :

> [TRADUCTION] Après avoir établi que la déférence s'imposait à l'égard de l'interprétation des dispositions législatives par le Conseil, la Cour a procédé à l'analyse approfondie de cette interprétation. Les juges majoritaires ont estimé que le Conseil avait mal interprété l'expression « mise à pied déguisée » et avait omis d'accorder suffisamment d'importance aux dispositions de la convention collective. Leurs motifs expliquent clairement la préférence d'une autre interprétation que celle

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there is very little evidence of the Court according deference to the Board's interpretation of its own statute, or to its choice as to how much weight to place on the terms of the collective agreement. *Canada Safeway* raises the familiar question of how a court should demonstrate its deference, particularly in the labour relations context.

(L. Sossin, "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000), 11 *S.C.L.R.* (2d) 37, at p. 49)

98 Professor Ian Holloway makes a similar observation with regard to *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644:

> In her judgment, [McLachlin J. (as she then was)] quoted from the familiar passages of *CUPE*, yet she . . . reached her decision on the basis of a review of the case law. She did not ask whether, despite the fact that it differed from holdings in other jurisdictions, the conclusion of the Newfoundland Labour Relations Board could be "rationally supported" on the basis of the wording of the successorship provisions of the *Labour Relations Act*. Instead, she looked at whether the Board had reached the correct legal interpretation of the Act in the same manner that a court of appeal would determine whether a trial judge had made a correct interpretation of the law. In other words, she effectively *equated patent unreasonability with correctness at law.*

(I. Holloway, "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" (1993), 22 *Man. L.J.* 28, at pp. 64-65 (emphasis in original); see also Allars, *supra*, at p. 178.)

99 At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review

retenue par le Conseil. Ils sont moins explicites quant à l'absence de fondement rationnel de cette dernière. En fait, la Cour ne fait guère preuve de déférence vis-à-vis de l'interprétation, par le Conseil, de sa propre loi constitutive ou de sa détermination du poids à accorder aux dispositions de la convention collective. *Canada Safeway* soulève la question habituelle : comment une cour de justice doit-elle manifester sa déférence, en particulier dans le domaine des relations de travail?

(L. Sossin, « Developments in Administrative Law : The 1997-98 and 1998-99 Terms » (2000), 11 *S.C.L.R.* (2d) 37, p. 49)

Le professeur Ian Holloway formule des observations semblables relativement à *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990] 3 R.C.S. 644 :

> [TRADUCTION] Dans ses motifs, [la juge McLachlin (maintenant Juge en chef)] a cité les extraits familiers de *SCFP*, mais elle a fondé sa décision sur la jurisprudence. Elle ne s'est pas demandé si, malgré le fait qu'elle différait des décisions rendues dans d'autres ressorts, la conclusion de la Commission des relations de travail de Terre-Neuve pouvait « rationnellement » s'appuyer sur les dispositions de la *Labour Relations Act* relatives à l'obligation du successeur. Elle s'est plutôt demandé si la Commission avait correctement interprété la loi, tout comme l'aurait fait une cour d'appel pour la décision d'un juge de première instance. En d'autres termes, elle a effectivement *établi une équivalence entre la norme du manifestement déraisonnable et celle de la décision fondée en droit*.

(I. Holloway, « "A Sacred Right" : Judicial Review of Administrative Action as a Cultural Phenomenon » (1993) 22 *R.D. Man.* 28, p. 64-65 (en italique dans l'original); voir également Allars, *loc. cit.*, p. 178.)

Dans certains cas, lorsqu'elle applique la norme de la décision manifestement déraisonnable, l'on peut reprocher à notre Cour de faire implicitement ce qu'elle rejette explicitement, soit modifier une décision qu'elle juge incorrecte, et non seulement une décision sans fondement rationnel. Dès lors, la ligne de démarcation entre la norme de la décision correcte, d'une part, et la norme de la décision manifestement déraisonnable, d'autre part, s'obscurcit. Il est fort possible qu'un tel risque soit inhérent au

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under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the two standards of reasonableness and correctness.

contrôle selon une norme de raisonnabilité, quelle qu'elle soit, étant donné la nature du processus intellectuel que ce contrôle suppose. Néanmoins, l'existence de deux normes de raisonnabilité paraît avoir accentué la tension sous-jacente entre ces deux normes et la norme de la décision correcte.

(c) *The Relationship Between the Patent Unreasonableness and Reasonableness Simpliciter Standards*

c) *L'interaction entre la norme du manifestement déraisonnable et celle de la décision raisonnable simpliciter*

100 While the conceptual difference between review on a correctness standard and review on a patent unreasonableness standard may be intuitive and relatively easy to observe (though in practice elements of correctness at times encroach uncomfortably into patent unreasonableness review), the boundaries between patent unreasonableness and reasonableness *simpliciter* are far less clear, even at the theoretical level.

La différence conceptuelle entre le contrôle selon la norme de la décision correcte et le contrôle selon la norme du manifestement déraisonnable peut être intuitive et relativement facile à constater (bien que, en pratique, des éléments du premier empiètent parfois de manière inquiétante sur le second), toutefois la frontière entre le caractère manifestement déraisonnable et le caractère raisonnable *simpliciter* est encore moins claire, même sur le plan théorique.

(i) The Theoretical Foundation for Patent Unreasonableness and Reasonableness *Simpliciter*

(i) Le fondement théorique de la norme du manifestement déraisonnable et de la norme du raisonnable *simpliciter*

101 The lack of sufficiently clear boundaries between patent unreasonableness and reasonableness *simpliciter* has its origins in the fact that patent unreasonableness was developed prior to the birth of the pragmatic and functional approach (see *C.U.P.E. v. Ontario*, *supra*, at para. 161) and, more particularly, prior to (rather than in conjunction with) the formulation of reasonableness *simpliciter* in *Southam*, *supra*. Because patent unreasonableness, as a posture of curial deference, was conceived in opposition only to a correctness standard of review, it was sufficient for the Court to emphasize in defining its scope the principle that there will often be no one interpretation that can be said to be correct in interpreting a statute or otherwise resolving a legal dispute, and that specialized administrative adjudicators may, in many circumstances, be better equipped than courts to choose between the possible interpretations. Where this is the case, provided that the adjudicator's decision is one that can be "rationally supported on a construction which the relevant legislation may reasonably be considered to bear",

L'absence d'une frontière suffisamment claire entre ces deux normes est attribuable au fait que celle du manifestement déraisonnable est apparue avant l'adoption de l'analyse pragmatique et fonctionnelle (voir *S.C.F.P. c. Ontario*, précité, par. 161) et, plus particulièrement, avant (et non en même temps que) la formulation de la norme de la décision raisonnable *simpliciter* dans *Southam*, précité. Puisque la norme de la décision manifestement déraisonnable, qui traduit une attitude de déférence judiciaire, avait été conçue par opposition uniquement à la norme de la décision correcte, il suffisait, pour en circonscrire la portée, que notre Cour mette l'accent sur l'idée que l'interprétation d'une loi ou le règlement d'un litige appelle souvent plus d'une interprétation correcte et que, dans certains cas, un tribunal administratif spécialisé peut être plus à même qu'une cour de justice de choisir entre les interprétations possibles. Le cas échéant, à condition que la décision puisse « rationnellement s'appuyer sur une interprétation qu'on peut raisonnablement considérer comme étayée par la législation

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the reviewing court should not intervene (*Nipawin*, *supra*, at p. 389).

102 Upon the advent of reasonableness *simpliciter*, however, the validity of multiple interpretations became the underlying premise for this new variant of reasonableness review as well. Consider, for instance, the discussion of reasonableness *simpliciter* in *Ryan*, that I cited above:

Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

(*Ryan*, *supra*, at para. 51; see also para. 55.)

It is difficult to distinguish this language from that used to describe patent unreasonableness not only in the foundational judgments establishing that standard, such as *Nipawin*, *supra*, and *CUPE*, *supra*, but also in this Court's more contemporary jurisprudence applying it. In *Ivanhoe*, *supra*, for instance, Arbour J. stated that "the recognition by the legislature and the courts that there are many potential solutions to a dispute is the very essence of the patent unreasonableness standard of review, which would be meaningless if it was found that there is only one acceptable solution" (para. 116).

103 Because patent unreasonableness and reasonableness *simpliciter* are both rooted in this guiding principle, it has been difficult to frame the standards as analytically, rather than merely semantically, distinct. The efforts to sustain a workable distinction between them have taken, in the main, two forms, which mirror the two definitional strands of patent unreasonableness that I identified above. One of these forms distinguishes between patent unreasonableness and reasonableness *simpliciter* on the basis of the relative magnitude of the defect. The other looks to the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to

pertinente », la cour doit s'abstenir de la modifier (*Nipawin*, précité, p. 389).

L'adoption de la norme du raisonnable *simpliciter* a cependant changé la donne, la validité d'interprétations multiples constituant également la prémisse de cette nouvelle variante du contrôle selon la norme de la décision raisonnable. Considérons par exemple l'extrait suivant de *Ryan*, cité précédemment, sur la norme de la décision raisonnable *simpliciter* :

À la différence d'un examen selon la norme de la décision correcte, il y a souvent plus d'une seule bonne réponse aux questions examinées selon la norme de la décision raisonnable. [. . .] Même dans l'hypothèse où il y aurait une réponse meilleure que les autres, le rôle de la cour n'est pas de tenter de la découvrir lorsqu'elle doit décider si la décision est déraisonnable.

(*Ryan*, précité, par. 51; voir également par. 55.)

Il est difficile de distinguer ces propos de ceux tenus pour décrire la norme du manifestement déraisonnable, non seulement dans les arrêts ayant établi cette norme, comme *Nipawin* et *SCFP*, précités, mais aussi dans les arrêts plus récents où notre Cour l'a appliquée. Par exemple, dans *Ivanhoe*, précité, la juge Arbour fait observer que « la reconnaissance par le législateur et les tribunaux de la multiplicité de solutions qui peuvent être apportées à un différend constitue l'essence même de la norme de contrôle du manifestement déraisonnable, qui perdrait tout son sens si l'on devait juger qu'une seule solution est acceptable » (par. 116).

Comme la norme du manifestement déraisonnable et celle du raisonnable *simpliciter* se fondent toutes deux sur ce principe directeur, il a été difficile de concevoir qu'elles étaient distinctes du point de vue analytique, et non sur le seul plan sémantique. Les tentatives pour établir une distinction valable entre les deux normes ont principalement revêtu deux formes reflétant les deux catégories de définitions du caractère manifestement déraisonnable. L'une d'elles distingue entre manifestement déraisonnable et raisonnable *simpliciter* en fonction de l'importance relative du défaut. L'autre met l'accent sur le caractère « flagrant ou évident » du défaut et, partant sur le caractère plus ou moins envahissant

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find it. Both approaches raise their own problems.

(ii) The Magnitude of the Defect

104 In *PSAC*, *supra*, at pp. 963-64, Cory J. described a patently unreasonable decision in these terms:

> In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational. . . . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction.

While this definition may not be inherently problematic, it has become so with the emergence of reasonableness *simpliciter*, in part because of what commentators have described as the "tautological difficulty of distinguishing standards of rationality on the basis of the term 'clearly'" (see Cowan, *supra*, at pp. 27-28; see also G. Perrault, *Le contrôle judiciaire des décisions de l'administration: De l'erreur juridictionnelle à la norme de contrôle* (2002), at p. 116; S. Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (2003), at pp. 34-35; P. Garant, *Droit administratif* (4th ed. 1996), vol. 2, at p. 193).

105 Mullan alludes to both the practical and the theoretical difficulties of maintaining a distinction based on the magnitude of the defect, i.e., the degree of irrationality, that characterizes a decision:

> . . . admittedly in his judgment in *PSAC*, Cory J. did attach the epithet "clearly" to the word "irrational" in delineating a particular species of patent unreasonableness. However, I would be most surprised if, in so doing, he was using the term "clearly" for other than rhetorical effect. Indeed, I want to suggest . . . that to maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality simpliciter will not is to make a nonsense

du processus d'analyse nécessaire à sa mise au jour. Chacune comporte ses propres difficultés.

(ii) L'importance du défaut

Dans *AFPC*, précité, p. 963-964, le juge Cory a décrit comme suit la décision manifestement déraisonnable :

> Dans le Grand Larousse de la langue française, l'adjectif manifeste est ainsi défini : « Se dit d'une chose que l'on ne peut contester, qui est tout à fait évidente ». On y trouve pour le terme déraisonnable la définition suivante : « Qui n'est pas conforme à la raison; qui est contraire au bon sens ». Eu égard donc à ces définitions des mots « manifeste » et « déraisonnable », il appert que si la décision qu'a rendue la Commission, agissant dans le cadre de sa compétence, n'est pas clairement irrationnelle, c'est-à-dire, de toute évidence non conforme à la raison, on ne saurait prétendre qu'il y a eu perte de compétence.

Cette définition n'était peut-être pas problématique en soi, mais elle l'est devenue lorsque la norme de la décision raisonnable *simpliciter* a vu le jour, en partie à cause de ce que les observateurs ont appelé la [TRADUCTION] « difficulté tautologique de distinguer des normes de rationalité à partir du terme "clairement" » (voir Cowan, *op. cit.*, p. 27-28; voir également G. Perrault, *Le contrôle judiciaire des décisions de l'administration : De l'erreur juridictionnelle à la norme de contrôle* (2002), p. 116; S. Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle : Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (2003), p. 34-35; P. Garant, *Droit administratif* (4e éd. 1996), vol. 2, p. 193).

Mullan fait allusion aux difficultés tant pratiques que théoriques du maintien d'une distinction fondée sur l'importance du défaut, c'est-à-dire sur le degré d'irrationalité d'une décision :

> [TRADUCTION] . . . il est vrai que dans *AFPC*, le juge Cory a accolé l'épithète « clairement » au mot « irrationnelle » en faisant état d'un cas particulier de décision manifestement déraisonnable. Cependant, je serais fort étonné qu'il ait employé l'adverbe « clairement » pour autre chose qu'un effet de rhétorique. En fait, soutenir que seule la décision « clairement irrationnelle » est manifestement déraisonnable, à l'exclusion de celle qui est irrationnelle simpliciter, vide de sens la règle de droit.

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of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality. In other words, I defy any judge or lawyer to provide a concrete example of the difference between the merely irrational and the clearly irrational! In any event, there have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny.

(Mullan, "Recent Developments in Standard of Review", *supra*, at pp. 24-25)

Also relevant in this respect are the comments of Reed J. in *Hao v. Canada (Minister of Citizenship and Immigration)* (2000), 184 F.T.R. 246, at para. 9:

I note that I have never been convinced that "patently unreasonable" differs in a significant way from "unreasonable". The word "patently" means clearly or obviously. If the unreasonableness of a decision is not clear or obvious, I do not see how that decision can be said to be unreasonable.

Even a brief review of this Court's descriptions of the defining characteristics of patently unreasonable and unreasonable decisions demonstrates that it is difficult to sustain a meaningful distinction between two forms of reasonableness on the basis of the magnitude of the defect, and the extent of the decision's resulting deviation from the realm of the reasonable. Under both standards, the reviewing court's inquiry is focussed on "the existence of a rational basis for the [adjudicator's] decision" (see, for example, *Paccar*, *supra*, at p. 1004, *per* La Forest J.; *Ryan*, *supra*, at paras. 55-56). A patently unreasonable decision has been described as one that "cannot be sustained on any reasonable interpretation of the facts or of the law" (*National Corn Growers*, *supra*, at pp. 1369-70, *per* Gonthier J.), or "rationally supported on a construction which the relevant legislation may reasonably be considered to bear" (*Nipawin*, *supra*, at p. 389). An unreasonable decision has been described as one for which there are "no lines of reasoning supporting the decision which could reasonably lead

Rattacher l'adverbe « clairement » à l'adjectif « irrationnelle » est certes une tautologie. Tout comme l'« unicité », l'irrationalité est ou n'est pas. Une décision ne peut être un peu irrationnelle. En d'autres termes, je mets au défi tout juge ou avocat d'illustrer concrètement la différence entre une décision simplement irrationnelle et une décision clairement irrationnelle! Quoi qu'il en soit, il y a lieu de s'inquiéter d'un régime de contrôle judiciaire qui permet le maintien d'une décision irrationnelle, même lorsque s'applique la norme commandant le degré le plus élevé de déférence.

(Mullan, « Recent Developments in Standard of Review », *loc. cit.*, p. 24-25)

Sont également pertinentes à ce propos ces observations de la juge Reed dans *Hao c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2000] A.C.F. n° 296 (QL) (1re inst.), par. 9 :

Je fais remarquer que je n'ai jamais été convaincue que la norme de la « décision manifestement déraisonnable » différait sensiblement de celle de la « décision déraisonnable ». Le mot « manifestement » veut dire clairement ou de toute évidence. Si le caractère déraisonnable d'une décision n'est ni clair, ni évident, je ne vois pas comment cette décision peut être considérée comme déraisonnable.

106

Même un bref examen des caractéristiques que notre Cour a attribuées aux décisions manifestement déraisonnables et aux décisions déraisonnables fait ressortir qu'il est extrêmement difficile, sinon impossible, de maintenir entre ces deux formes du critère de la décision raisonnable une distinction véritable fondée sur la gravité du défaut et l'importance de l'écart entre la décision et une décision raisonnable. Pour l'application de l'une et l'autre des normes, la cour doit prendre soin de vérifier « si la décision du tribunal a un fondement rationnel » (voir par exemple *Paccar*, précité, p. 1004, le juge La Forest; *Ryan*, précité, par. 55-56). L'on a affirmé de la décision manifestement déraisonnable qu'elle « ne saurait être maintenue selon une interprétation raisonnable des faits ou du droit » (*National Corn Growers*, précité, p. 1369, le juge Gonthier) ni « rationnellement s'appuyer sur une interprétation qu'on peut raisonnablement considérer comme étayée par la législation pertinente » (*Nipawin*, précité, p. 389). Notre Cour a ajouté par ailleurs de la décision déraisonnable qu'« aucun des raisonnements

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that tribunal to reach the decision it did" (*Ryan*, *supra*, at para. 53).

avancés pour étayer la décision ne pouvait raisonnablement amener le tribunal à rendre la décision prononcée » (*Ryan*, précité, par. 53).

107

Under both patent unreasonableness and reasonableness *simpliciter*, mere disagreement with the adjudicator's decision is insufficient to warrant intervention (see, for example, *Paccar*, *supra*, at pp. 1003-4, *per* La Forest J., and *Chamberlain*, *supra*, at para. 15, *per* McLachlin C.J.). Applying the patent unreasonableness standard, "the court will defer even if the interpretation given by the tribunal . . . is not the 'right' interpretation in the court's view nor even the 'best' of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement" (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 341). In the case of reasonableness *simpliciter*, "a decision may satisfy the . . . standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling" (*Ryan*, *supra*, at para. 55). There seems to me to be no qualitative basis on which to differentiate effectively between these various characterizations of a rationality analysis; how, for instance, would a decision that is not "tenably supported" (and is thus "merely" unreasonable) differ from a decision that is not "rationally supported" (and is thus patently unreasonable)?

Suivant les normes actuelles du manifestement déraisonnable et du raisonnable *simpliciter*, le seul désaccord avec la décision du tribunal ne suffit pas pour justifier l'intervention de la cour (voir par exemple *Paccar*, précité, p. 1003-1004, le juge La Forest, et *Chamberlain*, précité, par. 15, la juge en chef McLachlin). Lorsqu'elle appliquera la norme de la décision manifestement déraisonnable, « la cour de justice fera preuve de retenue même si, à son avis, l'interprétation qu'a donnée le tribunal [. . .] n'est pas la "bonne" ni même la "meilleure" de deux interprétations possibles, pourvu qu'il s'agisse d'une interprétation que peut raisonnablement souffrir le texte de la convention » (*Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 341). Au regard de la norme de la décision raisonnable *simpliciter*, « une décision peut satisfaire à la norme du raisonnable si elle est fondée sur une explication défendable, même si elle n'est pas convaincante aux yeux de la cour de révision » (*Ryan*, précité, par. 55). Il me paraît n'y avoir aucune différence qualitative réelle entre ces définitions d'une analyse axée sur la recherche d'un fondement rationnel; comment, par exemple, une décision non « fondée sur une explication raisonnable » (et donc « simplement » déraisonnable) se distingue-t-elle d'une décision qui ne peut « raisonnablement s'appuyer » sur la législation pertinente (et qui est donc manifestement déraisonnable)?

108

In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness (see D. K. Lovett, "That Curious Curial Deference Just Gets Curiouser and Curiouser — *Canada (Director of Investigation and Research) v. Southam Inc.*" (1997), 55 *Advocate (B.C.)* 541, at p. 545). Because the two variants of reasonableness

En fin de compte, la question essentielle demeure la même pour les deux normes : la décision du tribunal est-elle conforme à la raison? Si la réponse est négative du fait que, par exemple, les dispositions en cause ne peuvent rationnellement appuyer l'interprétation du tribunal, l'erreur entraîne l'invalidation de la décision, que la norme appliquée soit celle du raisonnable *simpliciter* ou du manifestement déraisonnable (voir D. K. Lovett, « That Curious Curial Deference Just Gets Curiouser and Curiouser — *Canada (Director of Investigation and Research) v. Southam Inc.* » (1997), 55 *Advocate (B.C.)* 541, p. 545). Puisque les deux variantes de la norme de

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are united at their theoretical source, the imperative for the reviewing court to intervene will turn on the conclusion that the adjudicator's decision deviates from what falls within the ambit of the reasonable, not on "fine distinctions" between the test for patent unreasonableness and reasonableness *simpliciter* (see Falzon, *supra*, at p. 33).

The existence of these two variants of reasonableness review forces reviewing courts to continue to grapple with the significant practical problems inherent in distinguishing meaningfully between the two standards. To the extent that a distinction is advanced on the basis of the relative severity of the defect, this poses not only practical difficulties but also difficulties in principle, as this approach implies that patent unreasonableness, in requiring "clear" rather than "mere" irrationality, allows for a margin of appreciation for decisions that are not in accordance with reason. In this respect, I would echo Mullan's comments that there would "have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 25).

(iii) The "Immediacy or Obviousness" of the Defect

There is a second approach to distinguishing between patent unreasonableness and reasonableness *simpliciter* that requires discussion. *Southam*, *supra*, at para. 57, emphasized the "immediacy or obviousness" of the defect:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

In my view, two lines of difficulty have emerged from emphasizing the "immediacy or obvious-

la décision raisonnable possèdent le même fondement théorique, l'intervention de la cour de justice s'appuiera sur sa conclusion selon laquelle la décision du tribunal déborde des limites du raisonnable, et non sur de « subtiles nuances » entre le critère du manifestement déraisonnable et celui du raisonnable *simpliciter* (voir Falzon, *loc. cit.*, p. 33).

109 L'existence de ces deux variantes de la norme de la décision raisonnable contraint la cour chargée du contrôle à continuer à affronter les grandes difficultés d'ordre pratique que comporte en soi l'établissement d'une distinction réelle entre les deux normes. Une distinction proposée sur le fondement de la gravité relative du défaut comporte non seulement des difficultés d'ordre pratique, mais soulève également des questions de principe, en ce qu'elle suppose que la norme du manifestement déraisonnable, en exigeant que la décision soit « clairement », et non « simplement », irrationnelle, offre une marge de manœuvre dans l'appréciation des décisions qui ne sont pas conformes à la raison. À cet égard, je me permets de rappeler les propos de Mullan selon lesquels [TRADUCTION] « il y a lieu de s'inquiéter d'un régime de contrôle judiciaire qui permet le maintien d'une décision irrationnelle, même lorsque s'applique la norme commandant le degré le plus élevé de déférence » (Mullan, « Recent Developments in Standard of Review », *loc. cit.*, p. 25).

(iii) Le caractère flagrant ou évident du défaut

110 Il convient d'examiner un autre critère appliqué pour distinguer entre le manifestement déraisonnable et le raisonnable *simpliciter*. Dans *Southam*, précité, par. 57, notre Cour a mis l'accent sur le caractère « flagrant ou évident » du défaut :

> La différence entre « déraisonnable » et « manifestement déraisonnable » réside dans le caractère flagrant ou évident du défaut. Si le défaut est manifeste au vu des motifs du tribunal, la décision de celui-ci est alors manifestement déraisonnable. Cependant, s'il faut procéder à un examen ou à une analyse en profondeur pour déceler le défaut, la décision est alors déraisonnable mais non manifestement déraisonnable.

111 À mon avis, l'insistance sur le caractère « flagrant ou évident » du défaut et, partant, sur la nature

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ness" of the defect, and thus the relative invasiveness of the review necessary to find it, as a means of distinguishing between patent unreasonableness and reasonableness *simpliciter*. The first is the difficulty of determining how invasive a review is invasive enough, but not too invasive, in each case. The second is the difficulty that flows from ambiguity as to the intended meaning of "immediacy or obviousness" in this context: is it the obviousness of the defect in the sense of its transparency on the face of the decision that is the defining characteristic of patent unreasonableness review (see J. L. H. Sprague, "Another View of *Baker*" (1999), 7 *Reid's Administrative Law* 163, at pp. 163 and 165, note 5), or is it rather the obviousness of the defect in terms of the ease with which, once found, it can be identified as severe? The latter interpretation may bring with it difficulties of the sort I referred to above — i.e., attempting to qualify degrees of irrationality. The former interpretation, it seems to me, presents problems of its own, which I discuss below.

plus ou moins envahissante de l'examen nécessaire à sa découverte, pour distinguer entre le manifestement déraisonnable et le raisonnable *simpliciter*, a fait naître deux difficultés. La première est de circonscrire dans chacun des cas l'examen qui est assez envahissant sans l'être trop. La deuxième se retrouve dans l'ambiguïté de la définition du caractère « flagrant ou évident » dans ce contexte : est-ce le caractère évident du défaut, le fait qu'il ressorte à première vue de la décision, qui définit fondamentalement le contrôle selon la norme du manifestement déraisonnable (voir J. L. H. Sprague, « Another View of *Baker* » (1999), 7 *Reid's Administrative Law* 163, p. 163 et 165, note 5) ou s'agit-il plutôt du caractère évident du défaut, compte tenu de la facilité avec laquelle il peut être qualifié de grave après sa découverte? Cette dernière interprétation peut poser des problèmes semblables à ceux mentionnés précédemment — l'établissement d'une échelle de l'irrationalité. La première interprétation me paraît comporter ses propres difficultés, dont je fais état ci-après.

112 Turning first to the difficulty of actually applying a distinction based on the "immediacy or obviousness" of the defect, we are confronted with the criticism that the "somewhat probing examination" criterion (see *Southam*, *supra*, at para. 56) is not clear enough (see D. W. Elliott, "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 *Sask. L. Rev.* 469, at pp. 486-87). As Elliott notes: "[t]he distinction between a 'somewhat probing examination' and those which are simply probing, or are less than probing, is a fine one. It is too fine to permit courts to differentiate clearly among the three standards."

En ce qui concerne tout d'abord la difficulté d'appliquer *de facto* une distinction fondée sur le caractère « flagrant ou évident » du défaut, d'aucuns ont déploré que le critère de l'« examen assez poussé » (voir *Southam*, précité, par. 56) ne soit pas suffisamment clair (voir D. W. Elliott, « *Suresh* and the Common Borders of Administrative Law : Time for the Tailor? » (2002), 65 *Sask. L. Rev.* 469, p. 486-487). Comme le fait observer Elliott : [TRADUCTION] « [l]a nuance entre un "examen assez poussé" et un examen simplement poussé ou moins poussé, est subtile. Elle est trop subtile pour permettre aux cours de justice de différencier clairement les trois normes. »

113 This Court has itself experienced some difficulty in consistently performing patent unreasonableness review in a way that is less probing than the "somewhat probing" analysis that is the hallmark of reasonableness *simpliciter*. Despite the fact that a less invasive review has been described as a defining characteristic of the standard of patent unreasonableness, in a number of the Court's recent decisions, including *Toronto (City) Board of Education*, *supra*,

Notre Cour a elle-même eu du mal à effectuer, dans tous les cas d'application de la norme du manifestement déraisonnable, un examen moins poussé par rapport à l'examen « assez poussé » qui caractérise la norme du raisonnable *simpliciter*. Même si l'on a affirmé qu'un examen moins envahissant constituait la caractéristique fondamentale de la norme du manifestement déraisonnable, dans un certain nombre d'arrêts récents, y compris *Conseil*

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and *Ivanhoe*, *supra*, one could fairly characterize the Court's analysis under this standard as at least "somewhat" probing in nature.

de l'éducation de Toronto (Cité) et *Ivanhoe*, précités, l'on peut qualifier d'« assez » poussée, à tout le moins, l'analyse que notre Cour a effectuée en fonction de cette norme.

114

Even prior to *Southam* and the development of reasonableness *simpliciter*, there was some uncertainty as to how intensely patent unreasonableness review is to be performed. This is particularly evident in *National Corn Growers*, *supra* (see generally Mullan, "Of Chaff Midst the Corn", *supra*; Mullan, *Administrative Law*, *supra*, at pp. 72-73). In that case, while Wilson J. counselled restraint on the basis of her reading of *CUPE*, *supra*, Gonthier J., for the majority, performed quite a searching review of the decision of the Canadian Import Tribunal. He reasoned, at p. 1370, that "[i]n some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis."

Même avant *Southam* et l'élaboration de la norme du raisonnable *simpliciter*, un degré d'incertitude régnait quant au caractère plus ou moins approfondi que devait revêtir le contrôle en fonction de la norme du manifestement déraisonnable. Cela ressort particulièrement de *National Corn Growers*, précité (voir généralement Mullan, « Of Chaff Midst the Corn », *loc. cit.*; Mullan, *Administrative Law*, *op. cit.*, p. 72-73). Dans cette affaire, alors que, se fondant sur son interprétation de *SCFP*, précité, la juge Wilson préconise la retenue, le juge Gonthier, au nom des juges majoritaires, se livre à un examen plutôt approfondi de la décision du Tribunal canadien des importations. Selon lui, « [d]ans certains cas, le caractère déraisonnable d'une décision peut ressortir sans qu'il soit nécessaire d'examiner en détail le dossier. Dans d'autres cas, il se peut qu'elle ne soit pas moins déraisonnable mais que cela ne puisse être constaté qu'après une analyse en profondeur » (p. 1370).

115

Southam itself did not definitively resolve the question of how invasively review for patent unreasonableness should be performed. An intense review would seem to be precluded by the statement that, "if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57). The possibility that, in certain circumstances, quite a thorough review for patent unreasonableness will be appropriate, however, is left open: "[i]f the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem" (para. 57).

À lui seul, *Southam* n'a pas réglé définitivement la question de l'examen plus ou moins envahissant que commande la norme du manifestement déraisonnable. L'énoncé « s'il faut procéder à un examen ou à une analyse en profondeur pour déceler le défaut, la décision est alors déraisonnable mais non manifestement déraisonnable » (par. 57) paraît militer contre un examen en profondeur. Cependant, l'énoncé suivant laisse planer la possibilité que, dans certains cas, la norme de la décision manifestement déraisonnable commande un examen assez approfondi : « Si la décision contrôlée par un juge est assez complexe, il est possible qu'il lui faille faire beaucoup de lecture et de réflexion avant d'être en mesure de saisir toutes les dimensions du problème » (par. 57).

116

This brings me to the second problem: in what sense is the defect immediate or obvious? *Southam* left some ambiguity on this point. As I have outlined, on the one hand, a patently unreasonable decision is understood as one that is

Ces réflexions nous amènent à l'examen de la deuxième difficulté : qu'entend-on par défaut flagrant ou évident? L'arrêt *Southam* reste ambigu sur ce point. Comme je l'ai exposé, d'une part, l'on entend par décision manifestement déraison-

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flawed by a defect that is evident on the face of the decision, while an unreasonable decision is one that is marred by a defect that it takes significant searching or testing to find. In other places, however, *Southam* suggests that the "immediacy or obviousness" of a patently unreasonable defect refers not to the ease of its detection, but rather to the ease with which, once detected, it can be identified as severe. Particularly relevant in this respect is the statement that "once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident" (para. 57). It is the (admittedly sometimes only tacit) recognition that what must in fact be evident — i.e., clear, obvious, or immediate — is the defect's magnitude upon detection that allows for the possibility that in certain circumstances "it will simply not be possible to understand and respond to a patent unreasonableness argument without a thorough examination and appreciation of the tribunal's record and reasoning process" (see Mullan, *Administrative Law*, *supra*, at p. 72; see also *Ivanhoe*, *supra*, at para. 34).

nable la décision qui, à première vue, est entachée d'un défaut, alors que la décision déraisonnable est celle qui est affectée d'un défaut dont la découverte exige maintes recherches ou vérifications. Toutefois, dans *Southam*, notre Cour laisse entendre par ailleurs que le caractère « flagrant ou évident » d'un défaut manifestement déraisonnable ne tient pas à la facilité de sa détection mais bien à celle de sa qualification de grave une fois qu'il a été découvert. Revêt alors une importance particulière à cet égard l'énoncé selon lequel « une fois que les contours du problème sont devenus apparents, si la décision est manifestement déraisonnable, son caractère déraisonnable ressortira » (par. 57). On reconnaît ainsi (parfois seulement tacitement, il est vrai) que ce qui doit en fait ressortir — c'est-à-dire être clair, manifeste ou flagrant — c'est l'importance du défaut lors de sa mise au jour et admettre que, dans certains cas, [TRADUCTION] « il ne sera tout simplement pas possible de comprendre l'argumentation relative au caractère manifestement déraisonnable et d'y répondre sans procéder à une analyse et à une évaluation approfondies du dossier du tribunal et de son raisonnement » (voir Mullan, *Administrative Law*, *op. cit.*, p. 72; voir également *Ivanhoe*, précité, par. 34).

117 Our recent decision in *Ryan* has brought more clarity to *Southam*, but still reflects a degree of ambiguity on this issue. In *Ryan*, at para. 52, the Court held:

> In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. [Emphasis added.]

Dans le récent arrêt *Ryan*, par. 52, notre Cour a apporté plus de clarté à l'arrêt *Southam*, malgré la persistance d'une part d'ambiguïté :

> Dans *Southam*, précité, par. 57, la Cour explique que la différence entre une décision déraisonnable et une décision manifestement déraisonnable réside « dans le caractère flagrant ou évident du défaut ». Autrement dit, dès qu'un défaut manifestement déraisonnable a été relevé, il peut être expliqué simplement et facilement, de façon à écarter toute possibilité réelle de douter que la décision est viciée. La décision manifestement déraisonnable a été décrite comme étant « clairement irrationnelle » ou « de toute évidence non conforme à la raison » (*Canada (Procureur général) c. Alliance de la Fonction publique du Canada*, [1993] 1 R.C.S. 941, p. 963-964, le juge Cory; *Centre communautaire juridique de l'Estrie c. Sherbrooke (Ville)*, [1996] 3 R.C.S. 84, par. 9-12, le juge Gonthier). Une décision qui est manifestement déraisonnable est à ce point viciée qu'aucun degré de déférence judiciaire ne peut justifier de la maintenir. [Je souligne.]

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This passage moves the focus away from the obviousness of the defect in the sense of its transparency "on the face of the decision", to the obviousness of its magnitude once it has been identified. At other points, however, the relative invasiveness of the review required to identify the defect is emphasized as the means of distinguishing between patent unreasonableness and reasonableness *simpliciter*:

> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

(*Ryan*, *supra*, at para. 53)

118 Such ambiguity led commentators such as David Phillip Jones to continue to question in light of *Ryan* whether

> whatever it is that makes the decision "patently unreasonable" [must] appear on the face of the record . . . Or can one go beyond the record to demonstrate — "identify" — why the decision is patently unreasonable? Is it the "immediacy and obviousness of the defect" which makes it patently unreasonable, or does patently unreasonable require outrageousness so that the decision is so flawed that no amount of curial deference can justify letting it stand?

(D. P. Jones, "Notes on *Dr. Q* and *Ryan*: Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law", paper originally presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003, at p. 10.)

119 As we have seen, the answers to such questions are far from self-evident, even at the level of theoretical abstraction. How much more difficult must they be for reviewing courts and counsel struggling to apply not only patent unreasonableness, but also reasonableness *simpliciter*? (See, in this regard, the comments of Mullan in "Recent Developments in Standard of Review", *supra*, at p. 4.)

Cet extrait met l'accent non plus sur le caractère évident du défaut en ce qu'il ressort à première vue de la décision, mais sur celui de l'importance du défaut une fois qu'il est découvert. Un autre passage, cependant, insiste plutôt sur le caractère plus ou moins envahissant de l'examen qui s'impose pour découvrir le défaut comme critère de distinction entre le manifestement déraisonnable et le raisonnable *simpliciter* :

> Une décision peut être déraisonnable sans être manifestement déraisonnable lorsque le défaut dans la décision est moins évident et qu'il ne peut être décelé qu'après « un examen ou [. . .] une analyse en profondeur » (*Southam*, précité, par. 57). L'explication du défaut peut exiger une explication détaillée pour démontrer qu'aucun des raisonnements avancés pour étayer la décision ne pouvait raisonnablement amener le tribunal à rendre la décision prononcée.

(*Ryan*, précité, p. 53)

Cette ambiguïté a incité des observateurs comme David Phillip Jones à se demander encore, à la lumière de *Ryan*, si

> [TRADUCTION] ce qui rend la décision « manifestement déraisonnable » doit ressortir à première vue du dossier [. . .] Ou peut-on tenir compte d'autres facteurs que le dossier pour établir en quoi la décision est manifestement déraisonnable? Est-ce le caractère « flagrant ou évident du défaut » qui la rend manifestement déraisonnable ou cette norme exige-t-elle une extravagance viciant à tel point la décision qu'aucun degré de déférence judiciaire ne peut justifier son maintien?

(D. P. Jones, « Notes on *Dr. Q* and *Ryan* : Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law », exposé initialement présenté à l'Institut canadien d'administration de la justice, table ronde de l'Ouest, Edmonton, 25 avril 2003, p. 10.)

Comme nous l'avons vu, les réponses à ces questions sont loin d'aller de soi, même sur le plan théorique. Quand jugera-t-on excessif le mal que doivent se donner pour y répondre les cours de justice et les avocats s'efforçant d'appliquer non seulement la norme du manifestement déraisonnable, mais aussi celle du raisonnable *simpliciter*? (Voir à cet égard les observations de Mullan dans « Recent Developments in Standard of Review », *loc. cit.*, p. 4.)

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120 Absent reform in this area or a further clarification of the standards, the "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* will continue. As a result, both the types of errors that the two variants of reasonableness are likely to catch — i.e., interpretations that fall outside the range of those that can be "reasonably", "rationally" or "tenably" supported by the statutory language — and the way in which the two standards are applied will in practice, if not necessarily in theory, be much the same.

À défaut d'une réforme en la matière ou d'une clarification des normes, la confusion « épistémologique » entourant la relation entre le manifestement déraisonnable et le raisonnable *simpliciter* persistera. Ainsi, tant les types d'erreurs que les deux variantes de la norme de la décision raisonnable permettent de déceler — soit les interprétations qui ne peuvent être tenues pour « raisonnables », « rationnelles » ou « défendables » compte tenu des dispositions en cause — que la manière dont les deux normes sont appliquées seront en pratique, si ce n'est nécessairement en théorie, essentiellement les mêmes.

121 There is no easy way out of this conundrum. Whatever attempts are made to clarify the contours of, or the relationship between, the existing definitional strands of patent unreasonableness, this standard and reasonableness *simpliciter* will continue to be rooted in a shared rationale: statutory language is often ambiguous and "admits of more than one possible meaning"; provided that the expert administrative adjudicator's interpretation "does not move outside the bounds of reasonably permissible visions of the appropriate interpretation, there is no justification for court intervention" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 18). It will thus remain difficult to keep these standards conceptually distinct, and I query whether, in the end, the theoretical efforts necessary to do so are productive. Obviously any decision that fails the test of patent unreasonableness must also fall on a standard of reasonableness *simpliciter*, but it seems hard to imagine situations where the converse is not also true: if a decision is not supported by a tenable explanation (and is thus unreasonable) (*Ryan*, *supra*, at para. 55), how likely is it that it could be sustained on "any reasonable interpretation of the facts or of the law" (and thus not be patently unreasonable) (*National Corn Growers*, *supra*, at pp. 1369-70, *per* Gonthier J.)?

Il n'existe pas de solution facile à ce problème délicat. En dépit des mesures prises pour préciser le contenu des catégories actuelles de décisions manifestement déraisonnables ou la relation existant entre elles, cette norme et celle de la décision raisonnable *simpliciter* continueront d'avoir une raison d'être commune : il arrive souvent que le législateur s'exprime de manière équivoque et qu'une disposition [TRADUCTION] « se prête à plus d'une interprétation »; tant que l'interprétation du tribunal administratif spécialisé [TRADUCTION] « ne dépasse pas les limites d'une conception raisonnable de l'interprétation qui s'impose, rien ne justifie la cour d'intervenir » (Mullan, « Recent Developments in Standard of Review », *loc. cit.*, p. 18). Il demeurera donc difficile d'assurer l'étanchéité conceptuelle de ces normes et je m'interroge sur l'utilité, au bout du compte, des efforts théoriques que cet exercice exige. De toute évidence, la décision qui ne satisfait pas à la norme du manifestement déraisonnable ne répond pas non plus à celle du raisonnable *simpliciter*, mais il paraît difficile de concevoir un cas où l'inverse n'est pas également vrai : lorsqu'une décision n'est pas fondée sur une explication défendable (et est de ce fait déraisonnable) (*Ryan*, précité, par. 55), quelle est la possibilité de sa confirmation « selon une interprétation raisonnable des faits ou du droit » (sans qu'elle soit tenue pour manifestement déraisonnable) (*National Corn Growers*, précité, le juge Gonthier, p. 1369)?

122 Thus, both patent unreasonableness and reasonableness *simpliciter* require that reviewing courts pay "respectful attention" to the reasons of adjudicators

Ainsi, la norme du manifestement déraisonnable et celle du raisonnable *simpliciter* exigent des cours de justice qu'elles accordent une « attention

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in assessing the rationality of administrative decisions (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 65, *per* L'Heureux-Dubé J., citing D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286, and *Ryan*, *supra*, at para. 49).

respectueuse » aux motifs des tribunaux administratifs en se prononçant sur la rationalité de leurs décisions (voir *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 65, la juge L'Heureux-Dubé, citant D. Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 286, et *Ryan*, précité, par. 49).

123 Attempting to differentiate between these two variants of curial deference by classifying one as "somewhat more probing" in its attentiveness than the other is unlikely to prove any more successful in practice than it has proven in the past. Basing the distinction on the relative ease with which a defect may be detected also raises a more theoretical quandary: the difficulty of articulating why a defect that is obvious on the face of a decision should present more of an imperative for court intervention than a latent defect. While a defect may be readily apparent because it is severe, a severe defect will not necessarily be readily apparent; by the same token, a flaw in a decision may be immediately evident, or obvious, but relatively inconsequential in nature.

Il est peu probable que, en pratique, les efforts visant à distinguer ces deux variantes de la déférence judiciaire en qualifiant l'examen que commande l'une d'elles d'« un peu plus poussé » se révèlent plus fructueux que par le passé. Fonder la distinction sur l'aisance relative avec laquelle peut être découvert le défaut crée par ailleurs un dilemme plus théorique : pourquoi un défaut ressortant à première vue de la décision justifierait-il davantage la cour d'intervenir qu'un défaut caché? Même si un défaut peut être aisément décelé en raison de sa gravité, un défaut grave ne sera pas nécessairement facile à découvrir; par ailleurs, une erreur peut être d'emblée évidente ou manifeste, mais sans avoir d'effet sérieux.

124 On the other hand, the effect of clarifying that the language of "immediacy or obviousness" goes not to ease of detection, but rather to the ease with which, once detected (on either a superficial or a probing review), a defect may be identified as severe might well be to increase the regularity with which reviewing courts subject decisions to as intense a review on a standard of patent unreasonableness as on a standard of reasonableness *simpliciter*, thereby further eliding any difference between the two.

Par contre, préciser que le caractère « flagrant ou évident » ne tient pas à la facilité de la détection du défaut, mais bien à la facilité avec laquelle, une fois mis au jour (à l'issue d'un examen superficiel ou poussé), le défaut peut être qualifié de grave pourrait bien amener les cours de justice à soumettre plus fréquemment les décisions qu'elles contrôlent en fonction de la norme du manifestement déraisonnable à un examen aussi approfondi que celui effectué au regard de la norme du raisonnable *simpliciter*, gommant ainsi davantage la différence, s'il en est, entre les deux.

125 An additional effect of clarifying that the "immediacy or obviousness" of the defect refers not to its transparency on the face of the decision but rather to its magnitude upon detection is to suggest that it is feasible and appropriate for reviewing courts to attempt to qualify degrees of irrationality in assessing the decisions of administrative adjudicators: i.e., this decision is irrational enough to be unreasonable, but not so irrational as to be

Préciser que le caractère « flagrant ou évident » du défaut ne renvoie pas au fait qu'il ressort à première vue de la décision, mais plutôt à son importance, une fois découvert, donne également à penser qu'il est possible et opportun qu'une cour de justice tente de recourir à une échelle de l'irrationalité lorsqu'elle évalue la décision d'un tribunal administratif. Par exemple, telle décision est suffisamment irrationnelle pour être déraisonnable, mais elle ne

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overturned on a standard of patent unreasonableness. Such an outcome raises questions as to whether the legislative intent could ever be to let irrational decisions stand. In any event, such an approach would seem difficult to reconcile with the rule of law.

l'est pas assez pour être infirmée suivant la norme du manifestement déraisonnable. Un tel résultat conduit à se demander si le législateur a pu vouloir qu'une décision irrationnelle soit maintenue. Quoi qu'il en soit, une telle interprétation paraît difficile à concilier avec les exigences d'un régime juridique fondé sur la règle de droit.

126 I acknowledge that there are certain advantages to the framework to which this Court has adhered since its adoption in *Southam*, *supra*, of a third standard of review. The inclusion of an intermediate standard does appear to provide reviewing courts with an enhanced ability to tailor the degree of deference to the particular situation. In my view, however, the lesson to be drawn from our experience since then is that those advantages appear to be outweighed by the current framework's drawbacks, which include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficultly caused at times by the interplay between patent unreasonableness and correctness.

Je reconnais que le cadre établi par notre Cour depuis l'adoption, dans *Southam*, précité, d'une troisième norme de contrôle, comporte certains avantages, du moins en théorie. L'existence d'une norme intermédiaire paraît permettre aux cours de justice de mieux adapter le degré de déférence à la situation considérée. Toutefois, j'estime qu'une leçon doit être tirée de notre expérience : les inconvénients du cadre actuel, y compris les difficultés conceptuelles et pratiques découlant du chevauchement entre la norme du manifestement déraisonnable et celle du raisonnable *simpliciter*, de même que la difficulté résultant de l'interaction paradoxale entre la norme du manifestement déraisonnable et celle de la décision correcte, paraissent l'emporter sur ces avantages.

127 In particular, the inability to sustain a viable analytical distinction between the two variants of reasonableness has impeded their application in practice in a way that fulfils the theoretical promise of a more precise reflection of the legislature's intent. In the end, attempting to distinguish between the unreasonable and the patently unreasonable may be as unproductive as attempting to differentiate between the "illegible" and the "patently illegible". While it may be possible to posit, in the abstract, some kind of conceptual distinction, the functional reality is that once a text is illegible — whether its illegibility is evident on a cursory glance or only after a close examination — the result is the same. There is little to be gained from debating as to whether the text is illegible *simpliciter* or patently illegible; in either case it cannot be read.

Plus particulièrement, l'impossibilité de maintenir une distinction analytique viable entre les deux variantes de la norme de la décision raisonnable a fait obstacle, en pratique, à une application présumément plus fidèle à l'intention du législateur. En fin de compte, tenter d'établir une distinction entre une décision déraisonnable et une décision manifestement déraisonnable peut être aussi stérile que d'essayer de distinguer ce qui est « illisible » de ce qui est « manifestement illisible ». Même s'il est possible d'établir, dans l'abstrait, une distinction conceptuelle, la réalité fonctionnelle veut que, une fois le texte jugé illisible — que cette illisibilité ressorte d'un examen sommaire ou uniquement d'une analyse en profondeur —, le résultat demeure le même. Il serait vain de chercher à savoir si le texte est illisible *simpliciter* ou manifestement illisible; dans l'un et l'autre des cas, il ne peut être lu.

128 It is also necessary to keep in mind the theoretical foundations for judicial review and its ultimate purpose. The purpose of judicial review is to uphold the normative legal order by ensuring that the

Il ne faut pas non plus perdre de vue les fondements théoriques et l'objectif ultime du contrôle judiciaire. Le contrôle judiciaire vise à maintenir l'ordre juridique normatif en s'assurant que les

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decisions of administrative decision makers are both procedurally sound and substantively defensible. As McLachlin C.J. explained in *Dr. Q*, *supra*, at para. 21, the two touchstones of judicial review are legislative intent and the rule of law:

> [In *Pushpanathan*,] Bastarache J. affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from a grant of powers" (*Bibeault*, *supra,* at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.

In short, the role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously.

As this Court has observed, the rule of law is a "highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" (*Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 805-6). As the Court elaborated in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 71:

> In the *Manitoba Language Rights Reference*, *supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". . . . A third aspect of the rule of law is . . . that "the exercise of all public

décisions des tribunaux administratifs soient rendues conformément à la procédure établie et soient défendables quant au fond. Comme l'a expliqué la juge en chef McLachlin dans *Dr Q*, précité, par. 21, les deux fondements du contrôle judiciaire sont l'intention du législateur et la primauté du droit :

> [Dans *Pushpanathan*,] [l]e juge Bastarache affirme que « [l]a détermination de la norme de contrôle que la cour de justice doit appliquer est centrée sur l'intention du législateur qui a créé le tribunal dont la décision est en cause » (par. 26). Cependant, cette méthode tient aussi dûment compte des « conséquences qui découlent d'un octroi de pouvoir » (*Bibeault*, p. 1089) et, tout en sauvegardant « [l]e rôle des cours supérieures dans le maintien de la légalité » (p. 1090), renforce le principe selon lequel il ne faut pas recourir sans nécessité à ce pouvoir de surveillance. La méthode pragmatique et fonctionnelle implique ainsi l'examen de l'intention du législateur, mais sur l'arrière-plan de l'obligation constitutionnelle des tribunaux de protéger la légalité.

En somme, la cour appelée à déterminer la norme de contrôle applicable doit rester fidèle à la volonté du législateur d'investir le tribunal administratif du pouvoir de rendre la décision. Elle doit en outre respecter le principe fondamental selon lequel, dans une société où prime le droit, le pouvoir ne doit pas être exercé de manière arbitraire.

129 Comme notre Cour l'a signalé, « la règle de droit » est une « expression haute en couleur qui, sans qu'il soit nécessaire d'en examiner ici les nombreuses implications, communique par exemple un sens de l'ordre, de la sujétion aux règles juridiques connues et de la responsabilité de l'exécutif devant l'autorité légale » (*Renvoi : Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753, p. 805-806). Notre Cour a développé sa pensée sur le sujet dans *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 71 :

> Dans le *Renvoi relatif aux droits linguistiques au Manitoba*, précité, aux pp. 747 à 752, notre Cour a défini les éléments de la primauté du droit. Nous avons souligné en premier lieu la suprématie du droit sur les actes du gouvernement et des particuliers. En bref, il y a une seule loi pour tous. Deuxièmement, nous expliquons, à la p. 749, que « la primauté du droit exige la création et le maintien d'un ordre réel de droit positif qui préserve et incorpore le principe plus général de l'ordre normatif ». [. . .] Un troisième aspect de la primauté du droit

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power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

"At its most basic level", as the Court affirmed, at para. 70, "the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."

130 Because arbitrary state action is not permissible, the exercise of power must be justifiable. As the Chief Justice has noted,

> . . . societies governed by the Rule of Law are marked by a certain *ethos of justification*. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals . . . are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness.*

(See the Honourable Madam Justice B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis in original); see also MacLauchlan, *supra*, at pp. 289-91.)

Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds (i.e., does the decision meet the requirements of procedural fairness?) ensures that they are fair.

131 In recent years, this Court has recognized that both courts and administrative adjudicators have an important role to play in upholding and applying the rule of law. As Wilson J. outlined in *National Corn Growers*, *supra*, courts have come to accept that "statutory provisions often do not yield a single, uniquely correct interpretation" and that an expert administrative adjudicator may be "better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language" in a

[. . .] tient à ce que l'« exercice de tout pouvoir public doit en bout de ligne tirer sa source d'une règle de droit ». En d'autres termes, les rapports entre l'État et les individus doivent être régis par le droit. Pris ensemble, ces trois volets forment un principe d'une profonde importance constitutionnelle et politique.

« À son niveau le plus élémentaire », notre Cour a-t-elle ajouté, au par. 70, « le principe de la primauté du droit assure aux citoyens et résidents une société stable, prévisible et ordonnée où mener leurs activités. Elle fournit aux personnes un rempart contre l'arbitraire de l'État. »

Parce que l'État ne peut agir arbitrairement, l'exercice du pouvoir doit être justifiable. Comme la Juge en chef l'a fait observer :

> [TRADUCTION] . . . les sociétés où prime le droit se caractérisent par une certaine *obligation de justification*. Dans une société démocratique, ce pourrait bien être la caractéristique générale de la primauté du droit dans laquelle sont subsumés les idéaux plus spécifiques. Dans une société caractérisée par une culture de la justification, l'exercice d'un pouvoir public n'est opportun que s'il peut être justifié aux yeux des citoyens sur les plans *de la rationalité et de l'équité.*

(Voir madame la juge B. McLachlin, « The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law » (1998-1999), 12 *C.J.A.L.P.* 171, p. 174 (en italique dans l'original); voir également MacLauchlan, *loc. cit.*, p. 289-291.)

Le contrôle judiciaire axé sur le fond vise à déterminer si la décision du tribunal administratif peut se justifier rationnellement, et celui axé sur la procédure (la décision satisfait-elle aux exigences de l'équité procédurale?), si elle est équitable.

Au cours des dernières années, notre Cour a reconnu que tant les cours de justice que les tribunaux administratifs ont un rôle important à jouer dans le maintien et l'application de la primauté du droit. Comme l'a souligné la juge Wilson dans *National Corn Growers*, précité, les cours de justice ont conclu que « souvent, les dispositions législatives ne se prêtent pas à une seule interprétation qui soit particulièrement juste » et qu'un tribunal administratif peut être « mieux en mesure que la cour

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way that makes sense in the specialized context in which that adjudicator operates (p. 1336, citing J. M. Evans et al., *Administrative Law* (3rd ed. 1989), at p. 414). The interpretation and application of the law is thus no longer seen as exclusively the province of the courts. Administrative adjudicators play a vital and increasing role. As McLachlin J. helpfully put it in a recent speech on the roles of courts and administrative tribunals in maintaining the rule of law: "A culture of justification shifts the analysis from the institutions themselves to, more subtly, what those institutions are capable of doing for the rational advancement of civil society. The Rule of Law, in short, can speak in several voices so long as the resulting chorus echoes its underlying values of fairness and rationality" (McLachlin, *supra*, at p. 175).

chargée du contrôle de dissiper les ambiguïtés dans le texte d'une loi et d'en combler les lacunes » d'une manière judicieuse dans son domaine spécialisé (p. 1336, citant J. M. Evans et autres, *Administrative Law* (3e éd. 1989), p. 414). L'interprétation et l'application du droit ne ressortissent donc plus uniquement aux cours de justice. Les tribunaux administratifs jouent un rôle vital, un rôle de plus en plus important. Comme la juge McLachlin l'a dit fort à-propos dans une récente allocution sur le rôle des cours de justice et des tribunaux administratifs dans le maintien de la primauté du droit : [TRADUCTION] « Une culture de la justification fait en sorte que l'analyse ne porte plus sur les institutions elles-mêmes, mais, plus subtilement, sur ce qu'elles sont en mesure de faire pour le progrès rationnel de la société civile. Bref, la primauté du droit peut s'exprimer par plusieurs voix, à condition que l'harmonie qui en résulte se fasse l'écho des valeurs d'équité et de rationalité qui la sous-tendent » (McLachlin, *loc. cit.*, p. 175).

132

In affirming the place for administrative adjudicators in the interpretation and application of the law, however, there is an important distinction that must be maintained: to say that the administrative state is a legitimate player in resolving legal disputes is properly to say that administrative adjudicators are capable (and perhaps more capable) of choosing among reasonable decisions. It is not to say that unreasonable decision making is a legitimate presence in the legal system. Is this not the effect of a standard of patent unreasonableness informed by an intermediate standard of reasonableness *simpliciter*?

En confirmant le rôle des tribunaux administratifs dans l'interprétation et l'application du droit, il convient cependant de rappeler une distinction importante : dire que l'Administration a un rôle légitime à jouer dans le règlement des litiges équivaut à affirmer que les tribunaux administratifs sont aptes (et peut-être plus aptes) à choisir entre plusieurs décisions raisonnables. Ce n'est pas conclure que le prononcé de décisions déraisonnables a place dans le système de justice. N'est-ce pas là l'effet de l'application d'une norme de la décision manifestement déraisonnable eu égard à une norme intermédiaire de la décision raisonnable *simpliciter*?

133

On the assumption that we can distinguish effectively between an unreasonable and a patently unreasonable decision, there are situations where an unreasonable (i.e., irrational) decision must be allowed to stand. This would be the case where the standard of review is patent unreasonableness and the decision under review is unreasonable, but not patently so. As I have noted, I doubt that such an outcome could be reconciled with the intent of the legislature which, in theory, the pragmatic and functional analysis aims to reflect as faithfully as possible. As a matter of statutory interpretation, courts

À supposer que l'on puisse effectivement distinguer entre une décision déraisonnable et une décision manifestement déraisonnable, il arrivera qu'une décision déraisonnable (c'est-à-dire irrationnelle) doive être maintenue. Ceci se produira si la norme de contrôle est celle du manifestement déraisonnable lorsque la décision contestée est déraisonnable, sans l'être manifestement. Je le répète, je doute qu'un tel résultat puisse être concilié avec l'intention du législateur, l'analyse pragmatique et fonctionnelle devant, en théorie, refléter le plus fidèlement possible cette volonté législative. En matière

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should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such an intent (see *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 367-68). As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an irrational decision, it seems highly likely that the court has misconstrued the intent of the legislature.

d'interprétation législative, une cour de justice doit toujours être très réticente à imputer au législateur l'intention de laisser l'Administration accomplir un acte irrationnel, à moins que cette intention ne soit formulée sans aucune équivoque (voir *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 367-368). Sur le plan théorique, le principe constitutionnel de la primauté du droit, un principe fondamental d'interprétation toujours applicable dans ce contexte, le confirme : lorsqu'une cour de justice conclut que le législateur a voulu qu'il n'existe aucun recours contre une décision irrationnelle, il paraît très probable qu'elle a mal interprété l'intention du législateur.

134 Administrative law has developed considerably over the last 25 years since *CUPE*. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

Le droit administratif a connu un développement considérable au cours des 25 dernières années, soit depuis l'arrêt *SCFP*. Cette évolution, qui témoigne d'une grande déférence envers les décideurs administratifs et reflète l'importance de leur rôle, a soulevé certaines difficultés ou préoccupations. Il restera à examiner, dans une affaire qui s'y prête, la solution qu'il conviendrait d'apporter à ces difficultés. Les tribunaux devraient-ils passer à un système de contrôle judiciaire comportant deux normes, celle de la décision corrrecte et une norme révisée et unifiée de raisonnabilité? Devrions-nous tenter de définir plus clairement la nature et la portée de chaque norme ou repenser leur relation et leur application? Voilà peut-être une partie de la tâche qui attend les cours de justice : construire à partir de l'évolution récente tout en s'appuyant sur la tradition juridique qui a façonné le cadre des règles actuelles de droit en matière de contrôle judiciaire.

III. Disposition

135 Subject to my comments in these reasons, I concur with Arbour J.'s disposition of the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: Caley & Wray, Toronto.

Solicitors for the respondent the City of Toronto: Osler, Hoskin & Harcourt, Toronto.

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

III. Dispositif

Sous réserve des observations formulées dans les présents motifs, je souscris au dispositif que la juge Arbour propose dans le présent pourvoi.

Pourvoi rejeté avec dépens.

Procureurs de l'appelant : Caley & Wray, Toronto.

Procureurs de l'intimée la Ville de Toronto : Osler, Hoskin & Harcourt, Toronto.

Procureur de l'intervenant : Procureur général de l'Ontario, Toronto.

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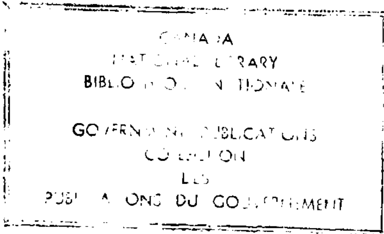

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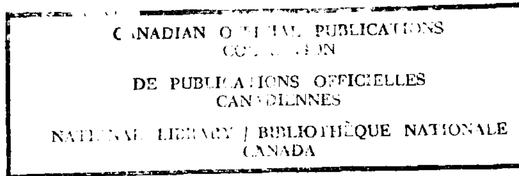

Proposals
for a
New Business Corporations Law
for Canada

VOLUME I
Commentary

by

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prohibition and one which is usually side-stepped anyway through such devices as redeemable shares and low capitalization.

18. Similarly, we don't think that the change in the method of incorporation from letters patent to registration is really a very basic one. The discretionary aspect of a grant of letters patent has long since ceased to exist in practice, and we don't see any reason why the law should pretend otherwise.

MAJOR REFORMS

19. The reforms under this heading are major in several different senses. In some areas, such as directors' duties and liabilities, our proposals are significant because they attempt to synthesize principles which have been more or less well developed in case law but which, in that form, are much less clear than we think they can and should be. In the field of corporate dissolution we have tried to rationalize and codify rules and principles now found in the Bankruptcy Act, the Winding-up Act and case law. The dissolution provisions are therefore partly old law, but they are also new in that comprehensive rules have never before been included in the Canada Corporations Act. Also, the procedural aspects of dissolution have been made to conform to the pattern established for incorporation and amendment. This, we hope, will assist efficient corporate administration.

20. We have designed provisions under which corporations can transfer their place of jurisdiction (continuance and discontinuance) which go beyond the parallel provisions which now exist in the legislation of some of the provinces. For one thing, we have not adopted the dog-in-the-manger attitude that a federally incorporated corporation should not be able to transfer to a jurisdiction unless that jurisdiction allows its corporations to move in the opposite direction. There is implicit in this policy a belief that corporation law belongs to the legislatures which enact it and to the officials who administer it. It does not. Also, the provisions in the Draft Act contemplate transfers to and from foreign jurisdictions, not just to and from the Canadian provinces. Finally, we propose that the transfer technique should be the means of bringing all federal corporations, including corporations incorporated under the Canada Corporations Act, under the new Act. This will permit a good deal of rationalization of federal corporation law, and it also solves a difficult transitional problem.

21. Part 6.00 of the Draft Act creates a wholly new regime (in Canada) for the transfer of corporate securities. In particular, the provisions

authorizing the establishment of a central depository for corporate securities should eventually eliminate much of the expense and delay which now plagues the securities industry. Similarly, Part 15.00 replaces the very inadequate provisions of the present Canada Corporations Act and, in addition, brings federal law into line with the advances made recently in several of the provinces. Part 15.00 is a significant step towards uniformity of legislation governing the public issue of corporate securities in Canada.

22. The Draft Act also contains new rules governing the rights and duties of auditors. The provisions in the present Act are unclear in a number of important respects, and Part 13.00 substantially improves the law in this long neglected area.

23. In some ways the most significant and far-reaching proposals are found in Part 19.00, shareholders' remedies. The position of the minority shareholder has always been an exceptionally unenviable one. The provisions of Part 19.00 simplify enormously the procedure under which a shareholder can pursue justice when he believes he has been unfairly dealt with. Equally important, courts are given wide powers to make orders appropriate to the situation. We believe that these provisions will bring into corporate life a much better degree of both fairness and efficiency.

OTHER MATTERS

Shares and capital

24. In part 5.00 we have tried to take some of the mystery out of corporate finance by adopting some new terminology and by abandoning some concepts which have outlived their usefulness. The terms "authorized shares" and "stated capital" separate, first of all, the legal and the accounting aspects of corporate capital. Much confusion has been created in the past because these two concepts have been merged into something called "share capital", which the legal and accounting professions have tended to regard and define differently. Under the Draft Act it is not even mandatory for corporations to state in their articles of incorporation a fixed number of shares (i.e., "authorized shares") which can only be changed by amendment of the articles. Any corporation can impose this traditional ceiling on itself if it so wishes, but the Draft Act allows every corporation a choice. The abolition of the utterly useless idea of par value removes all kinds of difficulties, and so does the

prohibition of the partly-paid share. Similarly, the new rules for redeemable shares remove a lot of complicated law. All these changes have been made without detracting from the flexibility of the corporate share as a commercial instrument. Indeed, we think that flexibility in corporate financing is improved under the Draft Act.

Non-voting shares

25. The non-voting share is something which has generated a good deal of discussion from time to time (see Lawrence Report, pp. 31-33). Most of the corporation Acts in Canada permit non-voting shares, although Ontario, since 1953, has provided that voting rights may only be restricted in "preference" shares ("special" shares in the new Ontario Act). Section 12(14) of the Canada Corporations Act is applied to require that even preferred shares must have the right to vote in certain circumstances.

26. The controversy over voting rights is largely confined to the question of whether "common" shares may be voteless; most writers do not object strongly to the elimination or restriction of voting rights on "preferred" shares. The argument therefore rests on the assumption that the terms "common" and "preferred" have a precise meaning, an assumption which we have rejected, along with the adjectives which we think are misleading. The Draft Act speaks only of "shares", although it recognizes that shares may be of different classes, with different terms and conditions attached to the shares in the different classes.

27. Ingenious corporate solicitors have not, of course, been defeated by those Acts which restrict the use of non-voting shares. The trick is simply to design a share which has voting rights in certain circumstances, but to ensure that, for practical purposes, those circumstances can almost never arise. The legal profession has been equal to the task, with the result that the protection given to shareholders by provisions such as those in the Ontario Act and in the Canada Corporations Act is largely illusory.

28. In the Draft Act, voting rights are not singled out for special attention. They are only one of the usual rights which shares will have unless, where there are two or more classes of shares, voting rights have been eliminated or restricted in some way. At least one class of shares in every corporation must always have unrestricted voting rights. Part 14.00 provides, however, that even shares which are normally non-voting can nevertheless be voted on matters which affect fundamentally the shares of that class. Moreover, the holder of a non-voting share has the same

479. The major premise of this Part is that a corporations Act should be largely self-enforcing by civil action initiated by the aggrieved party, not by severe penal sanctions or sweeping investigatory powers. If this policy is not adopted, it is our opinion, given the state of the common law, that we must continue to rely on ever broader powers of investigation as a means to remedy corporate ills, which become increasingly complex as businesses become more and more sophisticated. Bearing in mind this continually implied policy, we shall review Part 19.00 section by section.

480. Although only two defined terms are used in Part 19.00, we think them sufficiently important to be set out in a separate section, thus underlining their very broad scope. The term "action" is largely self-explanatory: it extends the application of these provisions to any legal action to which a corporation is a party, whether or not the right of action was created by the Draft Act. The term "complainant", following one of the recommendations of the Jenkins Report (paras. 119 to 212) is broadened to encompass the persons who clearly might be interested—a shareholder, a security holder or the Registrar—and, in addition, to include any other person the court thinks is a proper person to participate in the litigation. No specific reference is made in the definition of "complainant" to legal representatives of a deceased shareholder, notwithstanding the express recommendation to that effect by the Jenkins Committee, since we think it better, rather than attempt to list all the persons who might acquire ownership of shares by operation of law, to give the court discretion to determine who is a proper person to make an application. See subparagraph (iv) of paragraph (b) of s. 19.01.

481. Subsection (1) of s. 19.02 confers upon a complainant the right to apply to a court for consent to bring or intervene in a derivative action in the name and on behalf of the corporation or one of its subsidiaries to enforce a right of the corporation. This provision is largely self-explanatory, but two points merit special emphasis. First, it is most important to keep in mind that this provision relates only to the enforcement of rights of the corporation. It is not available as a remedy to enforce rights of an individual shareholder or even a group of shareholders, although a group of shareholders may bring, in representative form, a derivative action in the name of the corporation if they can characterize the issue as the enforcement of a right of the corporation. Typical examples of cases where a derivative action may be invoked are actions against directors or officers for a breach of duty under s. 9.19 alleging self-dealing or negligence, an action for an injunction to preclude a threatened injury to a corporation, or an action to restrain an act outside the scope of the authority of the corporation, its directors or officers. Second, by includ-

ing the reference to a subsidiary of the corporation, this provision contemplates and permits the "double derivative" action, that is, it confers on a shareholder of a holding corporation the right to initiate a derivative action in the name of a subsidiary of that holding corporation, notwithstanding that the shareholder does not own a share of the subsidiary.

482. Subsection (2) of s. 19.02, which adopts in principle a recommendation of the Jenkins Committee (para. 206), and which follows the model adopted in s. 99 of the Ontario Act, requires a shareholder who seeks to bring a derivative action to obtain a court order before commencing legal proceedings. At one stroke this provision circumvents most of the procedural barriers that surround the present right to bring a derivative action and, incidentally, minimizes the possible abuse of "strike suits" that might otherwise be instituted as a device to blackmail management into a costly settlement at the expense of the corporation. Although it confers extraordinarily wide discretion upon the court, subsection (2) does state the conditions that must be met before a derivative action may be commenced. By requiring good faith on the part of the complainant this provision precludes private vendettas. And by requiring the complainant to establish that the action is "prima facie in the interest of the corporation" it blocks actions to recover small amounts, particularly actions really instituted to harass or to embarass directors or officers who have committed an act which, although unwise, is not material. In effect, this provision abrogates the notorious rule in *Foss* v. *Harbottle* and substitutes for that rule a new regime to govern the conduct of derivative actions. In the preface (page v) to the second edition of his text, *Modern Company Law*, Professor Gower states that ". . . an attempt has been made to elucidate the mysteries of the rule in *Foss* v. *Harbottle;* I believe that I now understand this rule, but have little confidence that readers will share this belief". We have been so persuaded by Professor Gower's elucidation of these "mysteries" that we have relegated the rule to legal limbo without compunction, convinced that the alternative system recommended is preferable to the uncertainties—and obvious injustices—engendered by that infamous doctrine.

483. Section 19.03 is designed to give very broad discretion to the court to supervise generally the conduct of a derivative action, providing maximum flexibility in respect of interim financing of the litigation and the control over the conduct of the action in a way that obviates a multiplicity of actions. Moreover, in certain cases, e.g., where a corporation has redeemed or purchased its own shares or has been liquidated or dissolved, a court can order payment directly to shareholders and former shareholders of the amount recovered, thus resolving a technical problem

that has resulted in obvious injustice in some U.S. cases. In addition, it enables the court to permit the amount recovered to flow directly through to shareholders, precluding the wrongdoers from sharing in the recovery by the corporation.

484. Section 19.02 in broadly permissive terms—but always subject to court supervision—legitimates the shareholder's derivative action that is brought in the name of the corporation to enforce a right of the corporation, e.g., where the directors divert to themselves the profits from a transaction that they had a duty to effect in the name and on behalf of the corporation. The object of s. 19.02 is to remedy a wrong done to the corporation, therefore it applies to all corporations irrespective of size or distribution of shares. Section 19.04, on the other hand, will be invoked most frequently—but not always—in respect of a corporation the shares of which are held by only a relatively small number of persons, a so-called "close corporation", since its usual object is to remedy any wrong done to minority shareholders. Examples of such cases are commonplace. The most frequent cases are mentioned in the Jenkins Report (para. 205): e.g., where dominant shareholders appoint themselves to paid offices of the corporation, absorbing any profits that might otherwise be available for dividends; the issue of shares to dominant shareholders on advantageous terms; or the repeated passing of dividends on shares held by a minority group. Generally, the purpose of these tactics is to squeeze out minority shareholders. Another illustration is the liquidation "freeze-out" that succeeeded in *Fallis and Deacon* v. *United Fuel Investments Ltd.* [1963] SCR 397. Scrutiny of these examples shows that there is no clear dividing line between the cases. Diversion of corporate profits is clearly a wrong to a corporation that normally would be remedied by a derivative action under s. 19.02. A refusal to declare dividends in order to squeeze out minority shareholders would call for an application under s. 19.04. But the payment of excessive salaries to dominant shareholders who appoint themselves officers is a borderline case: it may constitute a wrong to the corporation and, at the same time, may have as its specific goal the squeezing out of minority shareholders (at a low price reflecting the small dividends paid) whose investment is no longer required. In such a case the aggrieved person may select the remedy that will best resolve his problem. And if neither of these remedies is adequate in the circumstances the aggrieved person may request the ultimate solution—liquidation and dissolution under s. 17.07. In sum, we think that the courts should have very broad discretion, applying general standards of fairness, to decide these cases on their merits.

485. Derived from s. 210 of the U.K. Companies Act, 1948, s. 19.04 is drafted in language which aims at the same goal as the original model, but

which has been modified in accordance with the recommendations of the Jenkins Report (para. 212) to strip away the self-imposed judicial qualifications that have limited the application of s. 210 and that have therefore cast considerable doubt upon the effectiveness of the original provision. The conceptual differences between the original model (s. 210) and s. 19.04 of the Draft Act are subtle, but in general terms the changes are as follows:

(a) The standard based on just and equitable grounds to wind up the corporation has been deleted, abrogating the effect of those cases that interpreted s. 210 to mean that grounds to wind up the corporation must always be established.

(b) The section applies not just to a continuing course of oppressive conduct but also to isolated acts of any corporate body that is affiliated with the corporation or any of its affiliated corporations.

(c) To the basic criterion "oppressive" is added the phrase "unfairly prejudicial to or in disregard of the interests of", which makes abundantly clear that s. 19.04 applies where the impugned conduct is wrongful, even if it is not actually unlawful.

(d) The Jenkins Report also recommends that the right to invoke s. 19.04 be conferred upon legal representatives and that the court be empowered, in connection with a s. 19.04 application, to make a restraining order. The former has been effected by paragraph (b) of s. 19.01 which gives wide discretion to the court to determine who is a proper person to make an application under s. 19.04, the latter by subsection (3) of s. 19.04.

In addition s. 19.04 is made applicable to all cases of conduct that are "oppressive or unfairly prejudicial to or in disregard of the interests of" any security holder, creditor, director or officer and not just to the narrow case where a shareholder is oppressed in his capacity as a shareholder. See the discussion in Gower, *Modern Company Law* s. 3rd. ed., pp. 598 to 604. Note, too, that s. 19.04 may be invoked in respect of an affiliate as well as the principal corporation. On summing up the standards set out in s. 19.04, it is difficult to improve on the frequently quoted interpretation of the meaning of s. 210 made by Lord Cooper in *Elder* v. *Elder and Watson Ltd.* [1952] SC 49 at p. 55: " . . . the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely".

486. Corresponding to s. 19.03, which relates to the powers of the court in respect of a derivative action, subsection (3) ensures that the court has broad powers to carry out its very comprehensive mandate under subsec-

tion (2). Some of these powers are novel. But they have one common object: to enable the court to apply a remedy that will offer continuing relief or indemnity to the complainant and, at the same time, render unnecessary the liquidation and dissolution of the corporation, which in practice often constitutes a pyrrhic victory for the complainant. Subsection (4) is also novel. If the court orders some change of a corporation's constitution by amendment of its articles or by-laws, those rules become static, creating vested rights that may be amended only with the consent of the court. The need for this provision could arise frequently, for under the Draft Act close corporations are, under s. 11.14, equated with incorporated partnerships, which suggests that the court should impose rules requiring that the business be continued, if practicable, in accordance with what are essentially partnership rules, including the arbitration of disputes. This furnishes a technique to continue a business that has been plagued by internal conflict until a dissident can be bought out or the business sold as a going concern.

487. Section 19.05 sets out several rules that apply both to derivative actions and "oppression" applications. Subsection (1) abrogates that aspect of the rule in *Foss* v. *Harbottle* that bars a shareholder from complaining of alleged misconduct on the ground that the impugned act *might* be authorized or ratified at a meeting of shareholders, a concept that has been described as "... the major absurdity of the *Foss* v. *Harbottle* rule ...": Gower, *Modern Company Law*, 3rd. ed., p. 586. Rather than set out a specific rule declaring how an act of the directors may be ratified, we think it better to characterize shareholder ratification or waiver as an evidentiary issue, which in effect compels the court to go behind the constitutional structure of the corporation and examine the real issues. If, for example, the alleged misconduct was ratified by majority shareholders who were also the directors whose conduct is attacked, evidence of shareholder ratification would carry little or no weight. If, however, the alleged misconduct was ratified by a majority of disinterested shareholders after full disclosure of the facts, that evidence would carry much more weight indicating that the majority of disinterested shareholders condoned the act or dismissed it as a mere error of business judgment. Tentative steps in this same direction are being taken in the case law: *Hogg* v. *Cramphorn Ltd.* [1967] Ch. 254; *Bamford* v. *Banford* [1969] 1 All ER 969. See also the discussion in Gower, *Modern Company Law*, 3rd. ed., p. 586. Note, however, as pointed out in the commentary on s. 9.19, this change of focus from a rule barring action to an evidentiary issue engenders significant substantive change. By giving the court wide discretion to consider the pertinent facts and by barring the court from following a simplistic path such as applying the shareholder ratification rule, we in effect compel the court to adjudge the issue on

THE OPPRESSION REMEDY: CLARIFYING PART II OF THE *BCE* TEST

Jassmine Girgis*

Claiming oppression is easy. Only the low bar of unfairness must be overcome. It seems to arise from any unwelcome conduct in a (usually) closely held corporation. It can be appended to any corporate misconduct claim. Broad statutory language governs the remedy, making it facially applicable to a broad range of conduct. In addition, the remedy is fact-based, being granted when a party satisfies the court that the corporation or its directors acted in a way that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any security holder, creditor, director or officer. In the face of these challenges, courts have struggled to maintain a clear set of applicable rules to govern when oppression has occurred. As a consequence, predicting the outcome of an oppression case is difficult.

This paper prescribes how courts can achieve greater clarity in cases where a party has alleged oppression by developing a principled approach to determine whether the impugned conduct rises to the level of harm required by the statute. This approach has two parts. The first part identifies the elements necessary to entitle the applicant to an oppression remedy and combines them to form two overarching principles. The second part of the approach discusses the effect of the impugned conduct on a complainant to show how prejudicial conduct or conduct that disregards the complainant can become conduct that is "unfairly prejudicial" or that "unfairly disregards" the complainant.

Il est facile de présenter un recours pour abus (oppression). Le seuil de l'injustice à prouver est relativement bas. Il semble résulter de toute conduite non désirée au sein (généralement) d'une société fermée. On peut le rattacher à toute allégation de faute de la part d'une société. Des dispositions législatives larges régissent la réparation, ce qui le rend à première vue applicable à une vaste gamme de conduites. De plus, la réparation repose sur les faits, étant accordée lorsqu'une partie convainc le tribunal que la société ou ses administrateurs ont agi d'une façon qui est abusive ou injustement préjudiciable pour un porteur de titres, un créancier, un administrateur ou un dirigeant, ou qui est injuste en ce qu'elle ne tient pas compte de leurs intérêts. Aux prises avec ces défis, les

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tribunaux ont eu du mal à maintenir un ensemble clair de règles applicables régissant les cas d'abus. Par conséquent, il est difficile de prédire l'issue d'un recours pour abus de droit.

Cet exposé décrit la façon dont les tribunaux peuvent être plus clairs dans les affaires où une partie allègue l'abus en élaborant une méthode raisonnée pour déterminer si la conduite reprochée atteint le degré de préjudice requis par la loi. Cette méthode comporte deux volets. En premier lieu, il faut déterminer les éléments nécessaires pour donner au demandeur droit à une réparation pour abus et les regrouper pour former deux principes fondamentaux. En deuxième lieu, il faut analyser l'effet de la conduite reprochée sur un plaignant pour démontrer la façon dont la conduite préjudiciable ou la conduite qui ne tient pas compte du plaignant peut devenir une conduite qui est injuste en lui portant préjudice ou qui est injuste en ne tenant pas compte de ses intérêts.

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1. Introduction

Claiming oppression is easy. Only the low bar of unfairness must be overcome. It seems to arise from any unwelcome conduct in a (usually) closely held corporation. It can be appended to any corporate misconduct claim. Broad statutory language governs the remedy, making it facially applicable to a broad range of conduct. In addition, the remedy is fact-based, being granted when a party satisfies the court that the corporation or its directors acted in a way that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any security holder, creditor, director or officer.[1] In the face of these challenges, courts have struggled to maintain a clear set of applicable rules to govern when oppression has occurred. As a consequence, predicting the outcome of an oppression case is difficult.

This article prescribes how courts can achieve greater clarity in cases where a party has alleged oppression. By clarifying and categorizing the harm that must be suffered by a complainant to successfully allege oppression, this area of law can become more structured, more transparent and less ambiguous. Courts have expounded on the rules and limitations applicable to assess the harm suffered by a complainant, and several implicit rules and limitations can be identified in the cases, but these are more of a "grab-bag" of rules than overarching principles. Courts have not identified an overarching principle to permit judges or affected parties to determine the harm necessary to demonstrate oppression. This paper identifies patterns in the case law and categorizes them to show how courts can achieve clarity in their oppression remedy jurisprudence.

When the oppression provision was enacted under the *Canada Business Corporations Act* ("*CBCA*"), the broad statutory language caused confusion about its limitations. Nevertheless, as courts began to interpret the provision and make decisions on its availability and applicability, the boundaries

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[1] The requirements are set out in section 241(2)(c) of the *Canada Business Corporations Act*, RSC 1985, c C-44 [*CBCA*], and under all provincial statutes except Prince Edward Island's. See *Business Corporations Act*, RSA 2000, c B-9, s 242(2); *Corporations Act*, RSM 1987, CCSM c C255, s 234(2); *Business Corporations Act*, SNB 1981, c B-9.1, s 166(2); *Corporations Act*, RSNL 1990, c C-36, s 371(2); *Companies Act*, RSNS 1989, c 81, Schedule III, s 5(2); *Business Corporations Act*, RSO 1990, c B.16, s 248(2) [*OBCA*]; *Business Corporations Act*, RSS 1978, c B-10, s 234(2); *Business Corporations Act*, RSY 2002, c 20, s 243(2); The *Business Corporations Act* of British Columbia protects only shareholders "or any other person whom the court considers to be [appropriate]" (SBC 2002, c 57, ss 227(2), 228(1)).

on the scope of the remedy slowly began to form, answering many of the questions that initially arose. As the remedy began to take shape, however, questions about how to establish a claim for oppression that would justify such a remedy remained elusive. Each lower court decision determined whether a remedy was warranted for the incident brought before it, but little was said about overarching principles and a comprehensive framework for identifying what distinguishes oppressive conduct from that which is not.

In 2008, in *BCE Inc, Re*, the Supreme Court of Canada articulated a two-step framework for the oppression remedy, a remedy for protecting reasonable expectations.[2] This framework for analysing cases built on the existing jurisprudence and attempted to inject a straightforward approach into an area of law known for its ambiguity and lack of clarity. First, it requires a court to determine whether a complainant's expectations are reasonable. Second, if the complainant's expectations are reasonable, the complainant will be entitled to a remedy if breach of those reasonable expectations is oppressive, unfairly prejudicial or unfairly disregarding of its interests. The first step of the *BCE* test and its application are unambiguous and straightforward, but the second step has done little to provide courts with guidance on how to approach these cases.

Step two of the *BCE* test frames this issue by requiring that the breach of reasonable expectations cause harm to the complainant in such a way as to meet one of the statutory components or standards of oppression, unfair prejudice or unfair disregard. The test does not, however, explain the type or amount of harm necessary to meet that requirement; the conditions necessary to satisfy the statutory components are not articulated. The analytical framework provided in the *BCE* decision is workable but it needed to be more comprehensive, as it has left lower courts with the task of identifying whether the impugned conduct rises to the level of harm required by the statute. A review of the case law shows that courts use the *BCE* test, and the outcomes are justifiable, but there is a lack of analytical clarity in the decisions, making it difficult to determine how judges reached these outcomes. This paper seeks to remedy this deficit in the post-*BCE* jurisprudence.

Part one of this paper examines the *BCE* decision and the inherent gap left by part two of the *BCE* test. This part of the paper will review cases post-*BCE* to show how courts have not sufficiently clarified the meaning of harm. This part will also discuss the reasons why this problem exists. In addition to the breadth of the statutory language, cases that obtain a remedy for oppression have facts that evidently demonstrate unfairness or wrongful

2 2008 SCC 69, [2008] 3 SCR 560 [*BCE*].

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behaviour that necessitates a remedy, allowing decisions to be reached with little explanation as to how the outcomes are achieved.

Part two of this paper develops a principled approach to determine whether the impugned conduct rises to the level of harm required by the statute. This approach has two parts. The first part identifies the elements necessary to entitle the applicant to an oppression remedy and combines them to form two overarching principles. In this part, I examine the last three years of oppression remedy cases in Alberta, British Columbia and Ontario, and categorize the features and patterns emerging from these decisions. I combine them to articulate two overarching principles to apply to every oppression remedy case—principles that clarify what constitutes relevant harm suffered by the complainants, extrapolated from the cases and expressly acknowledged by the courts. First, the complainant must experience harm arising from its relationship with the corporation, and the harm must be particular to the complainant's interests. Second, other remedies cannot be capable of addressing this harm. These two principles determine whether a complainant is eligible to be considered under the second step of the *BCE* test.

The second part of the approach discusses the effect of the impugned conduct on a complainant to show how prejudicial conduct or conduct that disregards the complainant can become conduct that is "unfairly prejudicial" or that "unfairly disregards" the complainant. The legislation does not define these statutory components and the Supreme Court maintained that they cannot be "conclusively defined", which is correct, as they are simply descriptors of inappropriate conduct.[3] Absent a definition, however, guidelines on how to meet these components are necessary. Although conduct will meet the standards on a case-by-case basis depending on the facts and the context of each case, rather than by ascribing legal meaning to the statutory components, one can nonetheless articulate principles to guide courts in their analysis. Specifically, identifying what effect of the conduct on the complainant is necessary to satisfy each component will clarify the courts' analysis of why certain behaviour meets the statutory standards, while other behaviour does not. In this part of the paper, I examine cases that clearly articulate the effect of the harm on the complainant.

Applying these two principles, and explaining the effect of the harm, will provide greater clarity in case law. A legal framework through which every oppression case can be analysed will provide predictability about the outcome of cases and eliminate the uncertainty that currently surrounds the oppression remedy.

3 *Ibid* at para 54.

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2. What is the Problem?

A) The BCE Decision

In 2008, the Supreme Court of Canada issued the *BCE* decision, their second major decision on the oppression remedy.[4] *BCE* arose from an offer to purchase all BCE Inc shares by the Ontario Teachers Pension Plan Board ("Teachers"). The offer was financed in part by Bell Canada, a wholly owned subsidiary of BCE, assuming a $30 billion debt.[5] This leveraged buyout was opposed by the debentureholders of Bell Canada, who maintained it would reduce the value of their bonds. The debentureholders argued that the arrangement, which would proceed under section 192 of the *CBCA*, would be unfair, and was oppressive to them under the oppression provisions.[6] Specifically, they argued that the arrangement would reduce the value of their debentures by about 20%, while awarding a premium of about 40% on the market price of BCE shares.[7]

BCE was doing well financially in 2006 and market analysts perceived it to be a suitable target for a buyout.[8] In 2007, amid circulating rumours about the pursuit of BCE by various parties, Teachers filed a report with the United States Securities and Exchange Commission, revealing a change in their shareholdings to active holders.[9] These activities fueled speculation that BCE was going private, compelling a meeting of the BCE board of directors ("Board") to discuss the best strategy going forward. The Board decided that it would be in BCE's and its shareholders' best interests to hold a competitive bidding process.[10] After BCE issued a press release, several debentureholders expressed concern to the Board about the potential leveraged buyout transaction, and the Board assured them that it intended to honour the contractual terms of the trust indentures.[11]

The Board received three offers from three groups. Each offer anticipated the addition of substantial new debt for which Bell Canada would be liable, and would have likely resulted in the downgrading of the debentures below investment grade.[12] The Board accepted an offer that was approved by a majority of 97.93% and provided for a compulsory acquisition of all of BCE's

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4 Their first decision was *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461 [*Peoples*].

5 *BCE*, *supra* note 2 at para 1.

6 *Ibid.*

7 *Ibid* at para 4.

8 *Ibid* at para 9.

9 *Ibid* at para 12.

10 *Ibid* at para 13.

11 *Ibid* at para 15.

12 *Ibid* at para 17.

outstanding shares at $42.75 per common share.[13] When this arrangement was announced, the credit ratings of the debentures were downgraded from investment grade to below investment grade, which caused the debentures to decrease in value by 20% and potentially obliged debentureholders to sell their debentures at a loss.[14]

The debentureholders commenced legal action. They sought relief under the *CBCA* section 241 oppression remedy and they opposed court approval of the arrangement, maintaining that the adverse economic impact it had on them meant that the arrangement was not "fair and reasonable".[15] They also brought motions for declaratory relief under the terms of their trust indentures, although that issue was not before the Supreme Court.[16]

At trial, the oppression claim was dismissed. The trial judge found that the debt guarantee assumed by Bell Canada had a valid business purpose, that the transaction did not breach the reasonable expectations of the debentureholders, that the transaction was not oppressive and that the interests of the debentureholders had not been unfairly disregarded.[17] In addition, the trial judge found that the arrangement was fair and reasonable.[18] The Court of Appeal overturned, finding that the transaction was not fair and reasonable to the debentureholders under section 192.[19] Based on that finding, the Court of Appeal found it unnecessary to reconsider the oppression claim. The parties appealed to the Supreme Court, where BCE and Bell Canada argued that the Court of Appeal had erred in not approving the plan of arrangement.[20] While the debentureholders cross-appealed on oppression grounds, they argued that the Court of Appeal's conclusion on section 192 was correct, "such that their [oppression] appeals became moot."[21] The portion below will focus on the Court's handling of the claims for oppression, where the debentureholders argued that the directors acted oppressively by approving the sale of BCE.

The Court found that there had traditionally been two approaches to the interpretation of section 241. The first approach strictly categorized types of conduct that would qualify as oppressive, which the Court found to be problematic because "the terms used [could not] be put into watertight

13 *Ibid* at paras 17, 19.
14 *Ibid* at para 21.
15 *Ibid* at para 22.
16 *Ibid.*
17 *Ibid* at para 23.
18 *Ibid* at para 26.
19 *Ibid* at para 27.
20 *Ibid* at para 29.
21 *Ibid.*

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compartments or conclusively defined."[22] The second approach focused on broad principles underlying section 241. The Court combined the two approaches, looking first to the principles underlying the oppression remedy by considering the parties' reasonable expectations.[23] Then, if a breach of reasonable expectations were established, the Court would assess whether the impugned conduct amounts to unfair disregard, unfair prejudice or oppression.[24] The Court prefaced its discussion on the *CBCA*'s oppression provisions by making two observations: the oppression remedy is equitable, giving the court "broad, equitable jurisdiction to enforce not just what is legal but what is fair,"[25] and the oppression remedy is fact-specific.[26] The parties' reasonable expectations are shaped by the context in which they arise and the relationships between the parties, meaning that "[c]onduct that may be oppressive in one situation may not be in another."[27]

The Court first focused on the reasonable expectations of the parties, the "cornerstone of the oppression remedy."[28] These expectations are formed when stakeholders enter into relationships with and within corporations, and they may conflict with the expectations of other individuals and groups.[29] The goal of the corporation—to maximize profit and share value—cannot be pursued at the cost of treating individual stakeholders unfairly, as "[f]air treatment … is most fundamentally what stakeholders are entitled to 'reasonably expect.'"[30] Directors, who are obligated to act in the best interests of the corporation, may need to consider how their decisions affect stakeholders. The best interests of the corporation may align with the interests of stakeholders, but if they diverge, then the duty of directors is owed to the corporation, not to the stakeholders; in such instances, stakeholders must reasonably expect that directors will act in the best interests of the corporation.[31]

The Court considered seven factors that emerged from case law to determine whether a reasonable expectation exists.[32] First, parties form expectations based on general commercial practice, and a complainant is usually entitled to a remedy if a business alters its practice in a way that

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22 *Ibid* at para 54.
23 *Ibid* at para 56.
24 *Ibid*.
25 *Ibid* at para 58.
26 *Ibid* at para 59.
27 *Ibid*.
28 *Ibid* at para 61.
29 *Ibid* at para 63.
30 *Ibid* at para 64.
31 *Ibid* at para 66.
32 *Ibid* at para 72.

undermines the complainant's exercise of his or her legal rights.[33] Second, factors such as the "size, nature and structure" of the corporation influence reasonable expectations and, as a result, directors of small corporations may be granted more leeway to deviate from commercial formalities than directors of larger companies.[34] Third, the relationships between the complainant and other corporate actors contribute to the expectations, with non-arm's length relationships, such as between friends or family, being governed by different standards than arm's length relationships, such as between shareholders in public corporations.[35] Fourth, the past practice of a corporation can create reasonable expectations between shareholders "on matters relating to participation of shareholders in the corporation's profits and governance."[36] Over time, practices and expectations can change, and "where valid commercial reasons exist for the change and the change does not undermine the complainant's rights, there can be no reasonable expectation that directors will resist a departure from past practice."[37] Fifth, the court may consider whether the complainant could have taken any preventative steps to protect itself from the harm it claims to have suffered.[38] Sixth, in determining reasonable expectations, the court may consider shareholder agreements and any representations made to stakeholders or the public via promotional materials.[39] The seventh factor outlines that any conflicting interests ought to be resolved by the directors "[acting] in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen."[40]

The Court then turned to the second prong of the oppression remedy. It determined that not every breach of reasonable expectations would amount to oppression, unfair disregard or unfair prejudice,[41] but rather that a complainant must show that the breach involved "unfair conduct and prejudicial consequences."[42] The Court explained the statutory components as follows:

> "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind,

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33 *Ibid* at para 73.

34 *Ibid* at para 74.

35 *Ibid* at para 75.

36 *Ibid* at para 76.

37 *Ibid* at para 77.

38 *Ibid* at para 78.

39 *Ibid* at paras 79–80.

40 *Ibid* at para 82.

41 *Ibid* at para 67.

42 *Ibid* at para 89.

> that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations.[43]

The Court maintained that the statutory components are adjectival and should not be regarded as "watertight compartments", as they often "overlap and intermingle".[44] Of the three standards, oppression was deemed the most serious.[45] The other two wrongs—unfair prejudice and unfair disregard—were later added to the *CBCA*, ensuring that section 241 would catch wrongs that were not as abusive and offensive as oppression.[46] Examples of unfair prejudice include:

> Squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm.[47]

Examples of unfair disregard include "favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant."[48]

Having established the requirements for the test, the Court proceeded to apply the test to the facts. The debentureholders argued that they reasonably expected the directors to act in a way that would preserve the investment grade status of their debentures or, in the alternative, that the directors would consider the interests of the bondholders in maintaining the trading value of the debentures.[49] The Court found that the expectation that the directors would consider the position of the debentureholders while making their decision was both reasonable and had been met, in that the Board, "having considered its options in the difficult circumstances it faced … made its decision, acting in what it perceived to be the best interests of the corporation."[50] Specifically, BCE was facing a takeover and the Board acted reasonably in the circumstances by creating a bidding process.[51] Each of the three bids were leveraged, and there was nothing that BCE could have

43 *Ibid* at para 67.
44 *Ibid* at para 91.
45 *Ibid* at para 93.
46 *Ibid*.
47 *Ibid*.
48 *Ibid* at para 94.
49 *Ibid* at paras 96, 101.
50 *Ibid* at para 104.
51 *Ibid* at para 106.

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done to avert that risk.[52] The Court noted that the debentureholders were actually arguing not for a reasonable expectation that the Board consider their interests, but rather for an expectation that the Board preserve the market value of the debentures.[53]

The Court went on to apply some of the factors that contribute to a reasonable expectation. First, commercial practice did not support the expectation that the Board could have preserved the trading position of the debentures: leveraged buyouts of this type, according to the Court, are not unusual, and the debentureholders had not negotiated protections to deal with changes of control and credit ratings.[54] Second, the nature and size of BCE indicated to the debentureholders that these types of arrangements were not unusual.[55] Third, although the company maintained investment grade ratings in past practice, the changing economic conditions that precipitated the leveraged buyout changed the reasonable practices.[56] Finally, the directors fairly considered the conflicting interests of the stakeholders and did what was in the best interests of the corporation. The directors made a decision that was "within the range of reasonable choices that they could have made in weighing conflicting interests."[57] Given these three observations, the Court found that the expectations argued before them were not reasonable, and that the debentureholders failed to establish that their expectations were not fulfilled.[58] The Court therefore did not have to consider the second step of the test.

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B) The BCE Decision: What Is Missing?

The second part of the *BCE* test aims to determine which breaches of reasonable expectations amount to oppression, unfair prejudice or unfair disregard of the complainant's interests. To that end, the test establishes two points. First, both causation and injury are necessary to meet the second step: a harmful effect on, or "prejudicial consequences"[59] to the claimant, caused by the breach of a reasonable expectation.[60] Second, not every

52 *Ibid.*

53 *Ibid* at para 105.

54 *Ibid* at para 108.

55 *Ibid* at para 109.

56 *Ibid* at para 110.

57 *Ibid* at para 112.

58 *Ibid* at para 114.

59 *Ibid* at paras 89–90.

60 This concept of harm and causation is not a new one in oppression remedy jurisprudence; it was considered in *Downtown Eatery (1993) Ltd v Ontario*, 54 OR (3d) 161, 200 DLR (4th) 289 at para 56 (CA).

breach of reasonable expectations will fulfill the requirements of one of the three statutory standards.[61]

This part, however, does not provide the necessary guidance on how to meet the test. Most importantly, the Court in *BCE* does not explain *how* a breach of reasonable expectations will meet the statutory standards: the type or amount of harm necessary to meet that requirement is unclear, and it does not articulate conditions that must be satisfied to meet the test. The Court attempts to justify this lack of explanation by maintaining that "a categorical approach to oppression is problematic because the terms used cannot be put into watertight compartments or conclusively defined."[62]

The Court defined the terms but did not specify the requirements as to *how* they could be fulfilled, thereby failing to delve into the substance of the second step. Instead, the Court discussed two peripheral elements of the test. First, it placed the statutory standards on a culpability spectrum—oppression being the most onerous and unfair disregard being the least.[63] This part is not particularly relevant because the focus of the statutory provision is on the effect of the conduct, rather than the motive of the wrongdoer. The language of the statute supports this view, as the provision provides a remedy where the act or omission "*effects a result* … that is oppressive, unfairly prejudicial to or that unfairly disregards the interests of a complainant."[64] This view has also been widely accepted in case law,[65]

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61 *BCE*, *supra* note 2 at para 89.

62 *Ibid* at para 54.

63 *Ibid* at para 67.

64 Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Canada, 2004) at 116–18 [Koehnen] [emphasis in original].

65 In *McGovern-Burke v Martineau*, 2016 ABQB 514 at para 58, 43 Alta LR (6th) 128, the court maintained, "[f]inally, it is important to note that this Court need not find bad faith or want of probity on Ms. Martineau's part or Wine-Ohs' part. The focus is on effect, not motive. Any remedy is not intended to punish the oppressor, only remedy the oppression." Similarly, in *Wood Estate v Arius3D Corp*, 2014 ONSC 3322, [2014] OJ No 2620 (Sup Ct J (Commercial Court)) [*Arius3D* SCJ], aff'd 2016 ONSC 36 at para 80, 347 OAC 334 (Div Ct), the Court maintained, "[i]n my view the trial judge did not err in applying the second branch of the *BCE* test. First, it is clear from his reasons that he was aware that it was the 'effect' of the impugned conduct, not its motivation or purpose, that is central to the analysis. He specifically referred to and properly relied upon *Downtown Eatery*." See also *Brant Investments v KeepRite Inc* (1991), 3 OR (3d) 289 at para 33, 80 DLR (4th) 161 (CA) [*Brant Investments*]; *DC Jensen Enterprises Ltd v Sand Dollar Enterprises Ltd*, 2017 BCSC 185 at paras 75–79, [2017] BCWLD 1675, citing *Walker v Betts*, 2006 BCSC 128, [2006] BCWLD 2523; *SCI Systems Inc v Gornitzki Thompson & Little Co* (1997), 147 DLR (4th) 300, 36 BLR (2d) 192 (Ont Ct J (Gen Div)); *Far East Food Products Ltd v 1104742 Ontario Ltd* (2009), 59 BLR (4th) 75, 59 BLR (4th) 75 (Ont Sup Ct J). These cases show that even if motive is mentioned in the case, the outcome is not contingent upon it. For general commentary on the issue, see Karen C Ulmer, "Business Issues: The Oppression Remedy" (1989) 53:2 Sask L

with *Wilson v Alharayeri*[66] being the most recent pronouncement, where the Supreme Court maintained, "the oppression remedy is concerned with the effects of oppressive conduct, not the intent of the oppressor."[67] Second, the Court provided examples of behaviour that would meet the components.[68] Despite the Court's attempts, these comments did not provide any meaningful clarity with respect to the test.

C) Attempts to Clarify Statutory Components Prior to BCE: Indicia of Oppression

The issue of defining or meeting the statutory components is not new. Prior to *BCE*, courts had developed a non-exhaustive list of indicia to determine whether conduct was *prima facie* oppressive. These included:

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Rev 211 at 219 [Ulmer]; Jeffrey G MacIntosh, "Bad Faith and the Oppression Remedy: Uneasy Marriage or Amicable Divorce?" (1990) 69:2 Can Bar Rev 276; Mary Anne Waldron, "Corporate Theory and the Oppression Remedy" (1981) 6:2 Can Bus LJ 129 at 138–41 [Waldron]; *First Edmonton Place Ltd v 315888 Alberta Ltd* (1988), 60 Alta LR (2d) 122, [1988] CLD 1277 (QB), rev'd (1989), 71 Alta LR (2d) 61, 45 BLR 110 (CA); *Palmer v Carling O'Keefe Breweries of Canada Ltd* (1989), 67 OR (2d) 161, 56 DLR (4th) 128 (Div Ct); *Eiserman v Ara Farms Ltd* (1988), 52 DLR (4th) 498, [1988] CLD 1328 (Sask CA); *Bank of Montreal v Dome Petroleum Ltd* (1987), 54 Alta LR (2d) 289, [1987] CLD 1284 (QB); *Ruffo v IPCBC Contractors Canada Inc* (1988), 33 BCLR (2d) 74, [1989] CLD 213 (SC), aff'd (1990), 44 BCLR (2d) 293, [1990] BCWLD 1015; *Goguen v Metro Oil Co* (1989), 95 NBR (2d) 295, 42 BLR 30 (CA).

[66] 2017 SCC 39, [2017] 1 SCR 1069.

[67] *Ibid* at para 42 (the Court did go on to note that "[a] director who acts out of malice or with an eye to personal benefit is more likely to attract personal liability than one who acts in good faith" at para 43). The concept of bad faith has had an uneasy history with the oppression remedy. Despite the accepted view that motive or bad faith is irrelevant, there are some outlying cases containing comments that do not necessarily fit with the current views on bad faith. With respect to "unfair disregard" of the complainant's interests in the test, some cases have implied the element of "unfair" adds the requirement of considering motive, for without such a consideration, a complainant would only ever have to prove that an action benefited the defendant at the cost of the complainant. See *Arius3D* SCJ, *supra* note 65 at paras 80–81. Similarly, in *Brant Investments*, *supra* note 65 at para 33, the Court noted that an additional consideration was needed, and rejected having to prove only the cost/benefit without anything more. Specifically, the Court said, "[o]f course, there may be many situations where the rights of minority shareholders have been prejudiced or their interests disregarded, without any remedy being appropriate." See also *Ballingall v Carleton Condominium Corp No 111*, 2015 ONSC 2484 at para 102, 42 BLR (5th) 74, where the Court grappled with how disregard could become unfair. For the most part, however, cases have tended to reject the consideration of motive for the standard of unfair disregard. In *Grigoriu v Ottawa-Carleton Standard Condominium Corp No 706*, 2014 ONSC 2885, 240 ACWS (3d) 757 (Sup Ct J) [*Grigoriu*], the Court found that the complainant's interests had been unfairly disregarded but that there had been no specific intention to harm the interests.

[68] *BCE*, *supra* note 2 at paras 93–94.

(i) lack of a valid corporate purpose for the transaction;

(ii) failure on the part of the corporation and its controlling shareholders to take reasonable steps to simulate an arm's length transaction;

(iii) lack of good faith on the part of the directors of the corporation;

(iv) discrimination between shareholders with the effect of benefiting the majority shareholder to the exclusion or to the detriment of the minority shareholder;

(v) lack of adequate and appropriate disclosure of material information to the minority shareholders; and

(vi) a plan or design to eliminate the minority shareholder.[69]

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These indicia can be helpful, but they are not fail-proof for two reasons. First, they share the common themes of bad faith or a culpable state of mind, so they are only helpful in considering whether there has been "oppression" and not unfair prejudice or unfair disregard. Oppression is arguably the easiest statutory component to define and identify. The definition of oppression originated in *Scottish Co-operative Wholesale Society v Meyer*[70] as conduct that is "burdensome, harsh and wrongful or which lacks probity or fair dealing"[71] and the definition has been quoted and referred to extensively since, including in *BCE*.[72]

Second, even if one or more of the indicia are present, it does not definitively indicate the presence of oppression. While most intentional bad behaviour will meet the requirements for oppression, this is not always the case. An example was discussed by Professor Vanduzer, in a situation where a corporation sells a corporate asset to another corporation and one of the directors has an interest in the sale but fails to disclose it.[73] Such conduct is a clear breach of fiduciary duty but unless the sale price exceeded the asset's

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69 *Ford Motor Co of Canada Ltd v Ontario Municipal Employees Retirement Board* (2006), 79 OR (3d) 81 at para 92, 263 DLR (4th) 450 (CA); *Millar v McNally* (1991), 3 BLR (2d) 102, [1991] OJ No 1772 (Ct J (Gen Div)).

70 [1958] 3 All ER 66 at 71, [1959] AC 324 (HL).

71 *Blue-Red Holdings Ltd v Strata Plan VR 857* (1994), 42 RPR (2d) 49, 50 ACWS (3d) 909 (BCSC) at para 52. See also *BCE*, *supra* note 2 at para 67.

72 *BCE*, *supra* note 2 at para 54.

73 J Anthony Vanduzer, "*BCE v 1976 Debentureholders*: The Supreme Court's Hits and Misses in its Most Important Corporate Law Decision Since *Peoples*" (2010) 43:1 UBC L Rev 205 at 233.

value, it would not be oppressive to the shareholders.[74] While the indicia might flag bad intention, the oppression remedy also requires prejudicial effect.

In sum, the Court's pronouncements on the statutory components in *BCE* do not explain how harm can become unfairly disregarding of, or prejudicial to, the complainant's interests, and the indicia are only helpful for flagging oppressive conduct. There is no analysis or test that shows how to get from finding a breach of reasonable expectations to determining that the breach fits within one of the lesser statutory components. This large gap needs to be addressed.

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D) Case Law Post-BCE: How are the Courts Dealing with Step Two?

The Court in *BCE* determined that not every breach of reasonable expectations will meet the statutory standards, but it failed to determine how the standards will be met: what *type* of harm will satisfy the standards? Subsequent case law shows that the problem has not been fixed in lower court decisions.[75] Below, I discuss two cases that show the need for clarification in decisions and one case that attempted, albeit unsuccessfully, to clarify how to meet the second step of the *BCE* test.

i) Scullion v Munro

In *Scullion v Munro*,[76] two friends, Scullion and Munro, went into business together. In 1998, they incorporated three companies: Munro and Scullion Contracting Inc ("M&S") under the *CBCA*—to carry on the business of landscaping, snow removal and construction—and two numbered companies, incorporated under the *OBCA*, that owned the land used by M&S to carry out its business.[77] In 2014, Scullion and Munro acquired another company, John Sweeping (2014) Inc.[78] Scullion and Munro were equal partners throughout the time in their business together: they held an equal number of shares in each of their corporations; they were the only two directors; they divided the responsibilities and were each paid a weekly salary of $3,000 plus benefits; and Scullion was the president and Munro

[74] *Ibid.*

[75] See e.g. *Wennekers v Gunn*, 2016 ABQB 358, [2016] AWLD 3579 [*Wennekers*]; *König v Hobza*, 2013 ONSC 1060, 31 BLR (5th) 248; *Kidner Investments Ltd v Totem Mercury Holdings Ltd*, 2017 BCSC 205, [2017] BCWLD 1670; *D'Antonio v Monaco*, 2013 ONSC 5007, 230 ACWS (3d) 1057, aff'd 2015 ONCA 274, 253 ACWS (3d) 345.

[76] 2016 ONSC 116, 53 BLR (5th) 320 [*Scullion*]. For additional reasons regarding costs, see *Scullion v Munro*, 2016 ONSC 1298, 264 ACWS (3d) 47.

[77] *Scullion*, *supra* note 76 at paras 3–4.

[78] *Ibid* at para 5.

was either the vice-president or secretary treasurer.[79] Scullion and Munro were also employees of their corporations. They did not have a written shareholder agreement.[80]

In August 2015, the situation changed. Munro decided to end his business relationship with Scullion and, to that end, changed the locks on the companies' premises, helped Scullion to remove his belongings from the premises, terminated Scullion's business mobile phone and access to the business computers and gave Scullion a letter from legal counsel, telling Scullion to terminate his involvement with M&S.[81] After those occurrences, Scullion was not involved with the business and ceased to collect his weekly salary.[82] Munro maintained that he took those steps after he discovered that Scullion had been paying himself improperly from the business for personal expenses.[83] Scullion and Thomas Scullion Holdings Inc (together, "the Applicants") sought relief pursuant to the oppression remedy provisions in both the *CBCA* and *OBCA*.[84] Munro and Paul Munro Holdings Inc (together, "the Respondents"), brought a cross application for relief pursuant to the oppression remedy and for an interim injunction.[85]

The Applicants took issue with the following actions by Munro: locking Scullion out of the business, stopping his salary, telling suppliers and customers that Scullion had been bought out of the business, and misappropriating Scullion's rights as a shareholder, director, officer and employee.[86] The Applicants argued that Munro acted without "colour of right" in forcing Scullion out of the business and that Munro was not entitled to relief because he did not have clean hands.[87] They further argued that the misappropriation allegation was unsubstantiated.[88]

The evidence consisted of affidavits from Scullion, Munro and the bookkeeper for the businesses.[89] The affiants were cross-examined.[90] The judge found that the effect of Munro's conduct had been unfairly prejudicial

79 *Ibid* at paras 6–8.
80 *Ibid* at para 6.
81 *Ibid* at para 9.
82 *Ibid* at para 10.
83 *Ibid* at para 11.
84 *Ibid* at para 12.
85 *Ibid* at para 13.
86 *Ibid* at para 21.
87 *Ibid.*
88 *Ibid.*
89 *Ibid* at para 26.
90 *Ibid.*

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to the Applicants and that the Applicants were entitled to relief pursuant to the oppression remedy in the *CBCA* and the *OBCA*.[91]

To reach that decision, the judge considered the wording of the oppression provisions and the wide discretion to grant relief to a complainant. The judge noted that "the complainant must establish that the act complained of has a result that is 'unfairly prejudicial to, or unfairly disregards the interest of one of the protected persons or groups'" in order to find a remedy.[92] The judge went on to point out that motive is an irrelevant consideration, but that "it is the unfairness as the end result that is critical to a finding of oppressive conduct."[93] After considering the *Litz v Litz*[94] decision—a case with similar facts—to support denial of injunctive relief, the Court concluded that Munro had acted "without right of any kind—general, contractual (i.e. a shareholders' agreement) or statutory—in ousting Scullion from the Corporations."[95] The Court found the effect of Munro's conduct to be unfairly prejudicial to the Applicants, entitling them to relief under the oppression provisions.

This decision refers to *BCE* but it does not apply the *BCE* test for oppression. The Court made no findings of reasonable expectations and did not explain why the impugned conduct was unfairly prejudicial to the Applicants. It simply determined that Munro had acted without any kind of right, which resulted in unfair prejudice to the Applicants. The outcome of the decision is unsurprising. It is relatively easy to spot the breach of reasonable expectations in the case: eliminating a partner from the business, depriving him of his salary and preventing him from access to the premises and computers without any right. Having met the first part of the test, it is also plain to see how the second part could be met. Assuming there was no oppression, and the court did not discuss bad faith or vindictiveness on the part of Munro, the conduct unfairly disregarded and unfairly prejudiced the complainant because of the conduct's lasting effects. The business relationship ended, but it did so in a public and humiliating way to the complainant. He was accused, without evidence, of misappropriating funds, and he was locked out of his business as a result. His reputation must have suffered, in addition to his financial situation and livelihood. These results would have raised the conduct from prejudice to unfair prejudice. The decision, however, lacks this analysis, thereby failing to explain how and why the statutory components were met.

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91 *Ibid* at para 52.

92 *Ibid* at para 50.

93 *Ibid*.

94 (1995), 101 Man R (2d) 40, [1995] MJ No 82 (QB).

95 *Scullion*, *supra* note 76 at para 52.

ii) Paulsen v Wolfson Law Professional Corp

This case was an appeal from the decision of Small Claims Court, awarding damages to the respondent, the law firm of Wolfson Law Professional Corporation ("Wolfson").[96] The appeal was dismissed.

Duane Paulsen and his company, Purrfect Pages Inc ("Purrfect Pages"), had entered into a contract with Mr. Johnston, and supplied Johnston with materials for which Johnston refused to pay.[97] Purrfect Pages sued Johnston and succeeded, but when Johnston refused to pay the damages, Paulsen sought the legal assistance of Mr. Wolfson, a member of Wolfson, to enforce the judgment.[98] Wolfson acted on this matter, as well as on other matters, for Purrfect Pages. Paulsen did not pay Mr. Wolfson for his services. Paulsen also maintained that Purrfect Pages, and not Paulsen himself, had retained Mr. Wolfson, and that the company alone should be liable for the fees.[99]

In Small Claims Court, the Deputy Judge found that the invoices for legal services were addressed to both Purrfect Pages and Paulsen, and that they were jointly and severally liable for Mr. Wolfson's legal fees; this was confirmed on appeal.[100] Also, since Paulsen knew of the near-insolvent state of Purrfect Pages but nonetheless agreed to pay Wolfson's legal fees, the judge found that Purrfect Pages had lost the privilege of separate legal entity.[101] Accordingly, Paulsen, as an individual, was found to be a client and therefore personally liable for the legal fees.[102]

Given the above, Wolfson pursued the oppression remedy as a creditor against Paulsen. After determining that creditors can seek the oppression remedy against debtors, the court set out the *BCE* test and proceeded to apply it.[103] It found, after considering the factors, that Mr. Wolfson had a reasonable expectation that he would be paid for his legal services, as evidenced by the letters and invoices that had been exchanged.[104] In the second step of the test, the Court found that the failure to pay Mr. Wolfson did not meet the parties' reasonable expectations and that the conduct was unfairly prejudicial.[105] At this point, the decision becomes unclear, as the Court switches from the finding of "unfairly prejudicial" to providing

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96 2015 ONSC 5714, 339 OAC 200 [*Wolfson*].
97 *Ibid* at para 5.
98 *Ibid.*
99 *Ibid* at para 8.
100 *Ibid* at para 6.
101 *Ibid* at para 13.
102 *Ibid* at para 18.
103 *Ibid* at para 22.
104 *Ibid* at para 23.
105 *Ibid.*

examples of "unfair disregard" from *BCE*.[106] Specifically, the Court determined that the conduct before it was similar to one example of conduct set out in *BCE* as evidencing unfair disregard: failing to deliver property belonging to the claimant.[107] It concluded, "Mr. Paulsen's actions amount to unfair conduct and prejudicial consequences."[108]

The decision is facially unclear because the Court initially concludes that the conduct is unfairly *prejudicial*, then it determines that the conduct is similar to an example of conduct that unfairly *disregards* the complainant, but finally concludes that the actions simply amount to "unfair conduct".[109] The Court likely meant "unfair disregard", but it is difficult to be certain. Even with the lack of clarity in setting out the statutory test, however, the decision is not substantively clear. Assuming the statutory standard being referred to was "unfair disregard", the reason the judge found the behaviour to meet the standard is that the impugned conduct was similar to one of the examples of unfair disregard that was provided in *BCE*. This is not a sufficient reason to find that a statutory standard has been met; more explanation is required. Again, what about that conduct met the standard, or elevated the conduct from disregard to unfair disregard?

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E) Why does this Problem Exist?

The specific problem here is that the statutory components have never been defined. It is an issue that has recently come to light because the Court in *BCE* did not have to apply this part of the test to the facts before it. Under the first part of the test, the court determined that one expectation was not reasonable and the other expectation—that the debentureholders' interests would be considered—was met.[110] Therefore, there was no breach to analyse under the second part of the test in *BCE*. The bigger problem with the remedy, as in the broad, undefined statutory language that governs the entire remedy, is not new. Indeed, it has existed since the remedy was enacted. Over the years, case law has managed to narrow the oppression remedy and develop boundaries for the statutory language for many aspects of it, but a precise framework or test for the second part of the test remains elusive.

The *Canada Business Corporations Act* of 1975 adopted the oppression remedy in response to the recommendations made by the federally

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106 It appears, from a reading of the decision, that the initial finding of "unfairly prejudicial" could be an error, as the Court continues its analysis of the behaviour under the statutory standard of "unfair disregard".

107 *Wolfson*, *supra* note 96 at para 24.

108 *Ibid.*

109 *Ibid.*

110 *BCE*, *supra* note 2 at paras 100–03.

commissioned Dickerson Committee, which was tasked with laying out a new federal business corporations law for Canada.[111] The Dickerson Committee, perceiving that the common law did not provide enough protection for minority shareholders, recommended in its report that the oppression remedy, now section 241 of the *CBCA* (and similar or identical provisions in the provincial business corporation legislation), be adopted.[112] The remedy applies when a party satisfies the court that the corporation, its shareholders or its directors acted in a way that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any security holder, creditor, director or officer.[113] It has been described as "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world."[114]

In spite of the breadth of the remedy recommended (and subsequently adopted), the Committee did not provide much in the way of guidelines as to how the remedy should be used, nor did it provide a framework for identifying when oppression has occurred. It simply maintained that the remedy should be invoked more frequently in relation to closely held corporations,[115] that it applies both to a continuing course of oppressive conduct as well as to isolated acts, that the court should have wide discretion to determine who a proper person is to make an application and that it can apply when the conduct is wrongful, whether or not it is lawful.[116] The

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111 *CBCA*, *supra* note 1, s 241; Robert WV Dickerson, John L Howard & Leon Getz, *Proposals for a New Business Corporations Law for Canada*, vol 1 (Ottawa: Information Canada, 1971) [Dickerson Report].

112 Although most of the provinces appointed advisory panels to consider the enactment of new corporate legislation in the 1970s and 1980s, the only published reports on the oppression remedy were those of Ontario (Ontario, Legislative Assembly, Select Committee on Company Law, *Interim Report of the Select Committee on Company Law* (1967) (Chair: Allan F Lawrence)), otherwise known as the "Lawrence Report", and Alberta (University of Alberta, *Report No. 36: Proposals for a New Alberta Business Corporations Act* (Edmonton: Institute of Law Research and Reform, 1980)). The Lawrence Report, wanting to keep courts from interfering in corporate affairs, recommended that the oppression remedy not be adopted in Ontario's business corporations legislation; the Alberta report largely adopted the recommendations in the Dickerson Report, *supra* note 111. See Waldron, *supra* note 65 at 130.

113 *CBCA*, *supra* note 1, s 241(2)(c).

114 Stanley M Beck, "Minority Shareholders' Rights in the 1980s" in *Special Lectures of the Law Society of Upper Canada: Corporate Law in the 80s* (Don Mills, Ont: Richard De Boo, 1982) 311 at 312.

115 Dickerson Report, *supra* note 111 at para 484.

116 *Ibid* at para 485.

Committee summed up the remedy by recommending the application of a broad standard of fairness and equity.[117]

The Dickerson Committee's omission of details on its recommended remedies, including the oppression remedy, was deliberate. It wanted to have remedies with a wider application because it recognized that "corporation law—and particularly the duties of officers, directors and dominating shareholders of corporations—is in a very fluid state" and that the role of the corporation in society is not defined.[118] It envisioned an "extraordinarily permissive" business corporations act, but one that responded quickly to misconduct.[119] It also determined that it could not anticipate all the ways in which a corporation could be misused.[120] For these reasons, the Committee established broad standards of conduct and left it to the courts to determine what constituted a breach, allowing the courts to develop the law in this area.[121]

Many concerns arose as to how the oppression remedy would be interpreted once it was enacted.[122] This was not surprising, given the lack of guidance provided by the Dickerson Committee, the breadth of the language in the statute and the numerous elements that would need to be identified, defined and interpreted.[123] Additionally, each case turns on its own facts.[124] The Dickerson Committee did provide a few examples of conduct and commented on whether the oppression remedy would apply. For example, the refusal to declare dividends in an attempt to squeeze out minority shareholders would be covered by an oppression application, while excessive salaries to dominant shareholders who are also officers is

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117 *Ibid* at para 484. See also Brian R Cheffins, "An Economic Analysis of the Oppression Remedy: Working Towards a More Coherent Picture of Corporate Law" (1990) 40:3 UTLJ 775 at 777 [Cheffins, "Economic Analysis"].

118 Dickerson Report, supra note 111 at para 477.

119 *Ibid* at 474.

120 *Ibid.*

121 *Ibid* at para 477.

122 See Brian Cheffins, "The Oppression Remedy in Corporate Law: The Canadian Experience" (1988) 10:3 U Pa J Intl Business L 305 [Cheffins, "Canadian Experience"]; Cheffins, "Economic Analysis", *supra* note 117 at 781.

123 Waldron notes with concern that as the law, including corporate law, shifts to consider what is fair in human relationships, "fairness, like beauty, is often in the eye of the beholder": see Waldron, *supra* note 65 at 151. Welling was concerned about judges' "potentially rampant discretion" in dealing with corporate affairs through the oppression remedy: see Bruce Welling, *Corporate Law in Canada: The Governing Principles* (Toronto: Butterworths, 1984) at 532–33.

124 Cheffins, "Economic Analysis", *supra* note 117 at 780. See also *Ferguson v Imax Systems Corp* (1983), 43 OR (2d) 128 at 137, 150 DLR (3d) 718. This concept is still followed and judges continue to use a fact-based analysis. See e.g. *Dancey v 229281 Alberta Ltd* (1988),

borderline oppressive.[125] Overall, however, the Committee defaulted to the idea that general standards of fairness applied to determine the outcome of these applications.[126]

Despite these concerns, the remedy was enacted and, from the outset, extensively and regularly relied upon to challenge corporate conduct. In response to the many cases before them, courts commented on and developed the law, addressing many of the questions identified on enactment of the oppression provisions.[127] As predicted by the Dickerson Report, applicants for oppression are mostly minority shareholders,[128] although creditors can also invoke it,[129] as can trustees in bankruptcy and employees.[130] Equal or majority shareholders can also bring an oppression claim.[131] Courts do not require a finding of bad faith to establish oppressive conduct, but

90 AR 283 at para 18, [1988] AWLD 1619, and *Matthew Investments Ltd v Assiniboine Medical Holdings Ltd*, 2008 MBQB 52, 227 Man R (2d) 9; *BCE*, *supra* note 2.

125 Dickerson Report, *supra* note 111 at para 484.

126 *Ibid* at paras 484–85.

127 Cheffins, "Economic Analysis", *supra* note 117 at 777.

128 Stephanie Ben-Ishai and Poonam Puri, "The Canadian Oppression Remedy Judicially Considered: 1995–2001" (2004) 30:1 Queen's LJ 79 at 102, 111 [Ben-Ishai & Puri, "Oppression Remedy"]. This study finds that 80% of oppression remedy actions are brought by shareholders, and 67% of those claims were from minority shareholders while 19% of them were brought by 50% shareholders.

129 *Peoples*, *supra* note 4 at paras 47–49. The Supreme Court of Canada, in holding that directors do not owe a fiduciary duty to creditors, pointed out that creditors can use the oppression remedy, and that while creditors may not fall within the definition of "complainant" found in section 238(a) of the *CBCA*, they can qualify as a "proper person" at the court's discretion under section 238(d).

130 See James Farley, Roger J Chouinard & Nicholas Daube, "Expectations of Fairness: The State of the Oppression Remedy in Canada Today" (2007) 33:1 Adv Q 261 at 267, 273; Ben-Ishai & Puri, "Oppression Remedy", *supra* note 128 at 102–03; Neil B Gross, "Figaro, Ferrari and Unfair Prejudice—Can Creditors Actually Use the Oppression Remedy? Canadian Opera Company v Euro-American Motor Cars" (1991) 13:1 Adv Q 115; Ulmer, *supra* note 65 at 225–26; Brian R Cheffins, "The Oppression Remedy in Corporate Law: Recent Developments" (1990) 48:3 Advocate 361 at 362 [Cheffins, "Recent Developments"]; Jeffrey S Leon and Sarah Armstrong, "The Relevance of the Oppression Remedy as a Control on Corporate Governance in Canada" (2003) 27:4 Adv Q 402 at 426–29. It has been found that employees typically use the oppression remedy when they allege they have been wrongfully dismissed and when they are unable to recover a claim against the corporation: see Mohamed F Khimji and Jon Viner, "Oppression—Reducing Canadian Corporate Law to a Muddy Default" (2016) 47:1 Ottawa L Rev 123 at 172.

131 This has been an issue because a finding of oppression will usually require an inequality of bargaining power, which is not present with equal or majority shareholders: see Michael Rice, "The Availability of the Oppression Remedy to Majority Shareholders in Ontario" (1989) 16:1 Can Bus LJ 58 at 59. But cases involving equal or majority shareholders include *Vedova v Garden House Inn Ltd* (1985), 29 BLR 236, [1985] OJ No 408 (H Ct J); *Re Gandalman Investments Inc v Fogle* (1985), 52 OR (2d) 614, 22 DLR (4th) 638 (H Ct J);

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the presence of bad faith may help demonstrate oppression. Applicants of any kind do not formally need clean hands with regard to the matter at issue to bring an action for oppression, but the courts have still considered the applicants' behaviour.[132] The remedy is available for both public and private companies, though private companies use it more frequently,[133] and a slightly more flexible standard may be applied to directors of private companies when they are defending a claim for oppression.[134]

In settling these issues, the courts defined the parameters of the oppression remedy and started building the foundation for an effectual cause of action. The cases established the identity of potential claimants; they made it clear that the effect of the conduct and not the motive of the defendant is relevant to establishing the claim; and they considered the difference between using oppression in public and private companies. But the answers to these questions were all peripheral to the main question: what does one have to establish to build a claim for oppression?

In answering these questions, courts have substantiated the broad nature of the statutory language, holding that the oppression provisions apply to a wide spectrum of applicants, conduct and situations. But the statutory components are not defined, nor are there requirements that must be met. As Koehnen put it, the words used do not provide guidance in determining

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Gillespie v Overs, [1987] CLD 1217, [1987] OJ No 747 (H Ct J); *Hui v Yamato Steak House Inc*, [1988] CLD 215, [1988] OJ No 9 (H Ct J). See also Ulmer, *supra* note 65 at 225.

132 For the most part, the courts do not rely on whether an applicant has clean hands. The statutory language does not mention clean hands, though this is not necessarily predictive of how courts will react, since the statutory predecessor to the oppression remedy—the winding up provisions, used by displeased shareholders—also did not mention the applicant's conduct, but the courts usually required an applicant to come to court with clean hands: see Cheffins, "Recent Developments", *supra* note 130 at 364–65. For this general proposition, see also Matthew Berkahn, "The Oppression Remedy and the 'Group' Approach to Shareholder Remedies in New Zealand" (1997) 10:1 Corporate & Business LJ 1; Koehnen, *supra* note 64 at 42–43; Cheffins, "Canadian Experience", *supra* note 122 at 315–16; BH Bresner, "A Litigation Perspective on 'The Oppression Remedy'" (1986) 7:3 Adv Q 266 at 274–75. But see *Lindzon v International Sterling Holdings Ltd*, [1989] BCWLD 2453, 45 BLR 57 (SC); *Cairney v Golden Key Holdings Ltd (No 2)*, 40 BLR 289, [1988] BCWLD 987 (SC), where the Court did place some weight on the applicants' conduct.

133 *BCE*, *supra* note 2 at para 74; Cheffins, "Recent Developments", *supra* note 130 at 362; Brian R Cheffins & JM Dine, "Shareholder Remedies: Lessons from Canada" (1992) 13:5 Company Lawyer 89 at 90–91; Brian R Cheffins & Bernard S Black, "Outside Director Liability Across Countries" (2006) 84:6 Tex L Rev 1385 at 1444–47.

134 "Courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company": *BCE*, *supra* note 2 at para 74.

when the court should intervene.[135] As with other equitable remedies, the availability of oppression depends on the facts; what will constitute oppression in one instance will not necessarily be oppressive in another.[136]

Even though the remedy has been clarified in some areas, the same clarification has eluded judges and scholars when it comes to determining exactly how the statutory standards are met. The breadth of the language cannot be blamed for this dilemma, as other parts of the remedy containing equally broad language have been delineated. The problem is likely, as the *BCE* court maintained, that the terms "cannot be put into watertight compartments or conclusively defined."[137] Indeed, how could one define "disregard" or "prejudice" narrowly enough to provide legal meaning? If these terms cannot be defined, it is nonetheless incumbent on us to articulate a framework or enumerate elements that must be met in this part of the test, for without such guidance, decisions appear random and haphazard. A party said to have engaged in oppressive conduct can legitimately be left wondering how the test was met. Given the deficiency in the current case law and statute, courts do not have the tools to write reasons that explain their decisions to parties on a principled basis. This can be rectified by recognizing what courts are doing and identifying the patterns that have emerged, as well as specifying the effect of the conduct on the complainant, to clarify the application of the remedy on a case-by-case basis. This makes the entire remedy clearer, more accessible and more predictable.

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3. What is the Solution?

A) Introduction

The solution to this problem requires the development of a structured approach to determine whether the impugned conduct rises to the level of harm required by the statute. This approach has two parts. First, it identifies the elements necessary to be entitled to an oppression remedy. Second, it articulates the effect of the impugned conduct on a complainant in each successful oppression remedy case.

B) The Two Principles

I have examined the last three years of oppression remedy cases in Alberta, British Columbia and Ontario, and categorized the features and patterns

[135] See *BCE*, *supra* note 2 at para 54, citing Koehnen, *supra* note 64 at 84: "[t]he three statutory components of oppression are really adjectives that try to describe inappropriate conduct … The difficulty with adjectives is they provide no assistance in formulating principles that should underline court intervention".

[136] *BCE*, *supra* note 2 at para 59.

[137] *Ibid* at para 54.

emerging from these decisions. I have combined them to articulate two overarching principles that can be applied to every oppression remedy case. These principles contain elements every complainant must meet to be eligible for a successful oppression claim, and they articulate the type of harm necessary to meet the statutory standards. These principles have both been extrapolated from the cases and expressly acknowledged by the courts, but they have not been expressed in their entirety in the form of a checklist; in such a format, the requirements for oppression can become more accessible. Currently, courts apply what is akin to a "grab bag" of rules, where they lay out the facts, then determine which rules apply. This "grab bag" of rules approach does not necessarily instigate incorrect results, but it does make decisions appear chaotic and haphazard.

The principles are as follows. First, the complainant must experience harm in its corporate role, arising from its relationship with the corporation, and the harm must be particular to the complainant's interests. Second, other remedies cannot be capable of addressing the harm. These two principles determine whether a complainant is eligible to be considered under the second step of the *BCE* test.

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i) Principle 1: The Complainant Must Experience Harm Arising from its Relationship with the Corporation, and the Harm Must be Particular to the Complainant's Interests.

There must be some harm to meet part two of the *BCE* test; "[b]ald allegations with no particulars of any wrong done to the interest of the plaintiffs themselves or otherwise are not sufficient."[138] Harm is not the end of the analysis, however, as harm resulting from the defendant's actions, in and of itself, does not entitle the complainant to a remedy. First, that

138 *790668 Ontario Inc v D'Andrea Management Inc*, 2016 ONSC 4657 at para 191, 269 ACWS (3d) 277. See also *Locke v Quast*, 2016 ONSC 1873 at para 71, 54 BLR (5th) 263. In *Zhao v Zhao*, 2016 ONSC 2469 at para 224, 267 ACWS (3d) 206, the judge noted, "there is no evidence of any damage caused to any of the respondents as a result of Pingbo's actions, apart from some modest expenses associated with Pingbo's actions in freezing the bank account of 219. In particular, while some of Pingbo's actions have probably caused Pingyuan some embarrassment, the Business does not appear to have suffered and has, in fact, prospered under his sole management." In *Bimman v Neiman*, 2015 ONSC 2313 at paras 158–59, 41 BLR (5th) 95, rev'd on other grounds 2017 ONCA 264, 277 ACWS (3d) 308, the harm done was that the rules were changed "at Bimman's expense." In *Shefsky v California Gold Mining Inc*, 2016 ABCA 103 at para 37, 616 AR 290, the Court maintained, "[a]n expectation based on a loss of an opportunity, without proof that such opportunity was more than merely speculative, is insufficient to ground an oppression claim because causation and compensable injury have not been established".

harm must have been inflicted unfairly.[139] Second, the complainant must experience the harm in its corporate role, arising from its relationship with the corporation, and the harm must be particular to the complainant's interests.

First, the harm addressed by the oppression remedy must be harm suffered by the complainant in the enumerated capacities, as a security holder, creditor, director or officer. In other words, the harm must involve the complainant in its corporate role; the harm cannot be personal to the complainant, nor can it be harm that affects the complainant in a role other than in its corporate role.[140] For example, when a shareholder is removed from her position as director or officer, that in itself would not trigger the oppression remedy if the complaint is being brought *qua* shareholder.[141] Similarly, if members behave badly to each other but the complainant's rights as a member are unaffected, the courts will not allow the use of the oppression remedy.[142]

Second, the harm addressed by the oppression remedy must be direct, personal and distinct to that shareholder or a small group of shareholders; it cannot be harm that affects every shareholder in the same way.[143] In other

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139 *R Floden Services Ltd v Solomon*, 2015 ABQB 450, 24 Alta LR (6th) 76 [*Floden Services*]. The unfairness aspect will be discussed below.

140 In *Jaguar Financial Corp v Alternative Earth Resources Inc*, 2016 BCCA 193 at para 188, 86 BCLR (5th) 317 [*Jaguar Financial*], the Court ruled that the harm was to Jaguar as a potential bidder, not as a shareholder. In *Geddes v Silvestri Holdings Inc*, 2014 ABQB 416 at para 123, [2014] AWLD 3982, a relationship breakdown between a minority and a majority shareholder did not thwart the minority shareholder's expectations as to the benefits she would continue to receive from the business in her role as a member.

141 *Diligenti v RWMD Operations Kelowna Ltd* (1976), 1 BCLR 36 at 43, [1976] BCJ No 38 (SC), citing *Re British Columbia Aircraft Propeller & Engine Co Ltd* (1968), 66 DLR (2d) 628, 63 WWR 80 (BCSC). However, if the shareholder has expectations that he or she will participate in the business, that could trigger the oppression remedy: see *Khela v Phoenix Homes Ltd*, 2013 BCSC 2079 at paras 111–12, 20 BLR (5th) 107 [*Khela*], aff'd 2015 BCCA 202, 77 BCLR (5th) 257. Similarly, when the shareholder suffered as an engineer because of forgeries on documents, the Court found that the harm was personal to the engineer, and not belonging to the shareholder: see *1043325 Ontario Ltd v CSA Building Sciences Western Ltd*, 2016 BCCA 258 at paras 57–58, 88 BCLR (5th) 278 [*CSA Building Sciences*].

142 In *Hui v Hoa*, 2015 BCCA 128 at para 52, 74 BCLR (5th) 251 [*Hui*], the Court found that the son had behaved "reprehensibly" toward his mother, but that it did not translate to corporate oppression because the mother was not entitled to the income stream as a shareholder after transferring her control over the company to her son.

143 *LaRosa v Brown*, 2016 ONSC 407 at paras 22–26, 263 ACWS (3d) 89 [*LaRosa*]. Here, the Court found that the conduct of the defendants, the alleged misappropriation of funds, was alleged to cause damages to the corporation, not to the shareholder, and that the personal interests of the shareholder were not engaged by the allegations. See also *829194 Ontario Inc v Garibotti*, 2013 ONSC 5857, 19 BLR (5th) 118.

words, as required by the legislation, it must be harm *to the interests of the complainant*. The limitation here is that it cannot be harm that affects the shareholder indirectly, such as that which would occur if the corporation were harmed, causing share prices to drop. Put differently, and following the rule in *Foss v Harbottle*,[144] harm to the corporation (and indirectly to the shareholders as a collective) is not harm to the complainant shareholder; harm to the corporation should be addressed by the derivative action, which is brought in the name of or on behalf of a corporation and requires the leave of the court.[145] The oppression remedy is intended to address harms done to the interests of stakeholders affected by the oppressive acts.[146] This rule has caused some difficulty because the two remedies are not mutually exclusive, and there has been inconsistent treatment in the case law when the remedies overlap.[147]

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The Court of Appeal of Ontario recently examined the distinction between the oppression remedy and the derivative action in *Rea v Wildeboer*, where the Court upheld the trial judge's determination that a claim alleging misappropriation of the company's funds properly belonged to the company to pursue by way of derivative action.[148] The Court confirmed that for the oppression remedy, "the impugned conduct must harm the complainant personally, not just the body corporate, *i.e.* the collectivity of shareholders as a whole."[149] Similarly, in *Jaguar Financial*, Justice Savage wrote,

> In my view the authorities require a shareholder to show it suffered harm that is "direct and special", "peculiar", or "separate and distinct" from the harm suffered generally by all of the shareholders. In other words, a shareholder need not be the only shareholder oppressed in order to claim oppression, nor suffer a different harm than the corporation does, but it must show peculiar prejudice distinct from the alleged harm suffered by all shareholders indirectly.[150]

Courts are adept at distinguishing between conduct that is clearly direct and personal to the shareholder and conduct that is clearly done to the corporation, and they apply the proper cause of action.[151] But problems may arise if the harm triggers both a derivative action and an oppression remedy. In certain circumstances, in closely held corporations, the actions

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144 (1843), 67 ER 189, [1843] EngR 478.

145 The purpose of the leave requirement is to prevent frivolous and vexatious actions, or actions not in the corporation's best interests to litigate: see *BCE*, *supra* note 2 at para 43.

146 *Ibid* at para 45.

147 *Rea v Wildeboer*, 2015 ONCA 373 at para 28, 384 DLR (4th) 747 [*Rea*].

148 *Ibid* at para 47.

149 *Ibid* at para 33.

150 *Jaguar Financial*, *supra* note 140 at para 179.

151 The test for determining oppression under condominium legislation is the same one that is used for the provincial business corporations acts. In *Grigoriu*, *supra* note 67 at

of directors might constitute both harm to the company and to the minority shareholders. If, for example, a majority shareholder treats the company as his own personal piggy bank, pays management excessive fees, or engages in self-dealing through nominee directors, that is both a wrong to the corporation and oppressive of the minority.[152] In these cases, if the harm also breaches a shareholder's reasonable expectations, courts have determined that the "size, nature and structure of the corporation" will influence whether a wrong done to the corporation can also be a wrong to the shareholder.[153]

Additionally, the consequences of proceeding by way of derivative action are pertinent. In certain circumstances, allowing a derivative action to proceed when a corporation has been harmed is not productive, and in those cases, courts have allowed complainants to pursue an oppression remedy: for example, if the corporation only has two shareholders, and the majority shareholder, who is also the controlling mind, removes money from the company, then a remedy consisting of repaying the money into the corporation is not going to be beneficial to the minority shareholder.[154]

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para 36, the judge found that the effect of the condominium declaration imposed a restriction on the applicant that had not been imposed on any other resident, rendering it oppressive to the applicants. In *Raging River Capital LP v Taseko Mines Limited*, 2016 BCSC 2302 at paras 52–53, [2017] BCWLD 432, the judge found that the harm alleged by the complainant was no different than the harm suffered by all the shareholders of the corporation, thereby finding no basis for the oppression remedy. See too *Barrett v Strata Plan LMS 3265*, 2016 BCSC 1477, [2016] BCWLD 6114, rev'd 2017 BCCA 414. See also *Todd Family Holdings Inc v Gardiner*, 2015 ONSC 4432, 47 BLR (5th) 46 [*Todd Family Holdings*], rev'd on other grounds 2017 ONCA 326, 64 BLR (5th) 1; *Khela*, *supra* note 141 at para 56.

152 See *CSA Building Sciences*, *supra* note 141 at paras 69–71.

153 *BCE*, *supra* note 2 at para 76. In *CSA Building Sciences*, *supra* note 141 at para 74 [emphasis in original], quoting *Jaguar Financial*, *supra* note 140 at paras 184–85, the Court noted, "[f]urthermore, there are scenarios where *BCE*'s examples, such as paying directors' fees higher than industry norms, could result in a shareholder experiencing distinct harm and therefore reconcile *BCE* with the other authorities. The size, nature and structure of a corporation is a key element in the analysis. Thus, in a closely-held corporation, the payment of a director's fee may be in breach of an expectation that all monies would be paid out of the corporation to the shareholders in proportion to the shares held (*BCE*, para 76). This would be a distinct harm as paying a director's fee would not only affect the company but separately and distinctly harm the other shareholder who alone would not receive a fee".

154 See *CSA Building Sciences*, *supra* note 141 at para 80, where the Court determined that allowing a derivative action to proceed—whereby the excessive management fees would be recovered by the corporation that is controlled by the defendant—would be "wholly counterproductive". In *Brockhedge Investment Group (1) Inc v Campus Court Developments Ltd*, 2013 ONSC 1578, 13 BLR (5th) 327, an oppression remedy by three minority shareholders was allowed to proceed where the defendants, the directing minds and owners of 50% of the shares, were using the corporation as their own personal piggy bank.

ii) Principle 2: Other Remedies Cannot be Capable of Addressing this Harm

The second principle requires a consideration of whether another cause of action can remedy the harm, other than an oppression remedy. If the complainant could have brought a claim for breach of contract, tort or wrongful dismissal, the courts will not grant the oppression remedy.[155] For example, if creditors attempt to use the oppression remedy for ordinary debt collection, or employees for wrongful dismissal, the court will not find oppression if the claims involve nothing further.

This principle, however, is not without exception. The oppression remedy is frequently relied on as a cause of action because of its breadth: the statutory language can essentially encompass any type of behaviour. Case law shows that although courts do not allow parties to use the remedy if another cause of action is applicable, they will sometimes take advantage of the broad language to assist a complainant who is without recourse. If another cause of action is applicable to the facts, but is unavailable, courts have used the oppression remedy. Below are several examples.

In *Hayat v Raja*, the Court found that the defendants had fraudulently excluded the applicant from ownership and control of the company by having him resign as director and surrender his shares.[156] In finding for the complainant, the Court noted that the contractual remedy of rescission would be impossible to pursue in this case because the shares had already been sold, so it utilized the remedies available under the oppression remedy.[157] Another example can be found in *2081451 Ontario Ltd v 2221306 Ontario Inc*, where the defendants went to great lengths to transfer their business and assets from one corporation to another, without consideration.[158] The Court found the purpose of the transactions was to defraud their creditors.[159] In finding for the applicant, the Court found the transactions to be fraudulent conveyances and awarded damages under the oppression provisions.[160] The

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155 *JSM Corp (Ontario) Ltd v Brick Furniture Warehouse Ltd*, 2008 ONCA 183, [2008] OJ No 958; *Todd Family Holdings*, *supra* note 151; *Dinis v Nobrega*, 2016 ONSC 6156, 272 ACWS (3d) 756. See also the statement by Justice D Brown (as he then was) in *Brookfield Financial Real Estate Group Ltd v Azorim Canada (Adelaide Street) Inc*, 2012 ONSC 3818 at para 52, 111 OR (3d) 580 (Sup Ct J (Commercial List)) where he said, "it is not appropriate to resort to the statutory oppression remedy where a simple breach of contract has occurred." With regard to employment, see e.g. *Benin v DrawSplash Inc*, 2014 ONSC 2659, 240 ACWS (3d) 865.

156 2016 ONSC 6805 at para 131, 273 ACWS (3d) 305.

157 *Ibid* at paras 131–32.

158 2016 ONSC 6270 at para 23, 272 ACWS (3d) 102.

159 *Ibid* at para 25.

160 *Ibid* at para 27.

Court did not mention the *Fraudulent Conveyances Act*,[161] even though it was clearly applicable, presumably because the Act does not provide for an award of damages.[162] Similarly, in *Wolfson*, a debt collection case, the Court used the oppression remedy to hold the sole shareholder and director personally liable for legal fees of the corporation because the principal knew of the poor financial state of the corporation when the law firm was retained, a fact the law firm could have no way of knowing.[163] In a similar case, where two employees were hired and put to work at a time when the sole director and officer knew he could not pay their wages because the corporation was insolvent, the Court allowed the oppression remedy to be used against his estate.[164]

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C) How do Principles Provide Greater Clarity in Case Law?

The principles above are those used by courts to determine whether a complainant is entitled to an oppression remedy once the complainant's expectations are found to be reasonable and shown to have been breached by the impugned conduct. In determining whether a remedy is warranted, courts will run through these principles, but they will not necessarily expressly articulate the requirements that must be met. They may focus on elements of the principles that are in issue,[165] but the aspects not in issue will not be discussed. As a result, an incomplete picture arises in the case law, as the required elements that must be met before the remedy becomes available are not discussed.

Providing greater clarity in the decisions would not require a significant change. Now, courts operate without an express list of elements; they do

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[161] RSO 1990, c F-29.

[162] See *Perry, Farley & Onyschuk v Outerbridge Management Ltd* (2001), 54 OR (3d) 131, [2001] OJ No 1698 (CA); *Taylor v Cummings* (1897), 27 SCR 589, 1897 CarswellNS 86; *Taylor v McKinnon* (1896), 29 NSR 162, 1896 CarswellNS 77 (SC); *336239 Alberta Ltd v Mella*, 2016 ABQB 190, [2016] AWLD 1658; *Nadi Inc v Yahyavi*, 2016 ONSC 4386, 39 CBR (6th) 133.

[163] *Wolfson*, *supra* note 96.

[164] *El Ashiri v Pembroke Residence Ltd*, 2015 ONSC 1172, 250 ACWS (3d) 414. Justice Boswell maintained, "[t]his is not a case where the plaintiffs were hired, had a long history with the defendants and where the defendants ran into financial [difficulty], leaving the plaintiffs as creditors. Mr. Dewji hired the plaintiffs and put them to work in responsible positions in his hotels and never, from the 'get go' paid them what they were due. He must have known when he hired them that he was not in a position, financially, to pay them what they were due. They provided their labour and services in good faith and in return were treated callously and as though they were his personal servants" (para 21).

[165] See e.g. *1186708 Ontario Inc v Gerstein*, 2016 ONSC 1331, 64 BLR (5th) 318, where the claims for losses were found to belong to the corporations; *LaRosa*, *supra* note 143, where the alleged harm would have been suffered by the corporation; *Rea*, *supra* note 147 at para 34, where the conduct was not found to harm the interests of the complainant.

consider the elements as they determine which cases are entitled to a remedy, but they do not do so expressly. Articulating the principles to indicate how they are met in individual cases would clarify the legal analysis. Similarly, showing how judges arrive at their decisions results in justifiable outcomes. This in turn leads to a stronger air of legitimacy in the entire area of law. Additionally, sharper analyses in the decisions will decrease the volume of these claims, as potential claimants will have a clear guideline as to the requirements that must be met before qualifying for an oppression remedy. Not all cases contain oppression, but they do go to court and they are tried, using valuable judicial resources in the process. Conversely, claimants with valid claims may be more willing to go to court when they can better assess the merits of their claim.

This type of clarification has already occurred in the first part of the oppression remedy test. Prior to *BCE*, courts had been using the doctrine of reasonable expectations in oppression remedy cases, and they were identifying the factors that were relevant to their decisions. However, the *BCE* Court combined these factors and applied them to the case before it in an articulate and comprehensible analysis, providing a clear and detailed map for lower courts to navigate this part of the test in an oppression remedy analysis.[166] A study of the case law over the last three years shows that most courts are clear and methodical in their analysis of reasonable expectations because they lay out all the factors and discuss their applicability. As a result, the legal analysis in this part of the test has become clear, justifiable and predictable.[167] This paper proposes a similar clarification for the second part of the *BCE* test.

D) Effect of Impugned Conduct

The second aspect of clarifying oppression remedy jurisprudence requires articulating the effect of the impugned conduct on the complainant. Such clarity could show how simple prejudicial conduct or conduct that disregards the complainant can become conduct that is "unfairly prejudicial" or that "unfairly disregards" the complainant. The Court in *BCE* was right to say these terms cannot be "conclusively defined", as they are simply descriptors

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[166] The factors are commercial practice; the nature of the corporation; relationships; past practice; preventative steps; representations and agreements; and fair resolution of conflicting interests. See *BCE*, *supra* note 2 at paras 73–88.

[167] See e.g. *Rothwell v Kemik Inc*, 2017 ABQB 310, [2017] AWLD 2291; *Collins Barrow Vancouver v Collins Barrow National Cooperative Inc*, 2015 BCSC 510, [2015] BCWLD 3286; *Hui*, *supra* note 142; *Floden Services*, *supra* note 139; *Goetz Investments Inc v Partners in Motion Pictures Inc*, 2015 BCSC 547, [2015] BCWLD 3743. There are, of course, still decisions that reach a conclusion without properly going through the test—or without going through the test at all—but these now tend to be the exceptions.

of inappropriate conduct.[168] As such, conduct will meet the statutory tests on a case-by-case basis, depending on the facts and the context, and not by ascribing legal meaning to the statutory tests. Uncertainty, however, does not require an absence of clarity. Courts need to be specific in their analyses, so as to clarify, in each decision, which conduct caused which harm, and why that harm qualifies the complainant for an oppression remedy. Specifically, articulating the legal significance of the effect of the conduct on the complainant will be the single most important factor in providing a clear analysis on a case-by-case basis, and would help ascertain why certain behaviour meets the statutory tests while other behaviour does not. Some cases already do this, but not nearly enough to provide an overarching clarity to oppression remedy jurisprudence.[169] In this part of the paper, I examine cases that clearly articulate the effect of the harm on the complainant.

The oppression remedy is not available unless harm has been done to the complainant, meaning that each successful oppression remedy case addresses harm that in some way meets one or more of the statutory tests. But in cases where the complainant has successfully obtained a remedy, several items are typically left unaddressed. Sometimes courts simply list a number of acts and call each of them, or a combination of them, oppressive, without anything more.[170] Some courts have not distinguished between the components and have found that one impugned act meets all the statutory

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168 *BCE*, *supra* note 2 at para 54.

169 In *Aurum, LLC v Calais Resources Inc*, 2016 BCSC 1173 at para 76, [2017] BCWLD 3040 [*Aurum*], the Court found that the ongoing conduct, particularly the failure to comply with the statute and the company's articles, and the attempt to dilute the complainant's shareholdings *in order to* interfere with the complainant's exercise of its legal rights as majority shareholder were unfairly prejudicial and possibly oppressive. The effect of the acts makes the Court's finding understandable and justifiable. There are several other cases where the courts were specific as to how the particular acts constituted oppression: see e.g. *Grigoriu*, *supra* note 67, where the Court found that an amended declaration that had the effect of prohibiting the applicants from selling their parking and storage unit with their residential unit constituted oppression. In *Blankenship v Jenks-Cochrane Properties Ltd*, 2016 ABQB 461 at paras 163–67, [2016] AWLD 3855, the judge found that there had been unfair disregard because of the refusal to recognize the existence of preference shares, as well as the fact that the share transfers had been taken without compensation and in defiance of the terms under which the share transfer was authorized. There had been unfair prejudice because the company was in arrears of property taxes and had ignored clean up orders. Further, there was oppression because the complainant had been pressured into accepting a mortgage for less than the full amount of debt owed by her company. In *Nowosad v Boutillier*, 2015 ABQB 763 at para 90, [2016] AWLD 606, the Court found that failing to provide financial information, against the backdrop of the lack of communication and a number of events that reduced the value of the company, had been unfairly prejudicial.

170 In *Randhawa v Gateway Building Management Ltd*, 2013 BCSC 1662 at para 125, 236 ACWS (3d) 623, the Court found many wrongful actions and found each act to be oppressive. These included failing to keep the corporate records of the company, failure to

components,[171] or have used the components interchangeably, without much explanation.[172] Some courts simply find unfairness then determine the test has been met,[173] and others use "oppressive conduct" as a catch-all phrase and fail to specify which component has been met by the impugned conduct.[174] Additionally, when the conduct consists of many aspects or stretches over long periods of time, it can be difficult to determine where the oppression lies and the cases are not always clear as to how each action contributes to the overall finding. As the Court in *Aurum, LLC v Calais Resources Inc* maintained, "[w]hile a single incident may not, by itself, constitute oppressive or unfairly prejudicial conduct, the combination of acts must be examined in their totality to determine if the shareholders' rights have been so affected."[175]

Unfairness, disregard and prejudice are limitless concepts, capable of being met by conduct ranging from the innocuous to the extreme. It is for these reasons that the concepts cannot be defined, but it is for these same reasons that a clear explanation is necessary each time one of these standards is met. Courts need to specify in each case how the effect of the conduct is elevated to unfair prejudice or disregard to justify a remedy.

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allow the complainant to access the records at the company, failure to call an AGM and to allow the complainant to exercise his rights as a shareholder, breaches of fiduciary duty by the director, failure to provide financial statements, making payments to another company, attempting to convert unsecured debt to shareholdings, not accounting for funds received or dispersed under a mortgage, and refusal to acknowledge the complainant's entitlement in the company's shares. There were additional alleged acts that would have each been oppressive if true.

171 See e.g. *Wennekers*, *supra* note 75 at para 223.

172 In *Uraizee v Pacific Art Stone Inc*, 2014 BCSC 236, [2014] BCWLD 1951, the Court simply found that the affairs of the company had been conducted in an oppressive manner, in a way that was unfairly prejudicial to the complainant as a shareholder. These included freezing the complainant out of the management of the company and failing to provide him with financial information or notice of the directors' and shareholders' meeting. It did not specify whether each action or the combination of them was oppressive: paras 41–42.

173 See e.g. *Paquette v Zaio Corp*, 2016 ABQB 529, 43 Alta LR (6th) 356, where the decision was not clear about whether manifest unfairness and prejudice equal "oppression", or whether they meet the statutory standard of unfair prejudice in the oppression remedy.

174 See e.g. *1007374 Alberta Ltd v Ruggieri*, 2014 ABQB 641 at paras 118–20, 9 Alta LR (6th) 395; *Lam v Chen*, 2017 ONSC 3926, 281 ACWS (3d) 536.

175 *Aurum*, *supra* note 169 at para 76. Similarly, in *Floden Services*, *supra* note 139 at para 36, the Court maintained, "Courts should consider not only isolated actions but patterns of conduct to determine whether conduct was unfair under s. 242".

E) Decisions: The Good and the Can-be-Improved

i) A Good Decision: *Wood Estate v Arius3D Corp*[176]

In this case, the late Mr. Wood indirectly lent Arius3D Corp $750,000 for an acquisition agreement it had negotiated with Masterfile Corporation.[177] Wood lent the funds to another company, A3DL Limited, which then lent them to Arius3D. In return, Wood received a promissory note from A3DL, in which it was indicated that Wood would be repaid the loan the day after the Irish Companies (the companies that were listed in the schedule attached to the promissory note) received the funds.[178] The "Irish deals" closed, and Arius3D received over $990,000, but it did not use the funds to repay Wood's loan.[179] Wood attempted to obtain the money but Arius3D did not pay, so he commenced an oppression action, seeking damages of $950,000.[180] Wood died but his estate continued the action.

The judge found that Wood had a reasonable expectation that his $750,000 loan would be repaid by Arius3D upon receipt of any funds from the Irish Companies until his loan had been repaid in full.[181] Arius3D breached that reasonable expectation because it received the funds from the Irish Companies but it did not apply any of it toward the Wood loan, nor did it tell him it had received the money until the money had been spent.[182] The judge had to determine whether Arius3D's failure to apply any of the funds from the Irish Companies to the Wood's loan was oppressive, unfairly prejudicial or unfairly disregarding of Wood's interest.

Several pieces of evidence were relevant to this analysis: Arius3D was insolvent; its directors were trying to keep the company operating as a going-concern; Wood was pressuring Arius3D for the repayment of his loan; and Wood was leading a proxy fight against the board.[183] Given the financial state of the company, the Court found that Arius3D had failed to pay several of its creditors, with the result that, "at the material time Arius3D was disregarding the interests of many of its creditors, including Wood."[184]

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176 *Arius3D* SCJ, *supra* note 65. Another excellent decision is *Binman v Neiman*, 2015 ONSC 2313, 41 BLR (5th) 95, rev'd in part on other grounds 2017 ONCA 264, 277 ACWS (3d) 308.

177 *Arius3D* SCJ, *supra* note 65 at para 1.

178 *Ibid.*

179 *Ibid* at para 2.

180 *Ibid.*

181 *Ibid* at para 123.

182 *Ibid* at para 124.

183 *Ibid* at para 129.

184 *Ibid* at para 130.

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The Court concluded that Arius3D's decision to use some of the Irish funds to pay its operating expenses and its employees' salary arrears did disregard Wood's interest, but not unfairly.[185] The Court also found, however, that Arius3D's directors used some of the Irish funds to repay themselves for the loans they had extended to the company. That, combined with their role in inducing Wood to loan the money to Arius3D, and their role in directing Arius3D to breach its undertaking to Wood so they could prefer their own self interest, amounted to conduct that unfairly disregarded the interests of Wood.[186]

This is a good decision because the Court discusses exactly how the breach of reasonable expectations became elevated to unfair disregard of the complainant's interests. It discussed the effect of the conduct on the complainant, and it discussed how the effect went from disregard to unfair disregard, which is required for part two of the *BCE* test. The conduct—failing to repay Wood while paying other expenditure—was a disregard of Wood's interests, but disregard alone does not meet the second stage of the *BCE* test. What *does* meet the test is the disregard being "unfair". In this case, the unfairness arose from the directors having induced Wood to make the loan, deciding to repay their own loans before his, and directing their company to breach its undertaking to him.

ii) A Second Good Decision: *R Floden Services Ltd v Solomon*[187]

Rick Solomon, an inventor in the firefighting industry, learned of a gel that could be used to fight forest fires. He began to develop injection systems that would mix the gel with water and deliver the mixture from a fire fighting aircraft.[188] The gel and injection systems could also be used in oil and gas wells. Solomon needed capital to fund his project. To that end, he approached Floden, a director, officer, and shareholder of R Floden Services Ltd ("Floden Services") in 2012, a company in the oil patch trucking services.[189]

Solomon and Floden Services entered into an agreement, although it was not set out in a formal document.[190] They agreed that Floden Services would provide capital in return for a share position in a new corporation, of which Solomon would be a shareholder and would provide expertise, equipment and his contacts.[191] Solomon would also develop the intellectual property.

185 *Ibid* at para 131.
186 *Ibid* at para 132.
187 *Floden Services*, *supra* note 139.
188 *Ibid* at para 1.
189 *Ibid* at para 2.
190 *Ibid* at para 3.
191 *Ibid.*

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They incorporated a company (Firefox Inc) in 2012, with four shareholders, including Solomon and Floden Services. Floden Services invested over $1.2 million in the business. By October 2014, the relationship between Floden Services and Solomon had broken down.[192] Floden Services brought an oppression remedy claim against Solomon, alleging he had engaged in self-dealing by diverting funds, assets and opportunities from Firefox Inc.[193] Solomon cross-applied, also claiming oppression. The Court found for Floden Services and dismissed the cross-application.

In reaching its conclusion on oppression, the Court noted that, after establishing a breach of reasonable expectations, a complainant must establish "that its interests were limited unfairly … [as] harm alone is not sufficient."[194] After going through the factors for reasonable expectations, the judge determined that it was reasonable for Floden Services to expect that Solomon, as a director of Firefox, would act in the best interests of Firefox and that he would follow through on the projects he brought to Firefox.[195] The judge went on to analyse the claims made against Solomon. He categorized them and determined how the actions in each category harmed Firefox.

In one category, the judge found that Solomon had failed to do business. Although a profitable business cannot be guaranteed, Solomon had not produced any significant results, and had demonstrated a lack of effort to obtain results.[196] This "indifference" was found to be an unfair disregard of the interests of Firefox and Floden Services. Additionally, failing to produce results and to apply work effort prejudiced the interests of Floden Services as a shareholder in Firefox.[197] These actions did not merely disregard and prejudice Floden Services; they unfairly did so because Solomon had made representations, extracted over $1.2 million, then failed to work hard to maintain the confidence of the investors.[198]

In another category, the judge found numerous counts of improper spending by Solomon. Overall, Solomon was found to have abusively and unfairly spent money in a way that did not benefit Firefox, and unfairly disregarded the interests of Floden Services. The transactions prejudiced the two companies because Firefox's money had been wasted, and they unfairly

192 *Ibid* at para 6.
193 *Ibid* at para 7.
194 *Ibid* at para 33.
195 *Ibid* at para 47.
196 *Ibid* at para 61.
197 *Ibid.*
198 *Ibid* at para 62.

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disregarded the interests of the companies because the money benefited Solomon without benefiting Firefox.[199]

The judge also found that Solomon had engaged in competition with Firefox. Solomon had obtained funds from Floden Services to obtain funding from a new investor, but then had taken the benefit for himself, not for Firefox.[200] This activity was done in bad faith and was found to be oppressive to Floden Services.

In this decision, the Court breaks down the different behaviour and discusses exactly how each category of behaviour affected the complainants' interests. As in the case above, it discussed how the effect went from simple disregard and prejudice to unfair disregard and prejudice. The conduct, in and of itself, showed an overall pattern of Solomon taking advantage of the companies for his own benefit. The companies were not merely prejudiced by these actions; they were unfairly prejudiced. They had been induced to provide money for these projects, but instead of benefiting from the venture, they were duped. As the judge noted, harm alone is insufficient for an oppression remedy; there must be unfair limitation of the complainant's interests.[201] In this case, the judge shows how harm can be elevated to trigger the second step of the *BCE* test by meeting one or more of the statutory components.

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iii) *Ryan v York Condominium Corp No 340*:[202] How to Fix a Problematic Decision

In this decision, Ryan, the applicant and the owner of a condominium, made a claim against York Condominium Corporation ("YCC"). He alleged YCC had failed its duty to maintain and repair the common area of the condominium building, which led to water damage in Ryan's unit.[203] Ryan maintained that doing so breached YYC's maintenance and repair obligations under the *Condominium Act, 1998*[204] and that its conduct had been oppressive to him.[205]

The evidence showed a longstanding problem in the condominium. The condominium corporation was established in 1977 and shortly after the units were occupied, it became apparent there was a serious defect in the construction, as there was no proper building envelope installed on the upper

199 *Ibid* at paras 63–85.

200 *Ibid* at para 117.

201 *Ibid* at para 33.

202 2016 ONSC 2470, 265 ACWS (3d) 511 [*Ryan*].

203 *Ibid* at para 1.

204 SO 1998, c 19.

205 *Ryan*, *supra* note 202 at para 1. See also *Grigoriu*, *supra* note 67 at para 21.

floors.[206] As a result, there were consistent and widespread water penetration issues largely related to weather conditions.[207] Since that time, the board of directors attempted various temporary fixes, all the while contemplating a permanent solution. The permanent solutions were not instituted until 2014 for water penetration, and 2015 for mould remediation.[208]

In 1980, Ryan purchased one of the units afflicted with water penetration problems. In 2010, water penetrated Ryan's unit after a storm and damaged the plaster and the floor. The board was advised and within a month, a contractor was sent in, but only part of the damage was repaired. The board was again advised as to the remaining damage, by letter then by phone. The board maintained it was in the process of hiring a contractor to finish the repairs. In November 2010, the board approved a major repair project, but it needed four million dollars that it did not have.[209] In December 2010, the board obtained an engineering report about the work required to repair the building.

In March 2011, Bird, Ryan's sister, advised the board about the dampness and mould in Ryan's unit. Bird contacted the board again in April 2011 about water damage in the den and living room. The maintenance staff confirmed the problem. At that time, Ryan, who had been living elsewhere due to health issues and proximity to the treatment centre, decided not to return to the unit because he believed it to be uninhabitable.[210] Ryan continued to pay all the expenses, the special assessment and taxes for his unit throughout the period he lived elsewhere.[211]

Between 2011 and 2014, Bird contacted the board to report water damage and mould in Ryan's unit at least a dozen times, with phone calls, letters and photographs. The board responded and sent construction contractors to make temporary repairs that were ultimately unsuccessful. Eventually, in November 2014, major repairs fixed the water penetration problem. However, the mould remained until October 2015, when a firm undertook mould remediation.

In court, Ryan requested damages for out-of-pocket loss as well as damages for mental distress, anxiety and psychological and emotional damages.[212] The judge found YYC had acted unreasonably and had breached its duty to repair under the *Condominium Act, 1998*, pursuant to which

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206 *Ryan*, *supra* note 202 at para 10.
207 *Ibid.*
208 *Ibid* at paras 56, 62.
209 *Ibid* at para 18.
210 *Ibid* at para 21.
211 *Ibid* at para 22.
212 *Ibid* at para 65.

YYC had a duty to maintain the common elements and repair them after damage.[213] Given that YYC had known of the water penetration problems for over thirty years and that it had failed to institute a permanent solution, its conduct had been unreasonable.[214] Additionally, even if the entire history was overlooked and one focused only on YYC's conduct since 2010, it would show that YYC had not acted reasonably and that it had breached its duty to repair.[215] YYC had been advised repeatedly about the infiltration problem since 2010 but it took YYC an additional four and-a-half years to make repairs that prevented the water infiltration and another year after to address the mould issues.[216] The judge ordered YYC to pay the damages for the expenses Ryan had incurred, as well as his court costs. The judge did not award damages for mental distress.

With regard to the oppression claim, the Court quoted the *BCE* test and defined the three statutory elements as other condominium cases had, though the definitions would have been equally applicable in corporate cases.[217] The Court maintained:

> Oppressive conduct is coercive, harsh, harmful, or an abuse of power. Unfairly prejudicial conduct is conduct that adversely affects the claimant and treats him or her unfairly or inequitably from others similarly situated. Unfair disregard means to ignore or treat the interests of the complainant as being of no importance.[218]

The Court noted that, as with corporate cases, oppressive conduct involves bad faith but the other two components do not, and that the remedy protects the reasonable expectations of shareholders or unit holders—expectations "determined according to the arrangements that existed between the shareholders or unit owners of a corporation."[219] The Court listed the factors that would contribute to the formation of reasonable expectations—the same factors articulated in *BCE*. However, it did not engage in an analysis of what the reasonable expectations were in this case, whether they were breached and, if so, whether they met the statutory standards.[220] The Court simply concluded that there was no evidence that YYC's failures constituted

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213 *Ibid* at para 68.

214 *Ibid* at para 73.

215 *Ibid.*

216 *Ibid.*

217 Although the Court did not reference *BCE*, it cited *Metropolitan Toronto Condominium Corp No 1272 v Beach Development (Phase II) Corp*, 2011 ONCA 667 at para 6, 285 OAC 372, which articulates the same test as in *BCE*.

218 *Ryan*, *supra* note 202 at para 78.

219 *Ibid* at para 79, citing *Walia Properties Ltd v York Condominium Corp No 478*, [2007] OJ No 3032, 60 RPR (4th) 203 (Sup Ct J), rev'd 2008 ONCA 461, 67 RPR (4th) 161; *Naneff v Con-Crete Holdings Ltd* (1995), 23 OR (3d) 481, 85 OAC 29 (CA).

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oppressive conduct under any of the statutory standards, and that while the conduct was ineffective, it was not abusive or oppressive.[221]

If the two principles proposed in this essay had been used, this case could have reached better, clearer results. The first principle has one element that may have been applicable in this case: that the complainant must experience harm in its corporate role, arising from its relationship with the corporation, and the harm must be particular to the complainant's interests. In this case, "corporate role" would be substituted with the role of "unit holder", but the first two aspects of the principle are not in issue; the harm Ryan experienced was clearly in his role as unit holder and arose from his relationships with YYC. There may have been a question on the third element as to whether the harm was particular to Ryan's interests, but that too seems straightforward. The decision focused on Ryan's unit, but it was not only Ryan's unit that was affected. Reference was made to the fact that Ryan's unit was only one of the units plagued by the water penetration problems,[222] and later in the decision, the judge made note of the water problems in Bird's unit as well.[223] Inherent in the oppression remedy is the requirement that the harm affect that complainant as an individual, rather than all the shareholders or unitholders. Here, the harm was affecting only a small group of unitholders—not all of them.

The second principle requires that other remedies cannot be capable of addressing this harm. The judge granted Ryan the damages to which he was entitled under the *Condominium Act*, and as Ryan could be fully compensated pursuant to the statutory provisions, it was unnecessary to consider the oppression remedy in this case. That is perhaps the reason the judge chose not to engage in any analysis of the oppression remedy, but if that is true, the oppression remedy should never have been considered. Unfortunately, it was, and the result was wholly unsatisfactory.

If one did engage in an oppression remedy analysis here, the following points are relevant. YYC's conduct was clearly not abusive. It responded to the complaints and it attempted, several times, to fix the problem. That takes the conduct out of the realm of oppression. The attempts, however, were only for temporary fixes. They were also unsuccessful. Additionally, these problems continued to occur over a course of years and decades, depending on how far back the analysis stretches. The effect on the complainant is the focus of the oppression remedy and in this case, Ryan's unit was uninhabitable; as the judge noted, Ryan's quiet enjoyment of his unit had been disrupted.[224] Ryan

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220 *Ryan*, *supra* note 202 at para 80.

221 *Ibid* at paras 81–82

222 *Ibid* at para 11.

223 *Ibid* at para 48.

was clearly prejudiced as a result of YYC's failure to remedy the problem—a problem that only affected a select number of unitholders. However, Ryan was *unfairly* prejudiced. Although he had moved out of his unit for unrelated reasons, Ryan determined he could not return in 2011, and it was not until 2014 and 2015 when YYC fixed the water and mould problems, respectively. His inability to return to his home for over four years was due to YYC's failure to remedy a significant issue; a remedy that was within YYC's duty to provide. Additionally, this was a problem that had subsisted for over thirty years, and one that had been brought to YYC's attention, specifically with regard to Ryan's unit, many times over a period of four to five years. These facts elevate the prejudice to unfair prejudice.

Had this case been analysed using the oppression remedy, it would have likely been successful. An application of the two principles would have simplified and clarified the requirements necessary to establish oppression, and a clear discussion of the effect on the complainant, and why one or more of the statutory components can be met, shows exactly how and why the complainant would be entitled to a remedy.

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F) Summary: The Proposed Solution

The second stage of the *BCE* test requires the courts to determine whether the harm resulting from a breach of the parties' reasonable expectations rises to the level of harm required by the statute, namely that it is oppressive, unfairly disregarding or unfairly prejudicial of the complainant. To be eligible for consideration under the second step of the oppression remedy, a complainant must meet the two principles articulated above. First, the complainant must experience harm in its corporate role, arising from its relationship with the corporation, and the harm must be particular to the complainant's interests. Second, other remedies cannot be capable of addressing this harm. These principles have both been extrapolated from the cases and expressly acknowledged by the courts but they have not been expressed in their entirety in any formal checklist. Applying the principles to each case will present a complete picture of the elements that must be met before a remedy becomes available, and will provide a much-needed clarification for the second part of the test.

In addition to the principles, in successful oppression remedy claims, judges must articulate the effect of the impugned conduct on the complainant to show how simple prejudicial conduct or conduct that disregards the complainant can become conduct that is "unfairly prejudicial" or that "unfairly disregards" the complainant. These terms cannot be defined, but judges can, on a case-by-case basis, articulate the

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[224] *Ibid* at para 85.

legal significance of the effect of the conduct on the complainant, to show why certain behaviour meets the statutory tests and other behaviour does not. Doing so will eventually provide an overarching clarity to oppression remedy jurisprudence—a clarity we do not presently have.

4. Conclusion

This paper prescribes how courts can achieve greater clarity in cases where a party has alleged oppression. By clarifying and categorizing the harm that must be suffered by a complainant to successfully allege oppression, this area of law can become more structured, more transparent and less ambiguous.

There is a deficit in the post-*BCE* jurisprudence that this paper seeks to remedy. The statutory components are not defined in the legislation and in *BCE* because the Supreme Court maintained that they cannot be "conclusively defined".[225] Absent definitions, guidelines as to how to meet these standards must be articulated. This paper develops a structured approach courts can use to determine whether the impugned conduct rises to the level of harm required by the statute. First, the elements that entitle a complainant to an oppression remedy must be identified, and second, the effect of the impugned conduct on a complainant in each successful oppression remedy case must be clearly discussed.

Applying these two principles and explaining the effect of the harm in each case will provide greater clarity in the case law. A legal framework through which every oppression case is analysed will provide predictability about the outcome of cases and will eliminate the uncertainty that currently surrounds the oppression remedy.

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[225] *BCE*, *supra* note 2 at para 54.

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not attorned to Quebec, the Court of Appeal held that it had no personal jurisdiction over it and could not issue orders against it. This did not, however, preclude the court from making an order against the directing mind of both the CBCA corporation and the foreign affiliate, over whom the court did exercise personal jurisdiction. This was not applying the CBCA extra-territorially but was applying it to a defendant under the jurisdiction of the court, albeit in connection with conduct committed outside of Canada.[179]

When dealing with affiliates outside Canada, conflicts may also arise where the conduct is permitted by the affiliate's foreign incorporating statute but not by the CBCA. To date courts have not been called on to deal with the issue. The degree to which the conduct in question relates to the CBCA corporation or to the foreign corporation and the degree to which the interests of the CBCA corporation or the foreign corporation were affected would probably be important elements in the resolution of such conflicts.

C. JUDICIAL DISCRETION TO DENY STANDING TO STATUTORY COMPLAINANTS

1. Applicant Must be Oppressed as a Complainant

An issue closely related to standing is the capacity in which the applicant's interests are prejudiced. The concluding language of s. 241(2) states that a remedy is available where the conduct is oppressive or unfairly prejudicial to or unfairly disregards the interests of "any security holder, creditor, director or officer." Harm suffered in any other capacity is not subject to remedy. Thus, even if the applicant has standing as a complainant, he will be denied relief if the interest he seeks to protect is not that of a security holder, creditor, director or officer. For example, an employee who is also a shareholder but has been treated unfairly only in his capacity as an employee is not entitled to relief.[180] Similarly, shareholders have been denied relief where the real complaint related to the conduct of a foreign corporation.[181] The proposition also frequently arises in complaints involving take-over bids. One fundamental issue often involves whether the applicant is complaining to protect shareholder interests,

179 (1991), [1991] A.Q. No. 2056 at para.128-131, 1991 CarswellQue 251 (Que. C.A.), leave to appeal refused (1992), 53 Q.A.C. 169 (note) (S.C.C.).

180 *Dicore Resources Ltd. v. Goldstream Resources Ltd.* (1986), 2 B.C.L.R. (2d) 244 (B.C. S.C.); *National Building Maintenance Ltd., Re* (1970), [1971] 1 W.W.R. 8 at 20 (B.C. S.C.), affirmed [1972] 5 W.W.R. 410 (B.C. C.A.). See page 152 below for a more complete discussion about oppression and employees.

181 See page 36 above.

in which case relief may be available, or is complaining to protect his interests as a bidder, in which case no relief is available.[182]

Although relief for oppression is available only if suffered as a "security holder, creditor, director or officer," this requirement may not apply to winding-up under the just and equitable rule.[183] When dealing with just and equitable winding-up proceedings, the applicant can rely "on *any* circumstances of justice or equity which affect him in his relations with the company, or ... with the other shareholders."[184] The circumstances rendering a winding-up just and equitable need not be connected with the plaintiff's capacity as a security holder, etc. This is particularly relevant for purposes of Canadian corporate legislation because most corporate statutes provide that, where it is just and equitable to wind-up a corporation, the court may wind-up the corporation or may resort to the remedies under the oppression provision of the constating statute.[185]

Where the complaint involves allegations of oppression as well as other complaints, some courts have held that the non-oppression claims cannot be pursued in an oppression action but must be pursued in a separate proceeding.[186] The basis for this distinction is unclear. Other courts have permitted personal claims to proceed with oppression claims.[187]

2. Clean Hands and the Plaintiff's Conduct

The clean hands doctrine is a rule that denies equitable relief when the plaintiff has acted improperly in connection with the matters with respect to which he seeks relief.[188] A number of arguments suggest that it does not apply to oppression claims. The statute does not refer to it, nor does the statute require good faith on the part of the plaintiff as it does when dealing with derivative

182 See page 266 below for a full discussion of the issue in the context of take-over bids.

183 CBCA s. 214(1)(b)(ii).

184 *Ebrahimi v. Westbourne Galleries Ltd.*, [1972] 2 All E.R. 492 at 496 (H.L.).

185 See CBCA s. 214(2); OBCA s. 207(2).

186 *Bauscher-Grant Farms Inc. v. Lake Diefenbaker Potato Corp.*, [1998] 8 W.W.R. 751 at 760 (Sask. Q.B.); *Aquino v. First Choice Capital Fund Ltd.*, [1995] 5 W.W.R. 608 at 619-20 (Sask. Q.B.), varied on other grounds [1997] 3 W.W.R. 143 (Sask. C.A.).

187 *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 at 155 (Ont. Gen. Div. [Commercial List]); *Algonquin Mercantile Corp. v. Cockwell* (1997), 43 B.L.R. (2d) 50 at 57 (Ont. Gen. Div. [Commercial List]). See also *Thomson v. Quality Mechanical Service Inc.* (2001), 18 B.L.R. (3d) 99 at 105 (Ont. S.C.J.).

188 John A. Yogis, *Canadian Law Dictionary*, 3rd Edition (New York: Baron's Educational Series, Inc., 1995.)

Corporate Stakeholders in Canada—An Overview and a Proposal

PM VASUDEV*

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The stakeholder vision has emerged as an influential stream in corporate governance. In the English-speaking world, Canada was the pioneer in introducing a regulatory stakeholder regime. This article examines the *Canada Business Corporations Act (CBCA)* for its concern for non-shareholder groups, and, in particular, their inclusion in the remedies provided by the statute. After a critical review of the *CBCA* stakeholder regime, the article proposes specialised agencies to deal with intra-corporate or stakeholder disputes in business corporations. The stakeholder remedy in the *CBCA* is egalitarian. It posits a doctrinal equality between shareholders and other constituencies. An issue with the stakeholder remedy, which the *CBCA* promotes and the stakeholder empowerment attempts to foster in this process, is the ex post principle. The principle is about intervention after conflicts have arisen between corporate actors. The framework is derived, essentially, from private law ideas about disputes and resolving them through litigation. As a result, the stakeholder regime in the *CBCA* does not sufficiently adopt the institutional approach to law-making. Yet the *CBCA* regime is a positive beginning which can graduate towards a more wholesome model, one with the stakeholder vision as an informing principle of governance.

The oppression remedy in the *CBCA* is also available to non-shareholder groups. Yet, the article argues, it has not been applied in an effective manner to resolve disputes raised by corporate stakeholders. The business judgment rule that courts apply to refrain from inquiring into corporate disputes is an important factor in undermining the statutory remedy available to non-shareholder groups. To overcome some of the difficulties posed by the business judgment rule and the courts' lack of business expertise, the

La place accordée aux parties intéressées a émergé en tant que courant d'influence en matière de gouvernance d'entreprise. Dans le monde anglophone, le Canada a fait œuvre de pionnier en instaurant un régime réglementaire en faveur des parties intéressées d'une société. Dans cet article, on examine la *Loi canadienne sur les sociétés par actions (LCSA)* sous l'angle de sa préoccupation pour les groupes de non-actionnaires et, en particulier, leur inclusion dans les recours prévus par la loi. Après avoir procédé à un examen critique du régime applicable aux parties intéressées intégré à la *LCSA*, l'auteur de l'article recommande d'habiliter des organismes spécialisés à se saisir des conflits internes ou entre les parties intéressées qui surgissent dans les sociétés par actions. Le recours dont disposent les parties intéressées dans la *LCSA* est de nature égalitaire. Ce faisant, la loi instaure une égalité doctrinale entre les actionnaires et les autres groupes d'intérêt de la société. Le recours octroyé aux parties intéressées, que la *LCSA* promeut et que l'habilitation des parties intéressées tente de mettre de l'avant dans ce processus, pose cependant un problème lié au principe « ex post ». Ce principe est celui de l'intervention a posteriori, c'est-à-dire qui survient après l'avènement des conflits entre les membres d'une société. Ce cadre d'analyse découle, essentiellement, des idées qui prévalent en droit privé au sujet des différends et de la manière de les résoudre par voie judiciaire. Par conséquent, le régime des parties intéressées dans la *LCSA* n'adopte pas suffisamment l'approche institutionnelle envers le processus législatif. Ce régime demeure toutefois une avancée positive susceptible d'évoluer vers un modèle plus sain, un modèle au sein duquel la vision des parties intéressées serait un principe de fond qui guiderait la gouvernance des entreprises.

* My thanks to Allan Hutchinson (Osgoode) and Ed Waitzer (Osgoode) for comments on an earlier version. I have also greatly benefited from the comments of two anonymous referees on the earlier version of the article. Errors and omissions continue to be my responsibility.

article proposes the creation of specialised, interdisciplinary panels to inquire into stakeholder disputes. These panels can help in making the stakeholder vision in Canadian corporate law more real and robust.

Le recours en cas d'abus, prévu par la *LCSA*, est également à la disposition des groupes de non-actionnaires. Dans cet article, cependant, on soutient qu'il n'a pas été appliqué de manière efficace en vue de résoudre les différends soulevés par des membres d'une société. La règle de l'appréciation commerciale, que les tribunaux appliquent pour éviter de s'immiscer dans les conflits d'une société, vient en quelque sorte contrecarrer l'effet du recours que la loi met à la disposition des parties intéressées. Ainsi, afin de surmonter certaines des difficultés posées par la règle de l'appréciation commerciale et le manque d'expertise des tribunaux en matière commerciale, l'auteur propose de créer des groupes d'experts interdisciplinaires qui seraient chargés d'examiner les différends soulevés par les parties intéressées. Le travail de ces groupes de spécialistes permettrait d'intégrer la vision des parties intéressées au droit canadien des sociétés de manière plus tangible et plus solide.

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> We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.
>
> Supreme Court of Canada (2004)[1]

I. INTRODUCTION

The stakeholder theme has been live since the 1930s when E. Merrick Dodd argued for a broader vision in corporate governance.[2] Dodd advocated moving beyond the limited "principal-agent" framework that was understood as the governing principle of Anglo-American corporate law. The notion restricted the loyalty of corporate managers, conceived as agents, to shareholders who were assimilated to principals.[3] The stakeholder principle is usually offered as a contrast to the shareholder primacy that is generally associated with common law jurisdictions.[4]

To be clear, Canada has no history of shareholder primacy in its pure or classical form—either in legislation or in judicial decisions. Rather, Canada has traditionally adopted a broader and more nuanced interpretation of business

1 *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68 at para 42, [2004] 3 SCR 461, [*Peoples*].

2 E Merrick Dodd, "For Whom Are Corporate Managers Trustees?" (1932) 45:7 Harv L Rev 1145.

3 Conventionally, *Dodge v Ford Motor Co*, 204 Mich 459 (1919) [*Dodge*] is cited as the authority for this principle. For a more recent reflection of the agency idea, see Michael C Jensen & William H Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 Journal of Financial Economics 305.

4 See e.g. Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law" (2001) 89 Geo LJ 439.

corporations and the relationships among the several groups in corporations, such as shareholders, managers and employees.[5]

Indeed, Canada was the pioneer among the common law jurisdictions to include non-shareholder groups in the framework of corporate law.[6] This was accomplished by including non-shareholders, or the so-called stakeholders, with shareholders in the remedies of derivative actions and oppression actions provided in the *Canada Business Corporations Act* (*CBCA*).[7] By extending derivative actions and the oppression remedy to non-shareholder groups, the *CBCA* recognizes the interest, or "stake," these other groups also have in business corporations. The remedies are designed to increase the number of constituencies who can seek redress for any injury to their "interests".[8]

Canadian corporate law, with its rough-and-ready egalitarian principle, is one thing. Among corporations and in the capital markets, however, there is evidence of the presence of important elements of the Anglo-American conception—that shareholders are the "owners" of business corporations[9] and that the pursuit of shareholder value is the legitimate goal of business corporations.[10] As a result, the position is more complex. In the recent years, the Supreme Court of Canada has also formally accepted the stakeholder principle and this adds a new dimension.[11]

This article provides an overview of the stakeholder idea in Canadian corporate law and examines the efficacy of the remedies provided in the *CBCA* for non-shareholder groups. To assess the efficacy of the remedies, it reviews three cases involving stakeholders—*Peoples Department Stores v Wise* (2004) (*Peoples*),[12] *Air Canada Pilots Association v Air Canada ACE Aviation Holdings* (2007) (*Air Canada*),[13] and *BCE Inc v 1976 Debentureholders* (2008) (*BCE*).[14] These are important cases decided in recent

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5 *Teck Corp v Millar* (1972), 33 DLR (3d) 288, [1973] 2 WWR 385 [*Teck Corp*] is an early authority for this proposition. In *Teck Corp*, the British Columbia Supreme Court upheld the right of directors to act in what they perceived to be in the interests of the corporation overriding the wishes of its majority shareholder.

6 This is subject to the creditor protection principle, which is a longstanding feature of corporate law. The principle is currently implemented through the solvency test. See e.g. *Canada Business Corporations Act*, RSC 1985, c C-45, s 42 [*CBCA*] on payment of dividends to shareholders.

7 *Ibid*, ss 238-241. This is among the features the *CBCA* shares with the Ontario *Business Corporations Act*, RSO 1990, c B-16.

8 *CBCA*, *supra* note 6, s 241(2) (the word "interests" is used in the *CBCA* oppression remedy). The significance of the term, in contrast to "rights," is discussed later in the article.

9 In 2006, when Air Canada planned to distribute assets to shareholders in the face of opposition from the pilots, it argued that shareholders were the "rightful owners," implying that it was legitimate for them to take the assets from the corporation. Brent Jang, "Air Canada to axe 300 workers", *The Globe and Mail* (14 September 2006) B5 [Jang, "Air Canada"].

10 The Supreme Court of Canada endorsed this position in *BCE Inc v 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560. With this approach, the Supreme Court rejected the efforts of the lenders of the corporation to question the harm to their interests caused by the leveraged buyout the corporation planned.

11 *Peoples*, *supra* note 1. See also *ibid* at para 66.

12 *Supra* note 1.

13 26 BLR (4th) 124, 28 CBR (5th) 163 (ON SC) [*Air Canada*].

14 *Supra* note 10.

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years that involve the interests of non-shareholder groups, and two of them (*Air Canada and BCE*) were based on the stakeholder remedy provided in the *CBCA*.

This article is an effort to assess the efficacy of the stakeholder remedy in the *CBCA* through an analysis of the important judicial decisions involving non-shareholder groups and the practical effect of the acceptance of the stakeholder vision in Canadian corporate law, at the doctrinal level. It argues that the formal recognition of the stakeholder model of governance has not translated into an effective legal regime that can protect the interests of non-shareholder groups, and identifies the business judgment rule as a major impediment.

Courts generally rely on the business judgment rule to refrain from inquiring into business or policy decisions of corporate enterprises, the reason being their lack of business expertise. This article points out how the stakeholder remedy is weakened because of the tendency of courts to defer to the business judgment of corporate management. To overcome the difficulties that have been experienced, the article proposes the creation of specialist, interdisciplinary panels that can inquire into and decide stakeholder disputes in business corporations. These specialist panels would be in a better position to consider and decide corporate disputes that might involve complex issues of business policy or strategy. They would be less inhibited by the technical rules on evidence, form and procedure that are important in litigation, and would adopt a non-adversarial approach to dispute resolution.

The cases analyzed in this article bring out some of the challenges faced by the stakeholder vision in the efforts to develop it into a legal principle of corporate governance. For law and the legal system, with their standard tools and techniques, the stakeholder principle appears rather amorphous. For example, it does not provide clear definitions of the "rights" of the various groups in business corporations. Equally, it defies efforts to rank the respective positions of groups such as shareholders, managers, employees, customers, communities and so on. Some other difficulties are that stakeholder conflicts usually involve issues of corporate policy or strategy and the business judgment rule developed by the courts discourages judicial inquiry into policy issues. These are major factors impeding the stakeholder remedy available in the *CBCA*.

Yet, the article argues, there is scope for strengthening the stakeholder element in the *CBCA*. To this end, it proposes the creation of alternative forums to adjudicate disputes among stakeholder groups. These forums will have representation from disciplines such as law, finance, management and other relevant disciplines, and will not be based on the adversarial principle. As such, they might be better suited to deal with conflict among the constituencies in business corporations. With a broader set of skills, these forums will likely not be too inhibited by the business judgment rule, which has been an effective check on all challenges to corporate policy and decision-making.

The article is divided into four parts. Part II provides an overview of stakeholders, their position in Canadian corporate law and the stakeholder remedy included in the *CBCA*. This is followed in Part III by a discussion of the three stakeholder cases

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(*Peoples*, *Air Canada*, and *BCE*), which explain some of the difficulties the courts face in dealing with stakeholder conflicts. Part IV concludes with a proposal for forums with experts from a cross-section of disciplines, such as law, finance, management and other relevant disciplines, to inquire into stakeholder disputes and determine the interests of the affected groups, with due sensitivity to preserving the freedom of corporate management to effectively perform the primary function of business corporations, which is to create and distribute wealth in an ethical, equitable and sustainable manner.

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II. STAKEHOLDERS IN CANADIAN CORPORATE LAW—AN OVERVIEW

The term "stakeholders" emerged in the US in the 1980s in the midst of fierce battles that were fought for the takeover of business corporations. The concept has since gained greater traction in corporate law.[15] To be fair, a concern for creditors, which is an important non-shareholder group, has been among the key principles of corporate law since the formative period.[16] The solvency rule that is designed to protect creditors is evidence of the concern in law for non-shareholder groups.[17] In similar spirit, the *CBCA* also imposes personal liability on the directors of business corporations for unpaid wages in some circumstances.[18] The concern for non-shareholders has become more expansive and robust in the recent decades giving rise to an institutional vision of business corporations.

As already mentioned, the stakeholder idea has been present in Canadian corporate law for several decades now.[19] This section provides an overview of the stakeholder element in corporate law, and it consists of two sections. Section A discusses the early manifestations of the stakeholder idea. This is followed, in Section B, by an examination of the stakeholder remedy in the *CBCA*.

A. The Preliminary Steps

Historically in North America, an element of public interest has been recognized in corporations.[20] Consistent with this, the *Canada Corporations Act* (*CCA*),[21] which was

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15 See generally R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Boston: Pitman, 1984). Several US states introduced stakeholder provisions in their corporate statutes in the 1980s. See "Appendix" (1991-1992) 21:1 Stetson L Rev 279.

16 See e.g. the discussion of the transition to the solvency test in corporate law by Edwin S Hunt, "The Trust Fund Theory and Some Substitutes for It" (1902) 12:2 Yale LJ 63.

17 Recently in Canada, the condition of solvency proved to be the undoing of the leveraged buyout transaction after it was approved by the Supreme Court of Canada in *BCE*, *supra* note 10. See Chris Sorensen, "Left dangling" *The Toronto Star* (27 November 2008) B1.

18 *Supra* note 6, s 119.

19 *Teck Corp*, *supra* note 5.

20 See generally Joseph Stancliffe Davis, *Essays in the Earlier History of American Corporations* (New York: Russell & Russell, 1965) vols 1 & 2.

21 *An Act to amend the Companies* Act, SC 1965, c 52, as amended by *Canada Corporations Act*, RSC 1970, c C-32.

enacted in 1965 authorized social activism by corporations. It permitted business corporations to make contributions for the welfare of employees or former employees, and for "any public, general or useful object."[22] This was similar to the position in several American jurisdictions at the time.[23]

Significantly, the *CCA* did not tie contributions to any benefit for the corporations, actual or potential. Doing so would bring corporate philanthropy under the genre of what is currently termed "Enlightened Shareholder Value", which interprets the consideration of non-shareholder groups and initiatives for amelioration in terms of their potential to advance the long-term business interests of corporations and enhance shareholder value.[24] The social activism enabled by the *CCA* was more altruistic. Corporate initiatives for amelioration did not have to be justified in terms of their benefit for the corporations or even the possibility of benefit.[25] The *CCA* provision on corporate social activism was among the early steps taken in Canada towards the broader and more inclusive stakeholder principle in corporate governance.

Another element of stakeholder concern in North American corporate law can be seen in its protective attitude towards employees. Several corporate statutes in the US imposed personal liability on directors for unpaid wages subject to conditions.[26] In Canada, the *CCA* contained a similar provision.[27] It made directors of a corporation liable for employees' wages up to a maximum of six months if the employees were unable to recover their dues from the corporation.

At common law, an important development in the stakeholder principle occurred in *Teck Corp*.[28] As has been pointed out, the stakeholder principle is based on an institutional vision of business corporations. In the institutional framework, a corporation is perceived as an entity engaged in commercial pursuits that would

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22 *Canada Corporations Act*, RSC 1970, c C-32, s 16(1)(e) [*CCA*].

23 In *AP Smith Manufacturing v Barlow*, 39 ALR (2d) 1179 (NJ Sup Ct 1953), the court upheld a donation by a New Jersey corporation to Princeton University and did so without referring to a provision in the New Jersey statute that permitted such acts by business corporations. See CA Harwell Wells, "The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century" (2002-2003) 51:1 Kan L Rev 77.

24 Recently, this principle has been included in the UK in the *Companies Act* 2006 (UK), c 46, s172. The statutory rule requires directors to promote the long-term welfare of shareholders by taking into consideration the interests of all non-shareholder groups. It is, however, questionable whether the idea is new. In *Hutton v West Cork Railway* (1883), 23 Ch D 654 at 673, the court, which ruled against voluntary payments to the directors of a company that had ceased to do business, expressly endorsed "cakes and ale…required for the benefit of the company". On Enlightened Shareholder Value, see also Virginia Harper Ho, "Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide" (2010) 36:1 J Corp L 59.

25 The governance principles developed by American Law Institute in the 1980s authorize corporations to "devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes," even when "corporate profit and shareholder gain are not thereby enhanced." *The American Law Institute, Principles of Corporate Governance: Analysis and Recommendations*, (St Paul, MN: American Law Institute Publishers, 1994) vol 1 at §2.01.

26 See e.g. David Millon, "Theories of the Corporation" [1990] 2 Duke LJ 201.

27 *CCA*, *supra* note 22, s 99(1).

28 *Teck Corp*, *supra* note 5.

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benefit all the groups involved in it—employees, shareholders, managers and so on. It is based on a community of interests,[29] in contrast to the principal-agent idea underpinning shareholder primacy.[30] The more restrictive agency model treats shareholders as the owners of business corporations and managers as their "agents." Logically, the duty of the agents is limited to serving the interests of the shareholders who are assimilated to principals.

In *Teck Corp*, the court preferred the broader institutional vision of business corporations. The case involved a hostile takeover bid for a corporation that was resisted by its directors who believed that the fledgling business would be undermined by the takeover. However, the majority shareholder of the corporation was in favour of the takeover bid and attempted to restrain the directors from opposing the bid. The court ruled that the directors had the authority to act in what they perceived to be the interests of the corporation and were not bound by the wishes of the majority shareholder. This decision affirmed a broader vision of the fiduciary duties of directors and officers of business corporations, beyond a narrow loyalty to shareholders.[31] The expansive character of fiduciary duties has been endorsed by the Supreme Court of Canada in *Peoples*[32] and *BCE*.[33]

Another contribution to the stakeholder idea came from the Saucier Committee (2001), set up by the Toronto Stock Exchange, the Canadian Venture Exchange and the Chartered Accountants of Canada to develop corporate governance guidelines for listed corporations. The Saucier Report reflected the strengthening of the stakeholder vision and made repeated references to "stakeholders." It treated corporate accountability as something owed to a broad spectrum of stakeholders, and not merely shareholders.[34]

B. Entry of Stakeholders into the *CBCA*

The *CBCA*, enacted in 1975,[35] strengthened the stakeholder principle in corporate law. To begin with, it retained the longstanding creditor protection principle through the solvency test. Dividends and any other payouts to shareholders are

29 See e.g. Eric W Orts, "Beyond Shareholders: Interpreting Corporate Constituency Statutes" (1992-1993) 61:1 Geo Wash L Rev 14.

30 The institutional vision is in contrast to the conceptualization of a corporation as a "nexus of contracts" (Jensen & Meckling, *supra* note 3). The nexus of contracts framework understands a corporation as a loose network of individuals, or at best, a collection of disparate groups, each of which jockeys for its advantage and uses its resources and powers to this end.

31 In coming to this conclusion, Berger J refused to follow the agency principle applied in the UK in *Parke v Daily News Ltd*, [1961] 1 All ER 695.

32 *Supra* note 1.

33 *Supra* note 10.

34 Joint Committee on Corporate Governance, *Beyond Compliance: Building a Governance Culture* (Toronto: Chartered Accountants of Canada, 2001), online: European Corporate Governance Institute <http://www.ecgi.org/codes/documents/beyond_compliance.pdf>.

35 *Canada Business Corporations Act*, SC 1975, c 33, as amended by *CBCA*, *supra* note 6.

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made conditional upon a corporation being solvent.[36] The solvency rule safeguards the interests of the creditors by conserving corporate resources and restricting shareholders' access to them. The *CBCA* also continues with personal liability for the unpaid wages of employees of corporations for up to six months, if the employees are unable to recover the money from their corporate employer.[37]

An important innovation in the *CBCA*, however, went beyond the conventional stakeholder concerns in corporate law. The *CBCA* introduced a new device of stakeholder remedies and made Canada the first among common law jurisdictions to grant formal recognition to non-shareholder groups in the statutory framework.[38] The Canadian statute extends the statutory remedies of derivative actions and oppression actions to non-shareholder groups as well.

The *CBCA* is the product of a committee chaired by Robert W Dickerson ("the Dickerson Committee"), established in 1970. The Dickerson Committee, which submitted its report in 1971,[39] recommended among other things broadening the statutory remedies by including non-shareholder groups. To begin with, the Dickerson Committee examined the idea of providing representation to non-shareholder groups in corporate boards. It noted:

> Suggestions have been made from time to time that corporation law focuses too narrowly on shareholders, and ignores the reality that others, especially the corporation's employees and creditors, are affected by and concerned with what corporations do. It follows from this, so the argument goes, that these groups should have some voice in the choice of corporate directors. Moreover, it is said, there is a broad public interest in corporations, and this interest should also be represented in corporate boardrooms.[40]

After stating that it had no quarrel with the principle, the Dickerson Committee added, "[B]ut we do not see any practical way, in the context of a corporations act, in which it [providing representation to non-shareholder groups] can be implemented. The problem is one of establishing the electorate."[41]

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36 *Supra* note 6, ss 34-36, 38, 42.

37 *Ibid*, s 119.

38 The UK started in this direction in 1980 by placing directors under a duty to consider the "interests of the…employees in general" as well as the shareholders. See *Companies Act 1980* (UK), c 22 s 46(1). In the US in the 1980s, many states introduced the so-called constituency statutes that enabled directors to consider non-shareholder interests. These provisions were generally limited in their scope and were applicable only in certain circumstances such as takeover bids and potential changes of corporate control. For extracts of the stakeholder provisions in various American jurisdictions, see "Appendix," *supra* note 15.

39 Robert WV Dickerson, John L Howard & Leon Getz, *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971).

40 *Ibid* at para 31.

41 *Ibid* at para 32.

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With this observation, the Dickerson Committee rejected "representation-and-empowerment" as the legislative approach in dealing with non-shareholder interests.[42] Pointing out that few legal impediments existed for including a wider section of stakeholders on their boards if corporations wanted to do so, the committee discarded the model as legally unworkable. In doing so, the Dickerson Committee also pointed out that "trade unions ha[d] not shown much interest in having representation on the boards of corporations…"[43] This was apparently an important consideration in the committee's preference for exploring other means of fostering non-shareholder interests.[44]

The Dickerson Committee chose to include non-shareholder groups in the statutory remedies as the instrument to implement the stakeholder principle. In placing non-shareholder groups on par with shareholders, it is apparent that the views of the Dickerson Committee were aligned to the Berle-Means paradigm of passive shareholders.[45] In this framework, shareholders did not play an effective or meaningful role that reflected the proprietary position attributed to them in corporate theory and the principle of electoral control by shareholders provided in it. The Dickerson Committee rejected notions about corporate democracy and the voting rights of shareholders:

> We have also rejected the argument made by some that "corporate democracy" should be improved by investing corporate shareholders with some of the powers now commonly exercised by directors. In our view, this idea is quite misconceived, not least because the analogy between democracy in a political context and the relationships between the shareholders and directors of a corporation is tortured and misleading.[46]

42 *Supra* note 39 at para 35. This is the broad principle on which the stock corporations of Germany are organized. The supervisory boards of German corporations have representatives from a range of stakeholder groups. See e.g. Marc Goergen, Miguel C Manjon Antolin, & Luc Renneboog, "Recent Developments in German Corporate Governance" (2008) 28:3 International Review of Law and Economics 175.

43 *Supra* note 39 at para 34.

44 This position is similar to the response from British trade unions, a few years later, to the query of the Bullock Committee about board representation. See Department of Trade, *Report of the Committee of Inquiry on Industrial Democracy* (London: Her Majesty's Stationery Office, 1977). For a reference to similar attitudes in the US, see Alfred F Conard, "Corporate Constituencies in Western Europe" (1991-1992) 21:1 Stetson L Rev 73. This is apparently a cultural issue in the English-speaking world. The reluctance of labour unions to participate in boards suggests that it would be simplistic to make comparisons to the German model of "co-determination" in which employees and other stakeholders have representation on the supervisory boards of public corporations.

45 Adolf A Berle, Jr & Gardiner C Means, *The Modern Corporation and Private Property* (New York: Macmillan Company, 1933).

46 *Supra* note 39 at para 10. The Dickerson Committee explicitly adopted the precepts of the American scholar Henry Ballantine, who stressed the "enabling" character of corporate statutes and argued that their limited goal was to facilitate efficient management of business. See Henry Winthrop Ballantine, *Ballantine on Corporations* (Chicago: Callaghan, 1946).

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According to the Dickerson Committee, shareholders were ineffective and the conventional democratic methods applied in corporate law (which is voting powers for shareholders to elect/remove directors) were inappropriate. This is also evident from Dickerson Committee's inclusion of shareholders under the more generic term of "security holders"[47]—several years before the term was used in economic theory to describe shareholders.[48]

The Dickerson Committee's framework of business corporations had little place for the proprietary ideas associated with shareholders, or the notion that directors were their elected surrogates. Shareholders had no special position or rights. They were, in substance, little different from other groups such as employees, suppliers and creditors who also had interests in corporations. It is apparent that this line of thought culminated in the Dickerson Committee clumping non-shareholder groups with shareholders in the scheme of statutory remedies. Logically, the Committee recommended extending the remedies to several groups including shareholders. Its recommendation quite clearly reflected the views of the committee, "[The remedy] is made applicable to all cases of conduct that are 'oppressive or unfairly prejudicial to or in disregard of the interests of' any security holder, creditor, director or officer and not just to the narrow case where a shareholder is oppressed in his capacity as a shareholder."[49]

The Dickerson Committee's recommendation was accepted, and in the *CBCA*, both derivative actions and relief against oppression are available to "complainants".[50] Other than security holders, complainants are defined to include directors and officers, including those who held office in the past. The Director of a corporation, a government official, is also empowered to take action, presumably in the public interest.[50.1] Finally, the court has the discretion to determine any other person as "proper" to invoke the remedies. Thus, the *CBCA*'s conceptualization of the groups that may have complaints against business corporations is quite broad.

Referring to the inclusive scheme of remedies in the *CBCA*, Stephanie Ben-Ishai developed the "team production" model of Canadian corporate law.[51] Ben-Ishai argued that corporate law in Canada accords primacy to the directors and that, considering the scope of the remedies, directors of corporations can be assimilated to "mediating hierarchs" among the different corporate groups—a position conceived for them in the team production theory of Margaret Blair and Lynn Stout.[52]

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47 See the definition of "security" in the *CBCA*, *supra* note 6, s 2.

48 See e.g. Jensen & Meckling, *supra* note 3.

49 *Supra* note 39 at para 485.

50 *Supra*, note 6, s 238.

50.1 *Ibid*.

51 Stephanie Ben-Ishai, "A Team Production Theory of Canadian Corporate Law" (2006) 44:2 Alta L Rev 299 [Ben-Ishai, "Team Production Theory"].

52 *Ibid*; Margaret M Blair & Lynn A Stout, "A Team Production Theory of Corporate Law" (1999) 85:2 Va L Rev 247.

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Incidentally, stakeholder remedies are not the only innovation in the *CBCA*. The statute also marked a transition of Canadian corporate law to a purer financial model—of the Delaware variety—in which share capital rules lost much of their substance. With business facilitation as the stated goal, the statute strengthened the controlling group—directors and officers.[53] The rules on capital were diluted. The *CBCA* permits corporations greater freedom to deal in their own shares through buybacks and also issuance of nonvoting shares. Labeling the changes "enablingism," Jacob Ziegel observed, "Influenced by American precedents, the drafters of [*CBCA*] consciously set out to strip the pre-war statutes of most of their restrictive elements."[54]

Reverting to the remedies available in the *CBCA*, they need some explanation, especially in the context of non-shareholder groups who are encompassed within them. Derivative actions and the oppression remedy in the *CBCA* are briefly examined below.

1. *Derivative Actions*

Derivative actions are meant to protect the corporate interests when persons in control either harm the corporations or fail to prevent harm inflicted by others.[55] Derivative actions are about safeguarding the corporation as a whole, rather than any particular group in it—shareholders, employees, suppliers and so on. This feature distinguishes derivative actions from the oppression remedy. Derivative actions usually have their origin in the breach of fiduciary duties by the directors and/or officers of corporations. The problem becomes more acute when a corporation is under the control of a majority shareholder.[56]

Conventionally, the right to bring derivative actions has been recognized for the shareholders. This is consistent with the proprietary position loosely recognized for them in legal theory, and their status as residual claimants, which economic theory stresses. Shareholders, whether passive or engaged, are entitled to the residue in corporations and have the incentive to maximize the residue. As the reasoning goes, it is therefore appropriate for them to take the action needed to protect corporations by avoiding losses and/or increasing the corporate wealth.

The law on derivative actions has its origin in the "separate legal entity" idea of business corporations.[57] This notion concluded that individual shareholders

53 *CBCA*, *supra* note 6, s 115 facilitates concentrating most of the policy and operational powers of the directors in the chief executive.

54 Jacob S Ziegel, "Creditors as Corporate Stakeholders: The Quiet Revolution—An Anglo-Canadian Perspective" (1993) 43 UTLJ 511 at 515 [Ziegel, "Creditors as Corporate Stakeholders"].

55 For an account of the development of the law on derivative actions, see Joel Seligman, *Corporations: Cases and Materials* (Boston: Little, Brown & Co, 1995) at 591-592.

56 See e.g. *Foss v Harbottle* (1843) 67 ER 189, which was an early case on the subject.

57 The "separate legal entity" idea, incidentally, supports the institutional vision aligned to the stakeholder principle and discourages the tendency to identify corporations with shareholders underpinning the shareholder primacy model.

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lacked any legal standing to question harm done to corporations, as distinct from injury or loss inflicted on their shareholders. The rationale behind derivative actions, originally developed in equity, was explained by the US Supreme Court, "Equity came to the relief of the stockholder, who had no standing to bring civil action at law against faithless directors and managers. Equity, however, allowed him to step into the corporation's shoes and to seek in its right the restitution he could not demand in his own."[58]

In this framework, injury to corporations could only be challenged by the shareholders.[59] The *CBCA* expands the remedy of derivative actions by extending it to non-shareholder groups as well. This was a result of the Dickerson Committee's tendency not to distinguish between shareholders and other groups in corporations, which has been pointed out earlier.

Other groups such as employees or suppliers were not, conventionally, recognized as having the requisite interest in corporations. This is logical in an economic sense because other groups would normally have only a limited interest, which would usually be defined in their contracts with the corporations. The legal right of non-shareholder groups would be restricted to issues affecting that limited and predefined interest. As long as a corporation is solvent and is able to discharge its obligations, non-shareholder groups can have little complaint about any diminution of the residue. These groups have no interest in or claim against the corporate residue and would not be concerned with it.

This reasoning appears to be developing cracks in its application to contemporary corporations, as the facts in *Air Canada* illustrate. In *Air Canada*, the Pilots Association attempted to block the distribution of $2 billion in assets to shareholders and argued that the resources had to be conserved to improve the financial health of the corporation and its ability to weather business cycles.[60] Arguably, in situations like this, employees of a corporation would have an interest in conserving resources and promoting long-term health and viability, although they are not technically claimants to the residue of the corporation.

The situation would also be different in insolvent companies. Here, the risk capital contributed by the shareholders is already eroded by losses and the corporate residue must be distributed among the creditors. It is, therefore, logical for creditors to make efforts to maximize the residue. The incentive to increase the residue in insolvent corporations will be with their creditors, and derivative actions will be an appropriate instrument for them in this effort.

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58 *Cohen v Beneficial Industrial Loan Corp*, 337 US 541 at 548 (1949).

59 The right to bring derivative actions representing the interests of a corporation is subject to the court being satisfied that the directors are unlikely to bring the requisite action. This safeguard is codified in the *CBCA*, *supra* note 6, s 239.

60 The pilots brought their action under the oppression remedy and lost, as the discussion appearing later in the article explains. It is debatable whether a derivative action might have made a difference to the outcome.

For a long time now, courts in the US have permitted creditors to bring derivative actions in insolvent corporations.[61] In *Credit Lyonnais Bank Nederland, NV v Pathe Communications*, the Delaware Court of Chancery permitted a creditor to maintain a derivative action when the debtor-corporation was found to be in the "vicinity of insolvency."[62] This right of the creditors was affirmed by the Delaware Supreme Court in *North American Catholic Educational Programming Foundation v Rob Gheewalla*.[63]

The position in other common law jurisdictions—UK, Australia, and New Zealand—is similar. In these countries, a creditors' right to take action against the directors of corporations that are either insolvent or approaching insolvency has been recognized since the 1970s.[64] Canadian courts have been less ready to recognize the right of creditors to bring derivative actions.[65] In the *CBCA*, the position of creditors is somewhat special in the matter of statutory remedies. As noted earlier, the *CBCA* empowers "security-holders," which is defined to include holders of shares, bonds, debentures and the like, to maintain derivative actions, and there are no apparent limitations on their power to bring actions. But lenders under contracts or trade creditors who are not "security holders"—will be in a different position. A creditor of this variety cannot automatically invoke the statutory remedy. A creditor of this variety must first persuade the court that it is a "proper person" under the definition of "complainant."

In the US, an argument has been made for extending the derivative remedy even to the creditors of solvent corporations.[66] This is possible under the *CBCA* even now, given the definition of "complainant." The economic incentive for the creditors of a solvent corporation to bring a derivative action was obvious in *BCE*.[67] In *BCE*, Bell Canada, a wholly owned subsidiary of *BCE*, planned to take on a large load of additional debt that affected the interests of the existing creditors.[68] Such situations clearly demonstrate the limitations of the pre-*CBCA* view that derivative actions would only make sense for shareholders who are the so-called residual claimants in corporations. It need not be true in all cases that as long as a corporation is able to pay its dues, there is little incentive for the creditors to worry about its health and viability.

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61 See generally "Creditors' Derivative Suits on Behalf of Solvent Corporations" (1978-1979) 88:6 Yale LJ 1299 ["Creditors' Derivative Suits"].

62 [1991] WL 277613 (Del Ch).

63 930 A (2d) 92 (Del 2007).

64 See Ziegel, "Creditors as Corporate Stakeholders", *supra* note 54.

65 See generally David Thomson, "Directors, Creditors and Insolvency: A Fiduciary Duty or a Duty Not to Oppress?" (2000) 58:1 UT Fac L Rev 31. The facts and the arguments made in *Peoples*, *supra* note 1, are more complicated. Peoples had the shades of a derivative action, but the question the Court had to consider was framed differently. It was about whether the directors owed the creditors a fiduciary duty of care. The case is discussed later in the article.

66 See "Creditors' Derivative Suits", *supra* note 61.

67 *Supra* note 10.

68 *Ibid* at para 1. In fact, the creditors of Bell Canada relied on the oppression remedy in their efforts to prevent Bell Canada from taking on additional debt to fund the LBO transaction. See *ibid* at para 22.

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The data on derivative actions in Canada is interesting. Reviewing the period 1999-2004, Stephanie Ben-Ishai found only three cases of "pure" derivative litigation—one each in the provinces of Alberta, British Columbia and Ontario.[69] All of them were initiated by shareholders.[70] During 1995-2001, 16 derivative actions were filed.[71] The results of Ben-Ishai's survey can be interpreted in a number of ways. They could either point to the absence of substantial breaches of fiduciary duties by managements, or the reluctance of shareholders (and/or others) to bring legal action. Interestingly, an apprehension was expressed that the real danger in Canada was the complete absence of derivative actions, rather than a multiplicity of actions.[72] This can suggest a general preference for non-confrontational approaches.[73]

Progress was mixed in derivative actions brought by creditors in earlier years. In *First Edmonton Place Ltd v 315888 Alta Ltd*,[74] the Alberta Court of Appeal stayed a derivative action brought by a creditor for recovery of disputed dues. But in *A E Realisations (1985) Ltd v Time Air*,[75] the Queen's Bench of Saskatchewan permitted a judgment-creditor to maintain a derivative action, recognizing it as a "proper" person under the *CBCA*.

Availability of the oppression remedy could be an explanation for the apparent paucity of derivative actions. The oppression remedy can be effective in achieving the results desired, especially by non-controlling shareholders, who need not also be constrained by the more demanding standards governing derivative actions.[76] For minority shareholders, the oppression remedy can be more convenient and effective.

In any event, the inclusion of all corporate groups in the remedy of derivative action in the *CBCA* represents progress for the stakeholder principle. It strengthens the trend of institutionalizing the stakeholder vision of corporate governance.

2. *The Oppression Remedy*

Another remedy provided in the *CBCA* is against oppression by the persons in control, who are sometimes also majority shareholders. The remedy against oppression is adopted from UK company law. Following cases such as *Foss v Harbottle* (1843),[77]

69 Ben-Ishai, "Team Production Theory", *supra* note 51 at 307.

70 *McAteer v Devoncroft Developments Ltd*, 2001 ABQB 917, 307 AR 1; *Discovery Enterprises v Ebco Industries Ltd*, 2002 BCSC 1236, 86 BCLR (3d) 120; *Jordan Inc v Jordan Engineering* (2004), 48 BLR (3d) 115, [2004] OTC 687 (Ont Sup Ct).

71 Stephanie Ben-Ishai & Poonam Puri, "The Canadian Oppression Remedy Judicially Considered: 1995-2001" (2004) 30:1 Queen's LJ 79 at 105.

72 Edward M Iaccobucci & Kevin E Davis, "Reconciling Derivative Claims and the Oppression Remedy" (2000) 12 Sup Ct L Rev (2d) 87.

73 See e.g. Jeffrey G MacIntosh, "The Role of Institutional and Retail Investors in Canadian Capital Markets" (1993) 31:2 Osgoode Hall LJ 371 at 381.

74 [1990] 2 WWR 670, 71 Alta LR (2d) 61 (CA).

75 [1995] 3 WWR 527, 127 Sask R 105 (Sask QB).

76 See *supra* note 59.

77 *Supra* note 56.

Menier v Hooper's Telegraph Works (1874)[78] and *MacDougall v Gardiner* (1875),[79] British Parliament introduced a statutory remedy against oppression in the *Companies Act*, 1948 (UK).[80]

The difficulties experienced with the short remedy against oppression included in the *Companies Act*, 1948 were considered by the Jenkins Committee (1962), which recommended spelling out in greater detail courts' powers to grant relief against oppression.[81] In Canada, the Dickerson Committee had the benefit of the Jenkins Committee report and it recommended a broad range of remedies against misconduct by the management or the group in control. The remedy in Canada is available against oppression and also against unfair prejudice or unfair disregard of interests. The Dickerson Committee explained, "To the basic criterion 'oppressive' is added the phrase 'unfairly prejudicial to or in disregard of the interests of', which makes abundantly clear that [the remedy] applies where the impugned conduct is wrongful, even if it is not actually unlawful."[82]

The inclusion of "interests" in the remedy is clearly not an accident. Quite obviously, the Dickerson Committee recognized that actions and/or policies that harm some groups in corporations need not necessarily involve an infraction of their legal rights. The policies and decisions can simply harm certain interests without violating the legal rights of the persons or the groups whose interests are affected. This was an important argument the Supreme Court of Canada considered in *BCE* and this is discussed a little later.

Reflecting the approach of the Jenkins Committee, the oppression remedy in the *CBCA* is designed to be wide in scope and application. The innovation in the *CBCA* is that it extends the remedy also to non-shareholder groups. The remedy is available against acts or omissions that are oppressive or unfairly prejudicial to or unfairly disregard the interests of any security holder, creditor, director or officer.

The *CBCA* oppression remedy is broad in scope. There are no apparent limitations on the courts' powers to mould the relief according to circumstances and needs. To facilitate a proactive approach, a lengthy list of the illustrative orders a court may make is included in the statute. Endorsing the recommendation of the Jenkins Committee report, the Dickerson Committee concluded, "[i]n sum, we think that the courts should have very broad discretion, applying general standards of fairness, to decide these cases on their merits." [83]

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78 [1873-1874] LR 9 Ch App 350.

79 [1875-1876] 1 Ch D 13.

80 *Companies Act*, 1948 (UK), 11 & 12 GEO VI, c 38, s 210. Interestingly, the remedy in British law is still restricted to shareholders, despite the adoption of the stakeholder model of governance in the *Companies Act*, *supra* note 24, s 172.

81 UK, Board of Trade, *Report of the Company Law Committee* by Lord David Jenkins et al (London: Her Majesty's Stationary Office, 1962).

82 *Supra* note 39 at para 485.

83 *Ibid* at para 484. Here again, the reference to "fairness" is significant. This standard is broader than mere legality. It is aligned to the concept of "interests," rather than just legal rights. These issues are discussed a little later in the article.

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The *CBCA* places no limitations on courts to craft relief according to the needs of individual cases. While the "court may make any interim or final order it thinks fit",[84] the specific powers include:

- Restraining the conduct about which complaint is made;
- Appointing a receiver or receiver-manager;
- Regulating a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
- Directing an issue or exchange of securities;
- Appointing directors in place of or in addition to all or any of the directors then in office;
- Directing a corporation, or any other person, to purchase securities of a security holder;
- Varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
- Compensating an aggrieved person;
- Directing the rectification of registers or other records of a corporation; and
- Liquidating and dissolving the corporation[85]

The powers of courts are sweeping by any standards. There are no limitations, either express or implied. Courts can place corporations under receivership, appoint directors, direct change of shareholding, rewrite articles of incorporation and rewrite contracts to which a corporation is a party. Other than these, courts can also order liquidation and dissolution of corporations. Obviously, some powers—for instance, the one involving unanimous shareholder agreement—would be more relevant in the context of a closely-held corporation.[86]

As already pointed out, the oppression remedy is available against unfair prejudice or unfair disregard of the interests of any stakeholder. Since the statutory criterion is "interests," it can facilitate an interpretive approach that is broad and inclusive, rather than restrictive. Courts need not be constrained by traditional notions about "rights" defined in a legal document. Roscoe Pound, the eminent American legal philosopher and Dean of Harvard Law School, conceived the legal order as a process in which recognition of interests gave rise to

84 *CBCA*, *supra* note 6, s 241(3).

85 *Ibid*.

86 *Ibid*, s146 enables all the shareholders of a corporation to enter into a written agreement by which they can take up management of the corporation themselves, supplanting the directors. Alternatively, they can reserve powers to issue directions or instructions to the directors who have statutory powers of management (*ibid*, s 102). Unanimous shareholder agreements, as the title makes clear, require the assent of all shareholders and they would be impracticable in a listed corporation.

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a duty and lead on to the development of a remedy for a breach of that duty.[87] Pound was sensitive to the fact that in real life development of the legal order does not always follow this sequence. Quite often, an urgent remedy is developed in a given situation and this happens before the related right takes shape and gains recognition.

The stakeholder remedy in the *CBCA* can be understood in terms of Roscoe Pound's paradigm of rights and interests in the development of legal order. The *CBCA* provides a remedy for non-shareholders without placing the directors under a clear duty to consider their interests. In this framework, the recognition given to the "interests" of stakeholders can be sufficient for courts to take remedial action against oppression, unfair prejudice or disregard of interests. Interpreted from Pound's paradigm of the legal order, recognition of interests would give rise to a "duty"—for a corporation[88]—to safeguard or foster the interests. In a negative sense, a corporation must not engage in acts that are oppressive or that prejudice or disregard the interests of any stakeholder. In more affirmative terms, the *CBCA* regime can be interpreted as placing corporations under a duty to protect and foster the interests of stakeholders. This position has been endorsed by the Supreme Court of Canada in *Peoples* and *BCE*.

In theory, a contract between the parties need not be the sole consideration or an inhibiting factor for a court because the applicable criterion is the interests of the complaining stakeholder, and the court has express powers to vary the terms of contract to decide a case according to "general standards of fairness."[89] The power given to courts to vary or set aside contracts indicates sensitivity to the relative bargaining powers of the actors in corporations, which is an important consideration for the stakeholder principle. The difference in bargaining positions often results in lopsided or unfair contracts. In such cases, it would be open to courts to apply the corrective powers available under the statute to include additional terms in "incomplete contracts"—a term used in economic theory to refer to the omission or failure of the parties to provide for situations not foreseen at the time of formation of the contract.[90]

87 Roscoe Pound, *Jurisprudence* (St Paul, Minn: West Publishing, 1959) vol 4 at 43.

88 In this context, the term "corporation" is ambiguous and lacks specificity. More particularly, it would mean the centre of corporate powers—namely, directors and senior managers.

89 In practice, however, it is doubtful whether courts with their traditions, standard tools and habits of thought are quite suited to perform such a radical function. This is a consideration for the interdisciplinary forums proposed in this article for dealing with stakeholder disputes.

90 Frank H Easterbrook & Daniel R Fischel argued that the role of corporate statutes is to supply default rules, which the corporate actors either did not or could not negotiate (*The Economic Structure of Corporate Law* (Cambridge, Mass: Harvard University Press, 1991)). This reasoning can also be applied for courts to use their statutory power to take necessary corrective action in specific cases, without being overly constrained by contracts. See also Ian Ayres & Robert Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" (1989) 99 Yale L J 87.

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III. STAKEHOLDER LITIGATION—A REVIEW OF SOME RECENT CASES

As pointed out earlier, the *CBCA* is based on a rough-and-ready parity among shareholders and other groups in corporations. To realize this vision, it extends the statutory remedies to non-shareholder groups as well. To test the efficacy of the stakeholder principle in the *CBCA* and the remedy it provides for non-shareholder groups, reviewing the facts and outcomes in *Peoples*, *Air Canada* and *BCE* is helpful. There do not appear to be earlier cases under the *CBCA* in which stakeholder interests were the central issue.

Among the three cases, *Air Canada* was an action initiated by pilots who were employees of the corporation. The other two were suits filed by creditors. *Air Canada* and *BCE* were actions under the oppression remedy. They involved *ex ante* challenges to corporate policy and the plaintiffs sought injunctions from the court. *Peoples* was a more conventional recovery action, brought *ex post*. The creditors developed their case around the fiduciary duty of care owed by the directors and officers of corporations. The outcomes in these cases reveal some of the difficulties for courts to intervene effectively in non-shareholder grievances, including application of the oppression remedy at the instance of stakeholders.

Stakeholder cases often involve issues of corporate policy or strategy, which might not be appropriate subjects for adjudication by courts with their standard tools and methods, and the adversarial procedure. The factors impeding courts from being effective in stakeholder disputes are the business judgment rule, the need to frame corporate policy issues in legally acceptable idiom, their difficulty in dealing with the concept of interests—as distinct from well-defined rights—and finally, technical rules of form, evidence and procedure that govern legal proceedings. To be clear, these issues, discussed below, are not distinct or separate. They are interconnected and operate together, as the discussion shows.

A. The Business Judgment Rule

The business judgment rule is now among the basic principles of corporate law.[91] Stated in very broad terms, the rule recognizes the complexity of corporate business and operations, and defers to the decisions of managements, which are presumed to possess the expertise and integrity needed to act in a reasonable manner. Equally, the rule is sensitive to the limitations and lack of expertise of the courts to sit in judgment over business decisions. The following statement of the business judgment rule by the Ontario Court of Appeal in *Maple Leaf Foods v Schneider Corp* (1998)[92] succinctly explains the principle:

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91 *Dodge*, *supra* note 3, which is usually cited as an authority for the principle of shareholder primacy, is equally an authority for the Business Judgment Rule. The court accepted the argument of Ford Motors about the need to conserve resources for the purpose of investing in a smelter and directed the company to distribute only a portion of its retained earnings.

92 [1999] 42 OR (3d) 177, (*sub nom Pente Investment Management Ltd v Schneider* Corp) [1999] 44 BLR (2d) 115 (Ont CA) [*Maple Leaf* cited to BLR].

> The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a *reasonable* decision *not a perfect* decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision...[93]

There can be no serious dispute with the argument that courts lack the expertise to judge the policies and decisions of large corporations operating in complex environments.[94] To a considerable extent, the business judgment rule is a product of the traditions and practices of courts in the common law system. It is mostly about contracts and enforcing the terms to which parties have agreed.

It is a different matter when lawsuits challenge corporate policies and decisions that affect a number of constituencies or groups in a corporation (for example, employees in *Air Canada* and lenders in *BCE*). In such cases, the court is under a duty to assess the policy and arrive at a decision. Specifically in the stakeholder context, the court must assess the impact of a policy on individual groups and deliver a verdict. In theory, it is possible for a court to play a radical role of this kind, considering the vast powers it has under the *CBCA*.[95] As already pointed out, a court's powers include setting aside or rewriting contracts among parties. The issue is whether, in reality, courts, with their traditions and systems, are equipped or willing to exercise their wide powers in deciding stakeholder cases. As LCB Gower accurately observed, "Unfortunately our...[court] procedure is ill-adapted for the exercise of the inquisitorial and salvationist role...imposed upon the judges..."[96]

In cases involving business or policy decisions, courts generally tend to rely on the business judgment rule and refrain from making an inquiry into the merits of the impugned policies. This prevents serious or objective assessment of corporate policies or strategies in most cases. A notable exception is in cases involving breach of the duty of loyalty and demonstrable self-dealing by the persons in

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93 *Ibid* at para 36.

94 Generally on the ambiguity in the Business Judgment Rule, see Fred W Triem, "Judicial Schizophrenia in Corporate Law: Confusing the Standard of Care with the Business Judgment Rule" (2007) 24 Alaska L Rev 23.

95 *Supra* note 6, s 241(3).

96 LCB Gower, *The Principles of Modern Company Law*, 3d ed by KW Wedderburn, O Weaver & AEW Park (London: Stevens & Sons, 1969) at 598. The width of the court's powers under the oppression remedy in the British Commonwealth jurisdictions can be contrasted with the appraisal remedy in American corporate law, which is more limited. The appraisal remedy merely enables dissenting shareholders to exit on receiving fair value for their shares. In contrast, courts in a British Commonwealth jurisdiction can specifically redress the grievances that are brought before them. The question that remains is whether this legal position is realized in actual practice.

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control. The following comment of Frank Easterbrook and Daniel Fischel, made in the context of agency costs and divergence between the interests of managers and shareholder-owners of corporations, describes quite well the situation resulting from the business judgment rule, "The handiwork of managers is final in all but exceptional or trivial instances. Courts apply the 'business judgment doctrine,' a hands-off approach that they would never apply to the decisions of administrative agencies or other entities-the officials of which do not stand to profit from their decisions…"[97]

In the recent years, however, the business judgment rule has been applied with greater caution and in a more restrictive manner—even in Delaware, a jurisdiction generally perceived to be management-friendly.[98] The "enhanced scrutiny" standard developed in Delaware weakens the business judgment rule that was originally based on a simple test of rationality of business decisions. The standard of enhanced scrutiny, which is applied in cases of change of corporate control, enables the court to examine (a) the adequacy of the decision-making process, (b) the material relied on by the directors and (c) the reasonableness of the decision that was made.[99]

In Canada, there is evidence that courts are circumspect in applying the business judgment rule especially in cases involving personal benefit for directors and officers. Courts readily apply the enhanced scrutiny standard, although the provincial Court of Appeal bracketed Ontario with Delaware in the matter of the business judgment rule.[100] A good example is *UPM-Kymmene Corp v UPM-Kymmene Miramichi* (2004).[101] In this case, the Ontario Court of Appeal upheld the challenge to the compensation package of a director although the approval process had gone through applicable safeguards, including scrutiny by an expert consultant and approval by a committee of the board. On the facts, the Court found that the consultant and the board committee had both acted without adequate information.

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97 Frank H Easterbrook & Daniel R Fischel, "The Corporate Contract" (1989) 89 Colum L Rev 1416 at 1417. Easterbrook and Fischel's reference was to the apparent imbalance in the corporate framework in which managers were omnipotent. Starting from here, they argued that the stock market took care of the imbalance and empowered the shareholders who could sell their shares and exit.

98 William T Allen, "Modern Corporate Governance and the Erosion of the Business Judgment Rule in Delaware Corporate Law" (2008) 4:2 Comparative Research in Law & Political Economy, online SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105591>.

99 See e.g. *Unocal Corp v Mesa Petroleum*, 493 A (2d) 946 (Del 1985).

100 *Maple Leaf*, *supra* note 90. In *Maple Leaf*, it is possible to view the court's reliance on the Business Judgment Rule as formal. The case was about a controlling shareholder that was unwilling to sell its shares to a specific bidder despite the marginally higher price offered by that bidder. This unwillingness was *de hors* the business judgment rule or the procedure by which the target company evaluated the competing bids made for its shares. In effect, the decision of the Ontario Court of Appeal upheld the right of the controlling shareholder to reject the offer made by a bidder to whom it did not want to sell its shares. This is about the more fundamental issue of property rights. In coming to its conclusion, the court also relied on the Business Judgment Rule. Given the controlling shareholder's position, it is difficult to see how any other conclusion was possible, with or without the business judgment rule.

101 250 DLR (4th) 526, (*sub nom UPM-Kymmene Corp v Repap Enterprises*) 42 BLR (3d) 34, (Ont CA).

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There is evidence of *some* erosion of the business judgment rule. It is true that courts will examine corporate actions and policies in some circumstances. Yet there are reasons to believe that progress is limited. Courts are more ready and effective in dealing with episodic or transactional instances—such as the change of control situation that attracts Delaware's enhanced scrutiny or the compensation package of an individual director in *UPM-Kymmene Corp*, discussed above.

The facts and outcomes in Canada's trilogy of stakeholder cases (*Peoples*, *Air Canada*, and *BCE*) are indicative of the difficulties for the courts in dealing with corporate policy and decisions. These difficulties persist and are unlikely to go away. The policy issues brought before the court were a joint procurement policy and its consequences (*Peoples*), distribution of assets to shareholders (*Air Canada*) and taking on additional debt to finance a leveraged buyout transaction (*BCE*). The facts in these three cases were unremarkable—or typical of business or policy decisions that corporations make. The business judgment rule is about the non-examination of policy decisions by courts, rather than courts upholding such decisions.

In *Peoples* suppliers who were unsecured creditors challenged a joint procurement policy, arguing that it had increased their credit risk. By the time the action was brought, the corporation had already failed, which was proof of failure of the policy. The suppliers argued that the directors of the corporation, who made the decision, owed them a fiduciary duty of care and the joint procurement policy was adopted in breach of that duty. In a famous passage, the Court recognized that the "best interests of the corporation" included interests of all the stakeholders,[102] but it upheld the directors' decision to combine the purchases of the two companies by applying the business judgment rule. As a result, the doctrinal acceptance of the stakeholder principle was not of much practical benefit to the suppliers who lost their action under the business judgment rule.[103]

Again in *Air Canada*, the business judgment rule was an important consideration for the Court in rejecting the challenge brought by pilots to the distribution of assets to shareholders. In dismissing the motion for injunction, the Court stated that the suit sought to "pre-empt…future business judgment by a present injunction."[104] Interestingly, Air Canada management treated the distribution of assets to shareholders as more than just a routine business issue; it obtained approval for the distribution as a plan of arrangement under the *CBCA*.[105]

It was the pilots' case that Air Canada, which had recently come out of bankruptcy, needed to conserve its assets. This was clearly the main concern of the

102 *Supra* note 1.

103 There is a criticism that the Supreme Court of Canada failed to take sufficient notice of the detailed evidence that had been recorded in the trial. Jacob Ziegel, "The *Peoples* Judgment and the Supreme Court's Role in Private Law Cases" (2005) 41 Can Bus L J 236.

104 *Supra* note 13, at para 42.

105 *CBCA*, *supra* note 6, s 192.

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pilots,[106] who attempted to prevent the distribution to shareholders for the purpose of improving shareholder value.[107] The plea of the pilots about the airlines' finances and the need to preserve them did not receive serious examination in court. It is significant that Air Canada justified the distribution in terms of shareholder value, an idea that has been influential for most of the last two decades. In the Court's decision to reject the efforts to prevent the distribution planned by Air Canada, the business judgment rule played an important role.

The pattern in *BCE* was similar, more or less. The court did not make a serious inquiry into the additional debt of over $38 billion that Bell Canada planned to take on for financing the leveraged buyout of the corporation, overriding the objections of the existing lenders. The business judgment rule was a major consideration for the court to refrain from examining the objections of the lenders of Air Canada who argued that incurring additional debt to finance the leveraged buyout seriously affected their interests and the company had to be restrained from borrowing.

In all the three cases, the outcome went against the stakeholder-plaintiffs who questioned corporate decisions. The courts applied the business judgment rule to uphold the decisions of the management. The business judgment rule is a uniform thread running through the three cases. The experience raises an important question. If courts are reluctant to evaluate the decisions of corporations, it must be an issue for public policy whether alternative forums are needed for the purpose. This article deals with this question in the final part, which proposes agencies with interdisciplinary composition to review corporate policy decisions that are currently excluded from judicial scrutiny under the business judgment rule.

B. Framing the Case in Legal Idiom

The first factor to contemplate before commencing a legal action is to interpret the facts in an idiom known to law and to present the case in terms familiar to the discipline. This is apparent in the way the stakeholder cases, in particular *Air Canada* and *BCE*, were argued in court. They raised challenges to corporate policy decisions and reinterpreted the facts to fit into the "artificial reasoning" that is often applied in law. The difficulties were less in *Peoples*. The cases were clearly developed with sensitivity to the business judgment rule. Simple challenges to policy decisions would invite dismissal under the rule and quite obviously, this was a factor.

Artificial reasoning in law has a fairly long history. In resisting the efforts of James I to assume powers to supervise judges, Edward Coke (1552-1634) argued that the mere ability to "reason" was inadequate to be a judge. Coke stressed that

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106 See e.g. the statement of Andy Wilson, President of the Air Canada Pilots Association, in Brent Jang, "Pilots union seeks to stop capital distribution by ACE", *The Globe and Mail* (5 October 2006) B12 [Jang, "Pilots union"].

107 This was stated by Robert Milton who was then the President & CEO of Air Canada. Bertrand Marotte, "ACE shareholders okay distribution plan", *The Globe and Mail* (6 October 2006) B6.

cases "are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it…"[108]

Oliver Wendell Holmes (1841-1935) was perhaps the earliest to point to the need for moving away from "black letter" law and enrich the legal discourse with perspectives from disciplines such as economics.[109] Yet, voices persist in favour of a narrower approach in law.[110] In any event, artificial reasoning and logic are facts of life in law. A latest example of such artificial reasoning can be found in the decision of the US Supreme Court on the constitutional validity of the healthcare legislation and the penalty it levies on persons not purchasing health insurance. In upholding the statute, the Chief Justice John Roberts of the Supreme Court equated the penalty with a tax and justified it by relying on the powers of the Congress to levy taxes.[111]

A second factor is the common law tradition of development of law on new subjects by adopting concepts and notions from other pre-existing branches. This is evident, for example, from the way in which courts developed the law applicable to trade in securities in the financial markets by borrowing principles from the law on sale of goods.[112] Common law is precedent-dominated and courts tend to apply familiar tools to resolve new situations. In the stakeholder context, this tendency is apparent in the efforts that Air Canada Pilots Association (Pilots Association), a new class of litigant, took to seek recognition as a "complainant" to maintain an oppression action under the *CBCA*. The Pilots Association argued that its members were similar to minority shareholders, who were already recognized as a vulnerable group in companies.

A third factor is the professional training of lawyers and their inculcated habits of thought. Lawyers are trained to interpret facts in an idiom that the courts are more likely to consider. Their arguments are shaped by stylized habits of thought and often represent a struggle to fit new ideas into pre-existing models. The influence of these factors is visible in the way the stakeholder cases were developed and presented in court.

1. *Air Canada Pilots Association v Air Canada ACE Aviation Holdings* (2007)

Air Canada's action had its origin in the bankruptcy proceedings of the airline that began in 2003. These proceedings culminated in a court-approved restructuring

108 *Prohibitions del Roy* (1658), 12 Co Rep 63 at 65, 77 ER 1342. To be fair, the statement of Coke is complex and it needs to be unbundled. It is apparent that Coke's motive was to preserve judicial independence from encroachment from the monarch. In making the statement, Coke pointed out that law, like any other profession, has its technicalities and a minimum level of expertise is needed both for presenting cases and for deciding them. Yet, it is a fact that law has developed its own reasoning and logic that, quite often, impede deciding cases on their individual merits.

109 OW Holmes, "The Path of the Law" (1897) 10:8 Harv L Rev 457 at 469.

110 Charles Fried, "The Artificial Reason of the Law or: What Lawyers Know" (1981-1982) 60 Tex L Rev 35.

111 *National Federation of Independent Business v Sebelius*, 567 US __ (2012), 132B S Ct 2566.

112 Stuart Banner, *Anglo-American Securities Regulation: Cultural and Political Roots*, 1690-1860 (Cambridge, UK: Cambridge University Press, 1998).

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in 2004 and the restructuring had a number of elements. A new corporation, ACE Aviation (ACE), was formed to take over the main airline business and assets. Several other parts, such as Aeroplan and Jazz Air, were constituted as partnerships, which issued partnership units. ACE held a sizable number of these partnership units and made plans in 2006 to distribute them to its shareholders. This was the subject of the Pilots Association's challenge in court.

The partnership units held by ACE were of two varieties: limited and general. The limited units had a fixed value, but the general units were of the "equity" variety, which would benefit from any rise in the value of the partnerships in the future. ACE made an initial public offering of a portion of the units, which were floated on the stock market in 2005. By 2006, the units had good valuations in the market.

The litigation was about ACE's plan in 2006 to distribute to its shareholders a portion of the partnership units it held. Treating the distribution as an "arrangement" under the *CBCA*, ACE sought approval for the transaction from the court in Quebec. The Pilots Association entered appearance and stated that it planned a separate action to question the distribution. Stakeholders, such as employees, are not expressly recognized in proceedings related to plans of arrangements under the *CBCA*. However, the case is different with derivative action and the oppression remedy, where they have statutory recognition. This was apparently a consideration for the Pilots Association.

The Pilots Association brought an action in Ontario under the oppression remedy to challenge ACE's distribution of the partnership units to its shareholders. From the stakeholder standpoint, this was a classic case of a corporate decision inspired by shareholder value, pitted against the more long-term interests that employees normally have in corporations. The facts in *Air Canada* can be understood from two perspectives: legal and non-legal. The following is a summary of *Air Canada*'s facts from a business or a general perspective, uninfluenced by legalistic considerations:

- The corporation, with a history of chronic financial sickness, came out of bankruptcy in 2004 with the help of various stakeholders, including employees, all of whom made concessions and additional commitments to facilitate a turnaround.
- The restructuring resulted in a significant loss of jobs. In addition, there were wage cuts and the employees made other concessions.[113] They also cooperated in obtaining regulatory approval for rescheduling the pension payments that were due.
- In 2006, the corporation launched a major financial engineering campaign that was intended to improve the market price of its shares.[114]

113 Jang, "Air Canada", *supra* note 9.

114 Robert Milton, chief of Air Canada at the time, stated that the stock market had undervalued ACE shares and the IPO was intended to unlock value. Brent Jang, "Air Canada readies for IPO" *The Globe and Mail*, Toronto (15 September 2006) B13.

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> The efforts for improving shareholder value included distributing partnership units in other businesses, such as Jazz Air and Aeroplan, to ACE shareholders.

The Pilots Association opposed the distribution because it believed that the distribution would weaken the financial position of the company, which had a recent brush with bankruptcy. In 2006, when ACE launched its financial engineering program, it eliminated 900 jobs citing Internet bookings and seasonal slowdown in passenger loads. But Canadian Auto Workers (CAW), representing Air Canada's call-center operators and customer-service agents, complained that "[the company] risk[ed] alienating consumers because the layoffs will lead to longer airport lineups and waits on the phone…"[115]

From a stakeholder perspective, the statements that ACE made to justify the distribution to shareholders are significant. In defending the distribution, ACE stressed that "shareholders are the rightful owners" and explained that it was not utilizing cash reserves for making the distribution.[116] This is a moot point because Air Canada's finances revealed that its cash earnings were quite meagre after considering the aircraft lease-rent and depreciation and the planned investments.

The challenge for the pilots was to develop a legal case, from the facts outlined above, that disclose a policy issue. But challenging corporate policy in court would invite dismissal under the business judgment rule. This concern is apparent in the legal case the pilots argued and lost. In court, the Pilots Association relied on the restructuring plan sanctioned in 2004 and raised a dispute on whether Air Canada and ACE implemented the plan as approved and authorized by the court. The Pilots Association also argued that the employees were not made aware that any growth in the equity value of the partnership units would accrue to ACE, which acquired them subsequently. The Pilots Association referred to the pension plan deficits of Air Canada to support its plea for conserving resources.

As already pointed out, the main concern of the Pilots Association was that the "airline's finances would be hurt" by the distribution of units.[117] The pilots were worried about their jobs and livelihood. It did not plead that it must get any of the assets the company planned to distribute among its shareholders. Rather, its interest was in conserving the corporate resources.

These arguments that the Pilots Association advanced in the court can be understood largely as products of the legal system. Obviously, the Pilots Association pinned its hopes on the inclusion of non-shareholders in the *CBCA* remedies. The court dealt with the issues raised by the Pilots Association rather conventionally. It rejected the Pilots Association's "attacks [on] the finality" of the restructuring order

115 Jang, "Air Canada", *supra* note 9.
116 *Ibid*.
117 Jang, "Pilots union", *supra* note 106.

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passed in 2004, and stated, "Paradoxically, this would leave the other creditors who gave up some $8 billion in creditor claims and those creditors and others who purchased shares in ACE, or extended credit to ACE, in reliance upon the finality and sanctity of the restructuring, at a severe disadvantage."[118]

In dealing with the Pilots Association's argument on the lack of awareness about future growth in the equity value of the partnership units, the court applied the tests of fraud and misrepresentation, and rejected the plea. Referring to the issue of Air Canada pension deficits, the court stated that with this argument "[the Pilots Association] would now seek to appropriate to itself other values realized through the restructuring."[119]

It is apparent that the Court approached the issue from a contractarian perspective. It treated the restructuring negotiated by all the stakeholders in 2004 as a contract—and bound them to its terms. An important issue is whether the contractarian framework is appropriate in cases of oppression, unfair prejudice or unfair disregard of the interests of stakeholders. This question is even more significant in actions brought by non-shareholder groups such as employees because they are rather new. A different set of standards and tools are needed to deal with the claims of corporate constituencies such as the Pilots Association in this case.

In another significant passage, the Court observed that "[the Pilots Association] does not plead any breach of contract, does not make any allegation as to actual or imminent insolvency...."[120] Again, the question is whether these are the appropriate standards considering the nature of the remedy included in the *CBCA*. The remedy deals with oppression, unfair prejudice or unfair disregard of interests and the court can even vary or set aside contracts. There is, *ex facie*, no need for the court to be constrained by contractarian notions, or attempt to resolve disputes within the limited framework of the law of contract or bankruptcy and insolvency.

The constraints of the conventional legal system and the struggle of the Pilots Association to somehow fit its case into the existing structures and ideas are equally evident from the manner in which the Pilots Association sought to gain recognition for its action. As already pointed out, the definition of a "complainant" in the *CBCA* is broad and inclusive.[121] Yet, the Pilots Association had to resort to precedent and phrases familiar to law, in order to qualify as a complainant. The following passage in the judgment sets out the efforts the Pilots Association made in this regard:

> [The Pilots Association] says that it was an affected unsecured creditor in the [restructuring] proceeding [of 2003-04] and therefore that

118 *Air Canada*, *supra* note 13 at para 59.

119 *Ibid* at para 60.

120 *Ibid* at para 77.

121 *Supra* note 6, s 238.

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> it properly has a standing to bring its application for oppression. [The Pilots Association] submits that it is a creditor of Air Canada with a special relationship of dependence and vulnerability analogous to a complainant who is a minority shareholder in the position of having reasonable expectations of management.[122]

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The Court ruled that the Pilots Association did not qualify as a "complainant" under the oppression remedy because the "essential nature of [the Pilots Association's] claim…relates to future wages and future pension benefits which are governed by the Collective Agreement."[123] Here again, the court used contractarian tools to find answers to the issues before it. The Pilots Association's challenge was wider in scope, involving corporate policy and its potential consequences for the future well-being of the enterprise.

The airline industry is known for vulnerability to business cycles and the concerns that underpinned the Pilots Association's legal action can hardly be faulted. With courts out of the picture due to the business judgment rule, the need for an expert arbiter to consider such disputes is an issue for public policy. In July 2009, Air Canada was placed in a group of "at-risk companies" for potential default on its bonds.[124] In June 2012, there was a report that Air Canada sought more help in meeting its pension obligations and had secured the support of an employee union.[125]

2. *BCE Inc v 1976 Debentureholders* (2008)

The transaction challenged in *BCE* was described as the "largest leveraged buyout in history."[126] The plan, initiated by the Ontario Teachers Pension Plan (OTPP) and a group of investors, was to take BCE, the holding company of Bell Canada, private through the purchase of all of its outstanding shares. The bondholders objected to the additional debt of over $38 billion Bell Canada planned to take on to finance its leveraged buyout. The Supreme Court of Canada rejected their challenge by a unanimous decision that approved the deal "on a remarkably expedited basis…"[127]

Bell Canada's LBO was also a deal of the shareholder value era. The Supreme Court of Canada noted in its judgment that the LBO would give BCE shareholders

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122 *Supra* note 13 at para 76.

123 *Ibid* at para 84.

124 Matthew Craft, "Deluge of Defaults", *Forbes* (6 July 2009), online: Forbes <http://www.forbes.com/2009/07/06/gm-lear-defaults-markets-bonds-income-economy.html>.

125 Brent Jang, "Air Canada looks for more pension help", *The Globe and Mail* (19 June 2012) B3.

126 Derek DeCloet & Sinclair Stewart, "The man who won the auction for the biggest prize in Canada", *The Globe and Mail* (2 July 2007) B1.

127 Ed Waitzer & Johnny Jaswal, "*Peoples, BCE,* and the Good Corporate 'Citizen'" (2009) 47:3 Osgoode Hall LJ 439 at 456. SCC pronounced the judgment on June 20, 2008, but took six months to deliver its reasons, which it did on December 20, 2008.

a gain of 40 percent over the prevailing market price of BCE shares.[128] Share price was the factor that received the greatest attention throughout.[129] Ironically, analysis in the media and the investment industry was not overly concerned with business outcomes or the potential commercial advantages from the LBO.[130] This is particularly relevant considering the premium offered to BCE shareholders, which needs economic justification.[131]

To finance the LBO, valued at $52 billion, BCE had to borrow $38.5 billion.[132] The balance amount was to be arranged by the OTPP investor group through a combination of loans and equity contribution. As a part of the deal, BCE had to issue $8 billion of equity to incoming investors.[133] The existing debentureholders of BCE objected to the company incurring additional debt of $38.5 billion to fund the LBO.[134] The plan for additional debt affected the interests of the debenture holders in several ways:

- Trading price of the debentures fell by 20 percent when the LBO was announced;
- BCE debentures were downgraded to below "investment grade;"[135] and
- The downgrade created a problem for many institutional investors who were not permitted to hold securities with low credit rating.

Injury to bondholders' interests was, thus, real and demonstrable. In *BCE*, like in *Air Canada*, the facts can be interpreted from a business or economic perspective. The bondholders complained about the additional borrowing to buy out the shareholders at a premium of 40 percent over market price. It was not clear whether any

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128 *Supra* note 10 at para 4.

129 See e.g. Lori McLeod, "No matter what happens, investors should profit", *The Globe and Mail* (2 July 2007) B4.

130 The relative lack of attention to the core business is evident in the news release about the definitive agreement it had reached with BCE. BCE, News Release, " BCE Reaches Definitive Agreement to be Acquired By Investor Group Led by Teachers, Providence and Madison—BCE Board Recommends Shareholders Accept C$42.75 (US$40.13) Per Share Offer" (June 30, 2007), online: BCE <http://www.bce.ca/news-and-media/releases/show/bce-reaches-definitive-agreement-to-be-acquired-by-investor-group-led-by-teachers-providence-and-madison-bce-board-recommends-shareholders-accept-c4275-us4013-per-share-offer>. The Material Change Report dated July 5, 2007 filed by BCE with the Ontario Securities Commission regarding its definitive agreement with the OTPP consortium is similarly silent about the business dimension of the transaction. See BCE Inc, *Form 51-102F3—Material Change Report* (July 5 2007), online: SEDAR <www.sedar.com>.

131 This raises questions about share valuation practices in the stock market and the Efficient Markets Hypothesis – indeed the role of the financial markets as an institution in the sociopolitical economy. These are, however, stories for another day.

132 *Supra* note 10 at para 20.

133 *Ibid*.

134 There is also evidence of the disquiet the development aroused among the employees. See Tim Shufelt, "Unions gear up to protect BCE members", *The Globe and Mail* (2 July 2007) A4. However, unlike in *Air Canada*, *supra* note 13, the employees do not appear to have taken any action with respect to the corporate changes that were planned in *Bell Canada*, *supra* note 10.

135 These facts are stated by the Supreme Court of Canada, *ibid* at para 21.

part the resources mobilized would be used for the company's business, and if so, potential benefits.[136]

Again, a challenge for the bondholders was to present the case in legal idiom. The business judgment rule dissuaded them from emphasizing the commercial implications of the LBO transaction, regardless of their importance. In stressing the business aspect, the bondholders would only weaken their chances in litigation. It was, therefore, better for them to make use of the existing legal tools and the oppression remedy.

BCE consisted of two separate actions. BCE treated the LBO as an "arrangement" under the *CBCA*,[137] and sought court approval, which was opposed by the bondholders. The bondholders brought another action under the oppression remedy.[138] To oppose the plan of arrangement, the bondholders relied on the applicable "fair and reasonable" standard.[139] The Supreme Court of Canada rejected the bondholders' argument on the ground that they had only demonstrated harm to their economic interests by the downgrading of Bell Canada debt and fall in the trading price of its bonds. But the bondholders had not demonstrated any violation of their legal rights by Bell Canada.[140]

The Supreme Court of Canada applied the "reasonable expectations" standard in dealing with the oppression action. It held that there could be no reasonable expectation for the bondholders that Bell Canada would maintain the trading price of its bonds or its credit rating. Accordingly, the Supreme Court of Canada ruled that the bondholders could not hold Bell Canada to anything more than the terms of their contract with Bell Canada.

The case made out by the bondholders and the reasoning applied by the Supreme Court of Canada both conformed, more or less, to existing legal forms and precedents. In substance, however, the case has some novel features. It is about the emerging stakeholder vision in corporate governance and the challenges in balancing the interests of the several groups that make up modern business corpo-

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136 In July 2008 BCE unveiled a "100-day plan" and appointed a new CEO. Gordon Pitts, Jacquie McNish & Simon Avery, "New BCE boss talks of ambitious changes—details to follow", *The Globe and Mail*, (12 July 2008). According to the report, the 100-day plan was "an aggressive strategy aimed at slashing costs, non-core telecom assets and layers of management…" Without more specific details, it is not possible to estimate the impact of the plan on BCE's business. In any event, there could be interesting questions about the 100-day plan. For one, it is not clear why the plan was not conceived or implemented, independent of the LBO transaction. After all, no significant money was expected to come into the company from the LBO and the 100-day plan did not, apparently, have any financial cost. Curiously, the restructuring plan does not appear to have been implemented after the LBO fell through.

137 *Supra*, note 6, s 192. Treating the LBO as an arrangement and seeking court approval appear to be strategic decisions to enhance the legitimacy of the transaction.

138 *Ibid*, s 241. In addition, a set of bondholders sought a declaration that the LBO cannot proceed without their trustee's approval under the terms of the applicable deed. It was dismissed by the Superior Court, and the matter was not carried in further appeal. See *CIBC Mellon Trust v Bell Canada*, 2008 QCCS 898, 43 BLR (4th) 39.

139 See e.g. *Re Stelco Inc* (2005), 75 OR (3d) 5, 253 DLR (4th) 109 (Ont CA).

140 To some extent, the decision upsets the longstanding law on the standard governing court approval of plans of arrangement.

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rations. Interestingly, in *BCE*, the Supreme Court of Canada referred to a director being required "to act in the best interests of the corporation, viewed as a good corporate citizen."[141] This is similar to the commendatory observations it made earlier in *Peoples*. The Court reiterated that corporate interests include a broad range of stakeholders, and not merely shareholders.[142] There are difficulties in reconciling this with the ruling that approved Bell Canada's LBO designed to benefit shareholders, potentially at the cost of other groups such as lenders and employees.

In any event, to bring legal challenges to corporate decisions it is necessary to substantially reinterpret the facts to fit the idiom of law, and even then chances are far from certain. The specialist forums proposed in Part IV of this article will, among other things, facilitate a review of appropriate business or policy decisions on their merits and for their impact on different stakeholder groups. It can reduce the need for complicated legal reasoning and reinterpretation of facts – whose perils are evident from experience.

3. *Peoples Department Stores Inc (Trustee of) v Wise* (2004)

In *Peoples*, there was a challenge, *ex post*, to a decision of the directors of Peoples Department Stores to adopt a joint procurement policy with the Wise chain of stores. The legal strategy in the case was apparently inspired by the law on directors' duties in other common law jurisdictions (US, UK, Australia, and New Zealand), which permits creditors of corporations that are insolvent, or are on the verge of insolvency, to proceed against the directors.[143] Any recovery from such actions would benefit the creditors, who will be the residual claimants in insolvent corporations.

Specifically in the Canadian context, the creditors framed their case with reference to the fiduciary duties of officers and directors which are codified in the *CBCA*. They argued that the joint procurement policy adopted by the Wise brothers and the large volume of credit sales made to Wise stores was in breach of the fiduciary duty of care the directors owed the plaintiffs who were suppliers and/or creditors of Peoples Department Stores.

Thus, the creditors invoked two legal principles to assail the procurement policy of the corporation and seek personal recovery from the directors who had adopted the policy. These were, respectively, the law on the rights of the creditors of insolvent corporations and the statutory fiduciary duties applicable to corporate directors and officers in Canada. The challenge to the decision to make joint purchases for two businesses was couched in these terms. Among the three cases discussed here, *Peoples* was perhaps the least complicated in the matter of interpreting the facts underpinning the action into a legal case.

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141 *Supra* note 10 at para 81.

142 *Ibid* at para 82.

143 On developments in the other common law jurisdictions, see Ziegel, "Creditors as Corporate Stakeholders", *supra* note 54.

C. Stakeholder Interests and Legal Rights

Traditionally, the law has been about "rights" and the legal system is engineered to provide remedies for the breach of clearly-defined rights. Given this tradition and conditioning, a question is whether the legal system can effectively handle the "interests" that form the core of the stakeholder principle. The issue is especially relevant because often non-shareholder groups lack clear rights. Yet, there can be little dispute that these groups have "interests," which is a rather problematic concept in law. At the same time, there is an express reference to "interests" in the statutory remedy against oppression and vast powers are conferred on courts to rectify situations about which complaints are made.

The difficulties for courts in dealing with interests, as distinct from rights, were evident in *BCE*. In disposing of the lenders' complaint about the fall in the trading price of the bonds and the downgrading, which the company's bonds suffered in the credit markets, the Supreme Court fell back on the concept of rights and restricted its enquiry to whether the lenders had any legal rights to require Bell Canada to maintain bond prices and preserve its credit rating. The court concluded that the lenders did not have any such rights and there could be no remedy for any problems faced by the lenders on these issues. This was the verdict despite the fact that the *CBCA* oppression remedy includes "interests" and the lenders who brought their action under that remedy were able to demonstrate harm to their interests.

The concept of interests that informs the stakeholder vision is problematic in law. On the one hand, there is a broad conception of the stakeholder principle in management, but the efforts in law are generally to make the principle more concrete and workable.[144] Broad statements of the stakeholder idea by courts, such as those made by the Supreme Court in *Peoples* and *BCE*, do not provide practical guidance to corporations in ordering their affairs.[145] As pointed out earlier, this was not of much help to the non-shareholder groups that were before the court in *Air Canada* and *BCE*.

The statements made by companies are another set of reference points on the issue of stakeholders, their interests and their relative position with shareholders. Quite often, corporations couch their stakeholder vision statement in terms of shareholder value. The position of Power Corporation of Canada, described in the following passage, reflects the idea quite clearly:

> Responsible management has always been an intrinsic corporate value at our company and is a constant priority that we believe is essential to long-term profitability and value creation. Responsible management defines our approach at Power Corporation in all facets

144 See PM Vasudev, "Corporate Stakeholders in New Zealand—The Present, and Possibilities for the Future" (2012) 18 New Zealand Business Law Quarterly [Vasudev, "Corporate Stakeholders"].

145 See Waitzer & Jaswal, *supra* note 129.

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> of our business. It informs our efforts when dealing with Corporate Social Responsibility (CSR) issues and initiatives relating to our portfolio companies. The same is true with the manner in which we manage our relationships with the communities where we are established and the ethical way in which we treat our customers, employees and business partners.[146]

Prioritization of interests is obvious in the statement, yet, it is more integrative in approach. Power Corporation presents responsible management as instrumental in achieving "long-term profitability and value creation." This is aligned to the "enlightened shareholder value;" of the kind now codified in UK.[147]

A more curious position is seen in the case of Toronto-Dominion Bank. The bank has published annual corporate responsibility reports at least since 2006 and its report for 2011 identified eight groups of stakeholders, including shareholders and investors. This is similar to the idea of parity among all the corporate groups, including shareholders, which is seen in the Dickerson Committee report.[148] Other than shareholders, the TD Bank report lists customers, employees, government, suppliers, industry associations, communities and non-governmental associations as stakeholders, and it states, "We interact with these stakeholder groups on a daily and/or weekly basis, with teams across TD dedicated to maintaining relationships and acting on the issues and concerns brought to our attention. We continue to offer an open-door policy with NGOs and interact as needs and opportunities arise."[149]

> The bank's corporate governance statement is more explicit in describing the corporate objective, which is about shareholder value. The statement readsWe are very proud of TD Bank Group's leadership in corporate governance. Strong corporate governance practices assure our shareholders that TD is being operated in their interests. We also believe that we will be more attractive to other investors because our strong corporate governance culture builds additional shareholder value.[150]

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146 Power Corporation of Canada, "Responsible Management" (3 May 2012), online: Internet Archive Way Back Machine <web.archive.org/web/20120503061300/http://www.powercorporation.com/en/social-responsibility/responsible-management/>.

147 *Companies Act* 2006, *supra* note 24.

148 *Supra* note 39.

149 TD Bank Group, *Taking Responsibility to be The Better Bank—2011 Corporate Responsibility Report and Public Accountability Statement*, online: Toronto-Dominion Bank <http://www.tdcanadatrust.com/easyweb5/crr-2011/pdfs/TD-CR-2011-Report-ENG.pdf> [TD Bank Group, "Corporate Responsibility Report"].

150 TD Bank Group, *Corporate Governance at TD Bank Group*, online: Toronto-Dominion Bank <http://www.td.com/about-tdbfg/corporate-governance/index.jsp> [TD Bank Group, "Corporate Governance"].

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The bank, quite obviously, understands corporate governance as a larger framework that includes corporate responsibility and a commitment to the stakeholder principle. The goal of corporate governance, understood in this wider sense, is building shareholder value. This can again be understood as an effort to prioritize interests and it elevates shareholders to a position of pre-eminence. But here again, like in the case of Power Corporation of Canada, the approach is not overly hierarchical. It tries to be integral.

Difficulties remain when integral approaches, such as those adopted by Power Corporation of Canada and Toronto-Dominion Bank, are tested in situations of conflict among the groups; as in *Air Canada* and *BCE*. These cases were fought about policies designed to benefit the shareholders, but the policies, it was argued, were inimical to the corporate interests (in *Air Canada*) or to the lenders (in *Bell Canada*).

The non-shareholder groups lost both cases because, among other things, the courts viewed the disputes from the legal perspective of rights. They examined whether non-shareholder groups that brought the actions had suffered any violation of rights as conventionally understood in law. Starting from here, the conclusion was that there was no breach of rights and, as a result, the plaintiffs lost. A problem with this reasoning is that it ignores the concept of "interests" that is explicitly recognized in the oppression remedy in the *CBCA*—under which the actions in both *Air Canada* and *BCE* were brought.

In *BCE*, the Supreme Court expressly applied the rights-interests paradigm and preferred the rights-based interpretation. It favoured shareholders to the detriment of lenders who provided material that demonstrated the harm to their interests from the LBO transaction. In Roscoe Pound's conception of the development of legal order,[151] it is possible to view the stakeholder principle as currently being in the "interests" phase, potentially on its way to crystallizing into better-recognized rights. This can be yet another reason for having interdisciplinary forums to adjudicate stakeholder interests, rather than law courts which are accustomed to dealing with "rights."

D. Legal Rules on Form, Evidence and Procedure

The technical rules on procedure, form and evidence that inform court procedure can be viewed as another factor impeding courts from enquiring into business issues on their merits. Some of these difficulties were apparent in two of the three stakeholder cases discussed in this article (*Peoples* and *Air Canada*). The discussion below supports the arguments in favor of developing alternative forums for adjudication of stakeholder conflicts.

In *Peoples*, the older case in which the Supreme Court of Canada stated the stakeholder principle in an expansive form, unsecured creditors charged the directors with breach of the fiduciary duty of care. As already indicated, a probable explanation

151 *Supra* note 87.

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for the creditors to argue their case on this point was the law on fiduciary duties of corporate directors as it had developed in other common law jurisdictions. In the US, UK, Australia and New Zealand, creditors of insolvent corporations can bring derivative actions, which are generally based on breach of fiduciary duties. Apparently encouraged by the law in these other jurisdictions, the unsecured creditors in *Peoples* argued that the combined procurement policy adopted by the directors was in breach of the fiduciary duty of care the directors owed them. They lost the case.

Another possible option available to the unsecured creditors was to rely on the oppression remedy and argue that the joint purchase policy adopted by the directors was prejudicial to their interests. But a difficulty here for the unsecured creditors would have been to persuade the court first that they are "proper persons" to bring the action. Trade suppliers are not "security holders" expressly included in the definition of "complainant" in the *CBCA* and this would have made it necessary for the unsecured creditors to obtain leave of the court first to maintain the action.[152] This was possibly another consideration for the unsecured creditors to build their case around fiduciary duties, rather than make an effort under the apparently more complicated oppression remedy.

It is interesting to debate about the possible outcome in *Peoples* if the unsecured creditors had brought their case under the oppression remedy. Significantly, the Supreme Court of Canada made a reference to the fact that the lawsuit filed by the suppliers was not under the oppression remedy.[153] The nature of the proceeding also determines the evidence that will be led in trial and the manner in which a case is argued. Having once chosen a path, a litigant must by and large stick to it and has limited flexibility to change the course midway. These are pointers to the technicalities that are often critical in conventional legal proceedings and their impact on the outcome in stakeholder cases.

In *Air Canada* again, the technical nature of the proceeding possibly affected the outcome. It was, as already pointed out, an action under the oppression remedy; the Pilots Association made efforts to get recognition from the court as a "proper person" to maintain the action, but was unsuccessful. With the benefit of hindsight, derivative action might have been an option for the Pilots Association.[154] This would have still required it to pass the "proper person" test, but it might have perhaps enabled it to frame its case in more accurate terms. It could have more directly pleaded the weakening of Air Canada's financial position due to the distribution of assets to shareholders. In a derivative action, it would not have been necessary for the Pilots Association to prove harm or injury to the specific interests of the pilots. It would have been adequate to plead injury to the corporate interests.

152 In *Air Canada*, *supra* note 13, the Court did not recognize the Pilots Association as a proper person for the purpose of the oppression action. This is a pointer to the challenges in obtaining leave of the court on this issue.

153 *Supra* note 1 at para 30.

154 *CBCA*, *supra* note 6, s 239.

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But then, there can be questions about the acceptability of employees' right to agitate the issue of broader corporate interests. Historically, the limited right recognized for non-shareholder groups is for them to bring derivative actions in corporations that are insolvent or nearing insolvency. In this universe, a first hurdle will be to establish a right for employees, or any other stakeholder, to question policy decisions on the grounds that they are not in the larger corporate interests.

Here again, it is not possible to speculate on the potential outcome if *Air Canada* had been argued as a derivative action rather than under the oppression remedy. Probably, the business judgment rule would have been applied by the court to refrain from inquiring into corporate policy. My limited purpose in raising these issues is to point out the different options that are usually available in law and how they can lead to different results—on essentially the same facts. In the stakeholder cases reviewed in this article, the result went against the non-shareholder groups that litigated. The question is whether a different agency that is not governed by technical rules to the extent that courts are can produce better results and enable stakeholders to make more effective use of the remedy that is available to them.

IV. CONCLUSION AND A PROPOSAL

A. Problems with the Current Stakeholder Remedy

A major purpose of this article is to examine the efficacy of the stakeholder remedy in Canadian law. This is important because there is no clarity on the traction that nascent ideas on corporate stakeholders have gained in law. The review reveals that courts are inhibited by more conventional standards and find difficulties in protecting non-shareholder interests, as distinct from clear rights derived from the law or contract. The business judgment rule is another major impediment to courts seriously engaging with stakeholder disputes. The traditional rule that is founded in the courts' lack of business expertise encourages deference to corporate decisions and often blocks a serious inquiry into the case. The article makes a modest effort to deal with the bottlenecks that have been identified and to make the stakeholder remedy more effective.

This concluding part advances a proposal for forums with interdisciplinary composition as an alternative agency to adjudicate stakeholder disputes. The need for such an agency is illustrated by the experience with courts that demonstrates their difficulties in dealing with corporate disputes. The legal system, with its conventional tools and techniques, is apparently overwhelmed by the complexities of the stakeholder model of corporations and unable to formulate effective or meaningful responses.

To be clear, the stakeholder principle is about consideration of all interests in business corporations. It is not about excluding or subordinating the interests of shareholders. It is about sensitivity to centralized power in business corporations and the importance of fostering the wide cross-section of interests that are impacted

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by corporations. Viewed in this perspective, it is questionable how far even shareholders, conceived as a group of stakeholders, are able to be effective in the current dispensation. In a recent Delaware case,[155] the shareholders of Citigroup were unsuccessful in their challenge to the decision of the corporation to engage in risky credit derivatives business. The business judgment rule was an important factor for the court in granting the corporation's preliminary motion for dismissal.

Apart from the powerful business judgment rule, another important factor is that the legal system is built largely around rights. Rights are better capable of addressing the law's need for certainty. They can be more effective in adjudicating disputes applying the adversarial principle. In the system of law, the court's task is to select winners and losers, and to do so, it is useful to have a clear set of rights for one party that can prevail over the other.

The stakeholder principle would be ill at ease in the conventional legal setting. The stakeholder idea is based on a different vision—one that involves balancing the interests of the several groups in a business corporation and fostering all of them, without excessive ranking or prioritization among the groups. This is a challenge the stakeholder principle poses for the law and it has long troubled jurists—even those of a more liberal persuasion. Traditionally, the concern of legal scholars has been about diluting managerial accountability, which is understood as owed to shareholders. This was the point Adolf Berle raised in his response to E Merrick Dodd's advocacy of the stakeholder principle over eight decades ago.[156]

To be fair, there is substance in the complaint of Berle. But his objection would be more valid in the conventional setting of law and preconceived ideas about rights, adversarial proceedings and the selection of winners and losers. The important questions that public policy must come to grips are whether the stakeholder principle must be abandoned or the statutory remedy for stakeholders be allowed to exist in an ineffective form (because the legal system has difficulties in applying it within the conventional parameters of the system)? Or is there a need to look for alternative mechanisms that can better handle the stakeholder model? This issue is at the root of the question about having independent and expert arbiters to inquire into corporate policy decisions that are usually at the core of stakeholder issues.

Few can dispute that the stakeholder vision has emerged as a major strand in corporate governance; it has found increasing recognition in corporate law, both statutory and judge-made. There is also evidence of widespread acceptance of the stakeholder idea by large corporations.[157] While the stakeholder ideal has become an important element in corporate governance, the law of corporations has

155 *In re Citigroup Shareholder Derivative Litigation*, 964 A (2d) 106 (Del Ch 2009) [*In re Citigroup*].

156 Adolf A Berle, Jr, "For Whom Corporate Managers Are Trustees: A Note" (1931-1932) 45 Harv L Rev 1365.

157 See generally PM Vasudev, "The Stakeholder Principle, Corporate Governance, and Theory: Evidence from the Field and the Path Onward" (2012) 41:1 Hofstra L Rev 399 [Vasudev, "The Stakeholder Principle"].

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experienced some difficulties in implementing it as a legal principle. To a large extent, this is because of the lack of precision in the stakeholder framework— understood as a legal principle.

It is apparent that the situation is different in management theory, which is not attuned to thinking about parties or groups in hierarchical terms and ranking them according to their position. In law, rank determines the rights of the groups, *inter se*. In management, it is sufficient to state the stakeholder idea as a guiding principle and in broad terms. This can facilitate the adoption of policies that reflect the interests of all groups, although it is open to debate how far the idea can be pushed. In the event of conflict, for example as seen in *BCE*, the issue will have to move towards ranking and making choices. In any case, management theory by and large finds it less necessary to prioritize the different groups in a corporation at the adoption stage of the stakeholder vision.[158] The statements of Toronto Dominion Bank, discussed above, are evidence of this trend.[159]

In implementing the stakeholder idea as a legal principle, valuable lessons can be learned from cases such as *Air Canada* and *BCE*. They illustrate the difficulties of the courts in dealing with corporate decisions, which have led to the development of the business judgment rule. The experience suggests that it is necessary to deal with the business judgment rule, and the notions underpinning the rule, if the stakeholder remedy in Canadian corporate law is to be more effective. In short, the issue is about opening up corporate policy or strategic decisions to some kind of review.

Opening the decisions of business corporations to review can have some important political and philosophical implications. The issue is not merely technical. It is not just about finding a solution that can deliver results, but equally about developing solutions that are appropriate and acceptable. A basic issue is whether a review mechanism would be an intrusion into business freedom. It can be viewed from the lens of liberty and property rights, which has a longstanding history and finds ready resonance in the English-speaking world. Or at a practical level, whether opening up managerial decisions to review and potential overruling will undermine the efficiency of corporations, which will in turn hamper their ability to create and distribute wealth.

It was argued in 1970 that the open structure of corporate law, and its withdrawal from regulation of corporations, drew its legitimacy from the success of corporate enterprises in generating wealth and enhancing prosperity in society.[160] More recently, the shareholder primacy norm, which is generally understood as being opposed to the stakeholder ideal, was credited with having "produced the highest

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158 For an account of the differences in the understanding of the stakeholder principle in law and in management, see Vasudev, "Corporate Stakeholders", *supra* note 147.

159 TD Bank Group, "Corporate Responsibility Report", *supra* note 152; TD Bank Group, "Corporate Governance", *supra* note 153.

160 James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (Charlottesville, Va: The University Press of Virginia, 1970).

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standard of living of any society in the history of the world."[161] These arguments can find some resonance in current Canadian law, which, as noted earlier, is heavily influenced by American law.[162]

There are some grounds to revisit the issue. One is that unionized labour, which was powerful until the 1970s, has since greatly declined.[163] Then, there is globalization. Not only can business enterprises outsource production to cheaper offshore locations, they must also compete with companies from all over the world. These developments effectively alter the power structure in corporations. A topic for future research on corporate governance and globalization may be the relative levels of growth in corporate wealth and the wealth of citizens during the recent decades. In today's globalized workplaces and markets, the "nexus of contracts" conceptualization of business corporations that developed in the 1970s has less validity and it can be viewed as incomplete.[164]

Emerging sensitivities about executive pay are another indicator of the problems associated with the centralized power structure in business corporations. They demonstrate that Adam Smith's insight about agency costs continues to be valid.[165] Recent ideas about aligning executives' interests with those of shareholders through stock options have revealed the structure's limitations.[166] The failures seen in the banking and financial sector during the Credit Crisis of 2008-09 and the following years underscore the risks in unchecked corporate power and the need to develop institutional mechanisms to foster more responsible governance.

The difficulties with the present arrangement were revealed in *In re Citigroup Shareholder Derivative Litigation* (2009).[167] The Delaware court rejected the efforts of Citigroup shareholders to challenge the decision of the corporation to engage in risky credit derivatives business. In granting Citigroup's preliminary motion for dismissal, the court relied on the business judgment rule. It also upheld, in broad terms, enhancing shareholder value as the goal of corporate governance. Accepting the shareholder value maxim and combining it with the business judgment rule, the court declined to inquire into the decision of Citigroup to take up the credit derivatives business. This is with a corporation that went to the brink of failure and was able to avoid collapse only because of the assistance provided by the US government. The

161 Stephen M Bainbridge, "In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green" (1993) 50:1 Wash & Lee L Rev 1423 at 1446.

162 Ziegel, "Creditors as Corporate Stakeholders", *supra* note 54.

163 See e.g. Janet McFarland, "State of the Union" *The Globe and Mail* (3 September 2012) A6.

164 This memorable phrase was coined by Jensen & Meckling, *supra* note 3, who argued that corporations were nothing but groups of stakeholders who were free to negotiate their positions and maximize their advantage, acting in self-interest. This presumes a position of strength for all the parties, which is open to debate. It is necessary to revisit the notion for its validity in the present conditions.

165 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Hartford, Conn: Lincoln & Gleason, 1804) vol 1.

166 The myopic business practices and stock market-centric policies bred by stock options were evident in the Enron failure in 2001-2002. On stock market short-termism, see generally Lawrence E Mitchell, *Corporate Irresponsibility: America's Newest Export* (New Haven, Conn: Yale University Press, 2001).

167 *Supra* note 154.

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In re Citigroup case can be cited as evidence of the continuing power of the business judgment rule and the virtual unassailability of corporate decisions—and their consequences for corporate constituencies, including shareholders.

B. Specialist Forums for Stakeholder Disputes—A Potential Alternative

The stakeholder principle in corporate governance has attained the status of a rule of common law. This much is evident both from the clear observations made by the Supreme Court of Canada in *Peoples* and *BCE*, and the widespread recognition of the principle by large corporations.[168] Likewise, there is also judicial recognition of shareholder value as a legitimate corporate purpose. Interestingly, this happened in *BCE* and also in *In re Citigroup*. There is lack of clarity in the landscape. This could be problematic if there are more conflicts in the future over corporate decisions designed to promote shareholders' interests, and potentially at the cost of other groups. Courts, as already argued, do not appear to be equipped to deal with stakeholder conflicts. There is, therefore, a need for developing alternative mechanisms that can be more effective in implementing the stakeholder remedy already available in Canadian corporate law.

This article proposes the creation of panels with representatives from a cross-section of disciplines, such as finance, law, management and other relevant disciplines, to deal with stakeholder disputes. Panels with a broader set of skills will likely be better equipped than courts to appreciate the business dynamics and arrive at decisions that are more balanced. It is about bringing an interdisciplinary perspective to the resolution of corporate disputes. Possessing necessary expertise, the panels proposed here may be less inhibited by the considerations that underpin the business judgment rule. These panels will be better positioned to examine decisions or policies on merits without being overly constrained by the technical rules that govern litigation and the adversarial culture that characterizes legal proceedings.

Ability to consider business decisions on their own terms, without the need to first fit them into pre-existing legal models and concepts, can be an advantage in achieving better results that promote the stakeholder vision in corporate governance. Expert panels with cross-disciplinary skills will be less constrained by the tendency to engage in "artificial reasoning" that often shapes the outcomes in litigation. This can enable them to deal with stakeholder disputes in a more direct manner and adjudicate with greater efficacy.

Specialist panels are hardly a novelty. They have been around for several decades and the regulatory landscape is replete with specialized agencies that oversee specific sectors of the economy. In fact, the Interstate Commerce Commission was established in the US over 130 years ago—in 1887—to regulate railway companies. Securities regulators and telecommunication regulators are two more recent examples.

168 See e.g. Vasudev, "The Stakeholder Principle", *supra* note 160.

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The argument advanced here is for creating a similar expert agency that is better equipped to deal with challenges to corporate policy decisions, viewed from the stakeholder perspective.

In corporate governance and advancing the stakeholder principle, specialist forums can have the following advantages:

- With interdisciplinary skills in finance, management, law, and other relevant disciplines, the forums can conduct necessary inquiries and gain a proper understanding of the issues. This is a prerequisite for crafting effective solutions. Unlike courts, the specialist forums will not be inhibited by lack of expertise, which is at the root of the business judgment rule developed at common law. For example, in the *BCE* LBO case, discussed above, the presence of finance and management experts might have made a difference to the way the LBO dispute was handled and the outcome.
- Equally, specialist forums with a multidisciplinary character will be less constrained by legal forms and this can improve its ability to deal with business issues as they are. It will not be necessary to first fit them into the idiom and reasoning of the law, which often has the result of distorting the actual issues at stake. These difficulties were in full play in *Air Canada*.
- In keeping with the spirit of the stakeholder vision in corporate governance, it would be appropriate if the proceedings of the specialist forums are not based on the adversarial principle. This would not come in the way of corporations and stakeholder groups receiving professional expert assistance and counsel they may need to participate in the proceeding, but this would be in a framework focused on resolving the dispute, rather than the confrontational note that characterizes adversarial litigation.
- Importantly, the proposed framework would be less guided by the binary approach to choose winners and losers. This is another point of departure from the typical outcome in traditional litigation. Rather, the specialist forums' effort will be to craft solutions that better address the interests and concerns of all the stakeholder groups. The effort to formulate decisions that are broadly acceptable to contesting groups would be in the spirit of harmony and cooperation that underlies the stakeholder vision and is less constrained by the hierarchical notions that often influence corporate law.
- Finally, with a more holistic and wholesome approach, the specialist forums can make better use of the vast and wide-ranging powers that are currently vested in courts.[169] As LCB Gower pointed out several

169 See *CBCA*, *supra* note 6, s 241(2).

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> decades ago, courts have not been effective in making use of these powers.[170] Recent cases analyzed in this article indicate that courts are still hampered, more or less. One challenge is to improve the practical efficacy of the dispute-resolving powers the statute vests in courts and the specialist forums proposed here can be an instrument in this effort.

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To be clear, the specialist forums proposed in this article are not claimed to be perfect. They are merely an effort at reducing the imperfections seen in the current remedy—a measure of incremental reform. Since courts generally refrain from inquiring into complex business issues and deciding them because of their lack of expertise, the interdisciplinary forums can take care of this handicap and facilitate better inquiry and more effective dispute resolution.

There can be some counter-arguments against the specialist forums. One would be about throwing open corporate decisions to review, which would undermine the efficiency of business corporations. This must, however, be balanced with equally valid concerns about corporate power[171] and the need to subject some decisions to scrutiny and review. The twentieth century argument that corporate power is legitimated by the wealth that corporations generate and distribute[172] appears to be less valid given the features of the present globalized world such as the rise of Asia and substantial outsourcing of operations by North American enterprises. It is also questionable how far corporate prosperity translates into societal prosperity.[173] Therefore, it would be difficult to simply brush aside objections to corporate power and decision-making authority. A more appropriate choice would be to include well-reasoned and clearly-defined criteria in the new remedy to ensure that it is only used in appropriate circumstances, without impinging on legitimate business freedom. Similarly, any complaints that might be made about the costs of the alternative remedy proposed here must be weighed with the benefits it is expected to generate, which would be to promote greater harmony in corporate governance and greater convergence between corporate and societal interests. From this perspective, it can be reasonably argued that a more effective stakeholder remedy will be worth the cost of administration.

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170 Gower, *supra* note 96.

171 There is extensive literature on corporate power and the criticisms against it. See e.g. Harry Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Toronto: Between the Lines, 2002); Allan C Hutchinson, *The Companies We Keep: Corporate Governance for a Democratic Society* (Toronto: Irwin Law, 2005).

172 See e.g. Hurst, *supra* note 163.

173 The trend among corporations to hoard large piles of cash was criticized by Mark Carney, Governor of the Bank of Canada. Kevin Carmichael, Richard Blackwell, & Greg Keenan, "Central banker's blunt message to companies with $526-billion in their coffers: Stop waiting, start spending, spur growth", *The Globe and Mail* (23 August 2012) A1.

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C. Specialist Corporate Law Forums in Other Jurisdictions

Specialized agencies to inquire into sector-specific issues, as just pointed out, have existed for a long time. Specifically in the context of business corporations, precedents are available in at least two jurisdictions—the Netherlands and India. The Netherlands has the "Enterprise Chamber," which is a specialized agency to deal with corporate disputes, including oppression of minority shareholders. A recent study "emphasize[d] the importance of the private enforcement of intra-firm disputes", and found that such specialized courts are more effective in protecting minority shareholders.[174] The Enterprise Chamber does not, apparently, have cross-disciplinary representation, but its practice of engaging experts for investigation of complaints can substantially take care of this issue.[175]

In India, the Company Law Board, which adjudicates among other things shareholder disputes, adopts the principle of inter-disciplinary membership. Members include experts in law and accounting, and also company secretaries.[176] The broad composition of the agency indicates greater sensitivity to the complex nature of corporate disputes and the wider set of skills needed to deal with them. The inter-disciplinary composition of the Company Law Board is designed to improve its efficiency as it possesses a more diverse set of skills for inquiring into disputes and making decisions.

The experience in other jurisdictions with special courts and more diverse representation in adjudicatory agencies can be helpful in the efforts to strengthen the stakeholder remedy in Canada. This is particularly so because of the limitations witnessed in the courts' administration of the stakeholder remedy. As the pioneer in the common law world in granting recognition to non-shareholder groups in the corporate statutory framework, Canada can now explore ways to make the remedy for stakeholders more effective.

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174 Joseph A McCahery & Erik PM Vermeulen, "Conflict Resolution and the Role of Corporate Law Courts: An Empirical Study", (2009) European Corporate Governance Institute, Law Working Paper No 132/2009 at 3, online: SSRN <http://ssrn.com/abstract=1448192>.

175 On the procedure adopted by Enterprise Chambers, see J van Bekkum et al, "Corporate Governance in the Netherlands", (2010) 14.3 EJCL, online: EJCL <http://www.ejcl.org/143/art143-17.pdf>.

176 India, Ministry of Corporate Affairs, *Company Law Board (Qualifications, Experience and Other Conditions of Service of Members) Rules, 1993*, r 3(2).

SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. DOUGLAS CUNNINGHAM, Q.C.
Plaintiff

-and-

ESL INVESTMENTS INC. et al.
Defendants

Court File No. CV-18-00611214-00CL

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