Tab 7

Case Name:

Markevich v. Canada

Her Majesty the Queen
v.
Joe Markevich

[2001] S.C.C.A. No. 371

File No.: 28717

Supreme Court of Canada

Record created: August 7, 2001.

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Status:

Appeal dismissed with costs March 6, 2003. See [2003] S.C.J. No. 8 in the SCJ database for the full text of the reasons.

Catchwords:

Statutes -- Interpretation -- Taxation -- Assessment -- Collection of unpaid income tax -- Taxpayer failing to pay taxes in early 1980's -- Assessed in 1986 -- Revenue Canada wrote off balance owing as uncollectable -- Revenue Canada reviving collection attempts in 1998 -- Whether collection procedures statute barred by limitation period in s. 32 Crown Liability and Proceedings Act or s. 3(5) B.C. Limitation Act.

Counsel:

Judith Bowers, Q.C. (Attorney General of Canada), for the motion.
Ian Worland (Legacy - Tax & Trust Lawyers), contra.

At hearing of appeal:
Graham R. Garton, Q.C. and Carl Januszczak, for the appellant.
Ian Worland, for the respondent.
Edwin G. Kroft and Geoffrey T. Loomer, for the intervener Teck Cominco Metals Ltd.

Chronology:

1. Application for leave to appeal:

FILED: August 7, 2001. S.C.C. Bulletin, 2001, p. 1420.

2. Motion to strike out dismissed with costs September 17, 2001. Before: LeBel J. S.C.C. Bulletin, 2001, p. 1702.

The respondent Markevich has filed a motion for an order striking part of the affidavit filed by Rémi Coté, in support of the application for leave to appeal filed by appellant, also to be granted leave to cross-examine Coté and extending the time for filing the response for leave to appeal, and, finally asking that the appellant be ordered to pay special costs on the motion. The appellant is seeking leave to appeal a judgement of the Federal Court of Appeal. This judgment issued a declaration that the Minister of National Revenue is prohibited from taking court action or initiating statutory collection procedures, in order to collect tax debts which were allegedly barred by a provincial statutory limitation period. In its motion for leave to appeal, the appellant has raised the issue of the national importance of the legal questions raised in this appeal, especially of the applicability of provincial limitation periods to the recovery of federal taxes payable to the Minister of National Revenue. The affidavit filed by Coté, for the appellant, states that significant amount of taxes would become uncollectable if the judgement of the Federal Court of Appeal is allowed to stand. Moreover, additional information was supplied to the respondent about the figures stated in the affidavit. In this context, the affidavit is relevant and filed in accordance with the rules of the Court. There appears no reason to strike the whole or part of this affidavit.

The request for an order granting leave to examine Coté is groundless and useless. When considering the motion for leave to appeal, the legal issues and its several importance, this Court will not be called upon to carry on an inquiry into the exact amount of taxes due to the Federal government which might become uncollectable. It is enough to know that a substantial amount may be involved. The examination requested by respondent might drown the parties in a morass of endless interrogations and communication of documents, which are not in the interest of justice, in the context of the present proceedings. While throwing little light on the case and its core issue, the proposed examination might cause much delay. Given the uselessness of the motion, appellant is entitled to costs. In the interest of justice, nevertheless, the respondent will be granted an extension of time in order to file his response to the application for leave to appeal.

For these reasons, the application filed by the respondent is dismissed but, a delay of 30 days starting from the day of the present judgement is granted in order to file a response to the motion for leave to appeal. The appellant will have its costs on the respondent's motion.

3. Miscellaneous motion granted September 27, 2001. Before: Arbour J. S.C.C. Bulletin, 2001, p. 1780.

   The motion for an order granting the applicant leave to file the supplementary affidavit of Rémi Coté in support of her application for leave to appeal is granted.

4. Application for leave to appeal:

   SUBMITTED TO THE COURT: November 13, 2001. S.C.C. Bulletin, 2001, p. 2021.
   GRANTED WITHOUT COSTS: December 6, 2001 (without reasons). S.C.C. Bulletin, 2001, p. 2171.
   Before: McLachlin C.J. and Iacobucci and Bastarache JJ.

5. Notice of appeal filed January 4, 2002. S.C.C. Bulletin, 2002, p. 39.
6. Motion for leave to intervene:

By: Teck Cominco Metals Ltd.

Granted March 6, 2002. Before: Bastarache J. S.C.C. Bulletin, 2002, p. 436.

UPON APPLICATION by Teck Cominco Metals Ltd., for leave to intervene in the above appeal;

AND HAVING READ the material filed;

IT IS HEREBY ORDERED THAT:

> The motion for leave to intervene of the applicant Teck Cominco Metals Ltd., is granted and the applicant shall be entitled to serve and file a factum not to exceed 20 pages in length.

The request to present oral argument is deferred to a date following receipt and consideration of the written arguments of the parties and the interveners.

The intervener shall not be entitled to adduce further evidence or otherwise to supplement the record of the parties.

Pursuant to Rule 18(6) the intervener shall pay to the appellant and respondent any additional disbursements occasioned to the appellant and respondent by the intervention.

7. Appeal inscribed for hearing during the session commencing September 30, 2002. S.C.C. Bulletin, 2002, p. 1137.
8. Further order on motion for leave to intervene:

By: Teck Cominco Metals Ltd.

Granted September 3, 2002. Before: Bastarache J. S.C.C. Bulletin, 2002, p. 1225.

UPON APPLICATION by Teck Cominco Metals Ltd., for leave to intervene in the above appeal and pursuant to the order of March 6, 2002;

IT IS HEREBY FURTHER ORDERED THAT the said intervener is granted permission to present oral argument not exceeding fifteen (15) minutes at the hearing of the appeal.

9. Appeal:

HEARD AND RESERVED: December 4, 2002. S.C.C. Bulletin, 2002, p. 1770.
DISMISSED WITH COSTS: March 6, 2003. S.C.C. Bulletin, 2003, p. 397. See [2003] S.C.J. No. 8 in the SCJ database for the full text of the reasons.
Before: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

Procedural History:

Judgment at first instance: Application for judicial review of Respondent's income tax assessment relating to unpaid taxes, dismissed.
Federal Court of Canada - Trial Division, Evans J., February 19, 1999.
172 D.L.R. (4th) 164; [1999] 3 F.C. 28; [1999] F.C.J. No. 250

Judgment on appeal: Appeal allowed: application for judicial review allowed; declaration Minister of National Revenue statute barred from taking any collection action against the Respondent.
Federal Court of Appeal, Décary, Rothstein and Malone JJ.A., May 7, 2001.

199 D.L.R. (4th) 255; [2001] 3 F.C. 449; [2001] F.C.J. No. 696

ver/rpl

Tab 8

Douglas Garnet Palmer and Donald Palmer *Appellants*;

and

Her Majesty The Queen *Respondent.*

1979: June 26, 27; 1979: December 21.

Present: Laskin C.J. and Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Appellants convicted of conspiring to traffic in heroin — Subsequent declarations by principal Crown witness asserting his trial evidence untrue — Refusal of Court of Appeal to admit this new evidence — No error in law on part of Court of Appeal — Criminal Code, R.S.C. 1970, c. C-34, s. 610(1)(d).

This was an appeal against the refusal of the British Columbia Court of Appeal to admit fresh evidence in the appeal of the appellants Palmer against their conviction in the Supreme Court of British Columbia before Macfarlane J. sitting without a jury upon an indictment charging a conspiracy to traffic in heroin. A separate appeal relying on the same grounds was taken by Thomas Maxwell Duncan, John Albert Smith and Robert Porter who were named conspirators in the same indictment with the Palmers and who were convicted at the same trial. (See [1980] 1 S.C.R. 783.)

One of the important witnesses called for the Crown, both at the preliminary hearing and at the trial, was one Ford, an admitted heroin trafficker and a disreputable character with a criminal record. His evidence was accepted by the trial judge and clearly played a significant part in the result. After the trial, Ford, in a series of declarations, asserted that his trial evidence was untrue, that it had been fabricated in its entirety, and that he had been influenced by threats and inducements, including the promise of payments of money, by the police. When this material came into the hands of the legal advisers of the appellants, they applied in the Court of Appeal, under s. 610(1)(*d*) of the *Criminal Code*, to adduce this new evidence in affidavit form. The application was dismissed by the Court of Appeal and the appeals of all the appellants, which raised other grounds of appeal as well, were dismissed. The present appeal was taken by leave of this Court upon two points as follows:

Douglas Garnet Palmer et Donald Palmer *Appelants*;

et

Sa Majesté La Reine *Intimée.*

1979: 26, 27 juin; 1979: 21 décembre.

Présents: Le juge en chef Laskin et les juges Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte et McIntyre.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit criminel — Appelants déclarés coupables de complot pour faire le trafic d'héroïne — Déclarations ultérieures du principal témoin à charge quant à son faux témoignage au procès — Refus de la Cour d'appel d'admettre ce nouvel élément de preuve — Aucune erreur de droit de la Cour d'appel — Code criminel, S.R.C. 1970, chap. C-34, art. 610(1)d).

Il s'agit d'un pourvoi à l'encontre du refus de la Cour d'appel de la Colombie-Britannique d'admettre de nouveaux éléments de preuve dans l'appel qu'ont formé les appelants Palmer; ils attaquaient par là leur déclaration de culpabilité prononcée en Cour suprême de la Colombie-Britannique par le juge Macfarlane siégeant sans jury sur un acte d'accusation imputant un complot pour faire le trafic d'héroïne. Thomas Maxwell Duncan, John Albert Smith et Robert Porter, qui étaient désignés comme conspirateurs avec les Palmer dans le même acte d'accusation et qui ont été déclarés coupables au même procès, ont interjeté un pourvoi distinct fondé sur les mêmes moyens. (Voir [1980] 1 R.C.S. 783.)

Un des témoins importants cités par le ministère public, à l'enquête préliminaire et au procès, est un nommé Ford, un trafiquant d'héroïne reconnu et un individu de mauvaise réputation avec un casier judiciaire. Le juge du procès a accepté son témoignage qui a manifestement joué un rôle important sur l'issue du procès. Après le procès, Ford a affirmé dans une série de déclarations que son témoignage était faux, entièrement fabriqué, et qu'il avait été influencé par des menaces et des incitations, y compris la promesse de paiements d'argent par la police. Lorsque ces documents sont venus aux mains des conseillers juridiques des appelants, ils ont demandé à la Cour d'appel, en vertu de l'al. 610(1)*d*) du *Code criminel*, l'autorisation de produire ces nouveaux éléments de preuve sous forme d'affidavit. La Cour d'appel a rejeté la requête ainsi que les appels de tous les appelants qui soulevaient également d'autres moyens. Ce pourvoi est interjeté sur autorisation de cette Cour sur les deux questions suivantes:

1. Did the Court of Appeal of British Columbia err in refusing to allow the appellants to adduce fresh evidence before it based on the affidavits and statements of the principal Crown witness Frederick Thomas Ford who received $25,000 from the police "in payment for services" about a week after the trial judgment herein?

2. Did the trial judge err in rejecting the testimony of the appellant Douglas Garnet Palmer with respect to three incidents concerning the observed movements of Frederick Thomas Ford on July 18, 1972, November 8, 1972 and January 23, 1973, when the said Ford gave no evidence on those incidents and the appellant Palmer was not cross-examined thereon, and did the Court of Appeal err in not quashing the convictions accordingly?

Held: The appeal should be dismissed.

Parliament has given the Court of Appeal a broad discretion in s. 610(1)(*d*). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them. The following principles have emerged: (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases. (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial. (3) The evidence must be credible in the sense that it is reasonably capable of belief. (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. The approach thus taken follows that of this Court in *McMartin v. The Queen*, [1964] S.C.R. 484.

In the present case it was evident that the Court of Appeal applied the test of credibility and found the evidence tendered as to the validity of Ford's trial evidence to be wholly unworthy of belief. It therefore refused the motion and in so doing made no error in law which would warrant interference by this Court. Also, although it might not be necessary to do so in view of this conclusion, the view was expressed that the Court of Appeal was fully justified in reaching the conclusion it

1. La Cour d'appel de la Colombie-Britannique a-t-elle erré en refusant aux appelants le droit de lui soumettre de nouveaux éléments de preuve appuyés sur des affidavits et des déclarations du principal témoin du ministère public, Frederick Thomas Ford, à qui la police avait versé $25,000 «pour services rendus» environ une semaine avant le jugement de première instance en l'espèce?

2. Le juge du procès a-t-il erré en rejetant le témoignage de l'appelant Douglas Garnet Palmer à l'égard des faits et gestes de Frederick Thomas Ford, remarqués à trois reprises, les 18 juillet 1972, 8 novembre 1972 et 23 janvier 1973, incidents sur lesquels Ford n'a pas témoigné et l'appelant Palmer n'a pas été contre-interrogé? La Cour d'appel a-t-elle erré en n'annulant pas les condamnations en conséquence?

Arrêt: Le pourvoi est rejeté.

Par l'alinéa 610(1)*d*), le législateur a donné à la Cour d'appel un grand pouvoir discrétionnaire. On doit donner la prépondérance, dans cette disposition, à l'expression «l'intérêt de la justice» et il ne serait pas dans l'intérêt de la justice de permettre à un témoin, par la seule répudiation ou modification de ses dépositions au procès, de rouvrir des procès à volonté au détriment général de l'administration de la justice. Les demandes de cette nature sont fréquentes et les cours d'appel de diverses provinces se sont prononcées à leur égard. Les principes suivants s'en dégagent: (1) On ne devrait généralement pas admettre une déposition qui, avec diligence raisonnable, aurait pu être produite au procès, à condition de ne pas appliquer ce principe général de manière aussi stricte dans les affaires criminelles que dans les affaires civiles. (2) La déposition doit être pertinente, en ce sens qu'elle doit porter sur une question décisive ou potentiellement décisive quant au procès. (3) La déposition doit être plausible, en ce sens qu'on puisse raisonnablement y ajouter foi. (4) Elle doit être telle que si l'on y ajoute foi, on puisse raisonnablement penser qu'avec les autres éléments de preuve produits au procès, elle aurait influé sur le résultat. La façon dont on a abordé la question suit donc celle adoptée par cette Cour dans *McMartin c. La Reine*, [1964] R.C.S. 484.

En l'espèce, il est évident que la Cour d'appel a appliqué le critère de crédibilité et a jugé que la preuve soumise quant à la validité du témoignage de Ford au procès n'était absolument pas digne de foi. Elle a donc rejeté la requête et, ce faisant, n'a commis aucune erreur de droit qui justifierait l'intervention de cette Cour. Aussi, bien que ce ne soit peut-être pas nécessaire de le dire compte tenu de cette conclusion, on a exprimé l'opinion que la Cour d'appel était tout à fait justifiée de

did upon a consideration of all the evidence adduced on the motion before it and the evidence appearing in the trial transcripts.

With respect to the matter of affording protection to witnesses, in cases where the courts are, after careful examination, satisfied that only reasonable and necessary protection has been provided and that no prejudice or miscarriage of justice has resulted in consequence, they should not draw unfavourable inferences against the Crown, by reason only of this expenditure of public funds.

As to the second point raised in the appeal, the trial judge, as stated by McFarlane J.A. for the Court below, gave a careful explanation for his acceptance of the story of Ford and rejecting that of Douglas Palmer. The finding against the credibility of Palmer was made upon much more than the evidence of the three events in question. It was based upon a consideration of the whole of the evidence including the full examination and cross-examination of Palmer.

R. v. Stewart (1972), 8 C.C.C. (2d) 137; *R. v. Foster* (1977), 8 A.R. 1; *R. v. McDonald*, [1970] 3 C.C.C. 426; *R. v. Demeter* (1975), 25 C.C.C. (2d) 417; *McMartin v. The Queen*, [1964] S.C.R. 484, referred to.

APPEAL against the refusal of the Court of Appeal for British Columbia to admit fresh evidence in the appeal of the appellants Palmer against their conviction in the Supreme Court of British Columbia before Macfarlane J. sitting without a jury upon an indictment charging a conspiracy to traffic in heroin. Appeal dismissed.

Harry Walsh, Q.C., for the appellants.

Mark M. de Weerdt, Q.C., for the respondent.

The judgment of the Court was delivered by

McINTYRE J.—This is an appeal against the refusal of the British Columbia Court of Appeal to admit fresh evidence in the appeal of the appellants Palmer against their conviction in the Supreme Court of British Columbia before Macfarlane J. sitting without a jury upon an indictment charging a conspiracy to traffic in heroin. A separate appeal relying on the same grounds was taken by Thomas Maxwell Duncan, John Albert

conclure comme elle l'a fait après un examen de toute la preuve produite à l'occasion de la requête qu'on lui adressait et de la transcription des dépositions faites au procès.

Quant à la question d'accorder une protection aux témoins dans les affaires où, après un examen minutieux, les cours sont convaincues que l'on a seulement accordé une protection raisonnable et nécessaire et qu'aucun préjudice ou déni de justice n'en a résulté, elles ne devraient pas tirer de conclusions défavorables contre le ministère public du seul fait de cette utilisation de fonds publics.

Quant à la seconde question posée dans ce pourvoi, le juge du procès, comme l'a dit le juge McFarlane en Cour d'appel, a soigneusement expliqué pourquoi il acceptait la version de Ford et rejetait celle de Douglas Palmer. La conclusion à l'encontre de la crédibilité de Palmer était fondée sur bien plus que la preuve relative aux trois événements en question. Elle s'appuyait sur un examen de l'ensemble de la preuve, y compris l'interrogatoire et le contre-interrogatoire complets de Palmer.

Jurisprudence: *R. v. Stewart* (1972), 8 C.C.C. (2d) 137; *R. v. Foster* (1977), 8 A.R. 1; *R. v. McDonald*, [1970] 3 C.C.C. 426; *R. v. Demeter* (1975), 25 C.C.C. (2d) 417; *McMartin c. La Reine*, [1964] R.C.S. 484.

POURVOI à l'encontre du refus de la Cour d'appel de la Colombie-Britannique d'admettre de nouveaux éléments de preuve dans l'appel qu'ont formé les appelants Palmer qui attaquaient par là leur déclaration de culpabilité prononcée en Cour suprême de la Colombie-Britannique par le juge Macfarlane siégeant sans jury sur un acte d'accusation imputant un complot pour faire le trafic d'héroïne. Pourvoi rejeté.

Harry Walsh, c.r., pour les appelants.

Mark M. de Weerdt, c.r., pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE McINTYRE—Il s'agit d'un pourvoi à l'encontre du refus de la Cour d'appel de la Colombie-Britannique d'admettre de nouveaux éléments de preuve dans l'appel qu'ont formé les appelants Palmer; ils attaquaient par là leur déclaration de culpabilité prononcée en Cour suprême de la Colombie-Britannique par le juge Macfarlane siégeant sans jury sur un acte d'accusation imputant un complot pour faire le trafic d'héroïne.

Smith and Robert Porter who were named conspirators in the same indictment with the Palmers and who were convicted at the same trial. Although the appeals were heard together, these reasons will deal with the Palmers only.

The indictment dated November 24th, 1975, charged in count 1 a conspiracy to traffic in heroin between the 1st day of February 1969 and the 30th day of April 1975. This count is the only one in issue on this appeal. A preliminary hearing commenced in February of 1975, after a postponement from September 1974, because the witness Ford, of whom much more will be said, had then absented himself. The trial, which lasted several weeks, commenced on January 12, 1976. The appellants were found guilty on March 23, 1976.

One of the important witnesses called for the Crown, both at the preliminary hearing and at the trial, was Frederick Ford, referred to above, an admitted heroin trafficker and a disreputable character with a criminal record. His evidence was accepted by the trial judge and clearly played a significant part in the result. After the trial, Ford, in a series of declarations, asserted that his trial evidence was untrue, that it had been fabricated in its entirety, and that he had been influenced by threats and inducements, including the promise of payments of money, by the police. When this material came into the hands of the legal advisers of the appellants, they applied in the Court of Appeal to adduce this new evidence in affidavit form. The application was dismissed by the Court of Appeal and the appeals of all the appellants, which raised other grounds of appeal as well, were dismissed. This appeal is taken by leave of this Court upon two points which are set out hereunder:

1. Did the Court of Appeal of British Columbia err in refusing to allow the appellants to adduce fresh evidence before it based on the affidavits and statements of the principal Crown witness Frederick Thomas Ford who received $25,000.00 from the police "in payment for services" about a week after the trial judgment herein?

Thomas Maxwell Duncan, John Albert Smith et Robert Porter, qui étaient désignés comme conspirateurs avec les Palmer dans le même acte d'accusation et qui ont été déclarés coupables au même procès, ont interjeté un pourvoi distinct fondé sur les mêmes moyens. Bien que les pourvois aient été entendus ensemble, ces motifs ne portent que sur le cas des Palmer.

L'acte d'accusation daté du 24 novembre 1975 impute au premier chef un complot pour faire le trafic d'héroïne entre le 1er février 1969 et le 30 avril 1975. Seul ce chef est en litige dans ce pourvoi. Une enquête préliminaire a débuté en février 1975, après une remise accordée en septembre 1974, parce que le témoin Ford, dont on va longuement parler, était alors absent. Le procès qui a duré plusieurs semaines a commencé le 12 janvier 1976. Les appelants ont été déclarés coupables le 23 mars 1976.

Un des témoins importants cités par le ministère public, à l'enquête préliminaire et au procès, est Frederick Ford, susmentionné, un trafiquant d'héroïne reconnu et un individu de mauvaise réputation avec un casier judiciaire. Le juge du procès a accepté son témoignage qui a manifestement joué un rôle important sur l'issue du procès. Après le procès, Ford a affirmé dans une série de déclarations que son témoignage était faux, entièrement fabriqué, et qu'il avait été influencé par des menaces et des incitations, y compris la promesse de paiements d'argent par la police. Lorsque ces documents sont venus aux mains des conseillers juridiques des appelants, ils ont demandé à la Cour d'appel l'autorisation de produire ces nouveaux éléments de preuve sous forme d'affidavit. La Cour d'appel a rejeté la requête ainsi que les appels de tous les appelants qui soulevaient également d'autres moyens. Ce pourvoi est interjeté sur autorisation de cette Cour sur les deux questions suivantes:

1. La Cour d'appel de la Colombie-Britannique a-t-elle erré en refusant aux appelants le droit de lui soumettre de nouveaux éléments de preuve appuyés sur des affidavits et des déclarations du principal témoin du ministère public, Frederick Thomas Ford, à qui la police avait versé $25,000 «pour services rendus» environ une semaine avant le jugement de première instance en l'espèce?

2. Did the trial Judge err in rejecting the testimony of the appellant Douglas Garnet Palmer with respect to three incidents concerning the observed movements of Frederick Thomas Ford on July 18, 1972, November 8, 1972 and January 23, 1973 when the said Ford gave no evidence on those incidents and the appellant Palmer was not cross-examined thereon, and did the Court of Appeal err in not quashing the convictions accordingly?

The principal point argued in this Court was point 1. It will, of course, be seen at once that this point raises no question as to the conduct of the trial and attacks no determination made by the trial judge. The sole issue raised relates to the disposition made by the Court of Appeal.

Ford gave evidence both at the preliminary hearing and at the trial that in June of 1971 he had approached Douglas Palmer, whom he had known for some fifteen years, and asked for a job in the drug business. After some delay, he was introduced into the business and he worked with the Palmers in the trafficking of heroin during the period covered by the indictment. He said that on numerous occasions he had received bulk heroin from Douglas Palmer. It was then his task, with the assistance of others, to put the heroin into gelatin capsules and bundles of the capsules into glass containers and to bury the containers at locations, particulars of which he would give to Palmer. As the heroin was sold, Palmer, or others under his direction, were thus enabled to direct purchasers to the hidden heroin to complete the sales. During this period, Ford was paid for his services by Douglas Palmer.

Ford said that during the summer of 1972 he had employed his nephew to plant out caches of heroin for him. The nephew was caught by the police and Ford was able, by giving the police information which led to the arrest of one of his associates named DeRuiter, to procure the release of his nephew and have the prosecution dropped. It seems that it was this contact with the police which led Ford at or about that time to furnish information concerning the activities of the Palmers to the police.

Ford said that he received a call from Douglas Palmer on January 20, 1973, in which he was

2. Le juge du procès a-t-il erré en rejetant le témoignage de l'appelant Douglas Garnet Palmer à l'égard des faits et gestes de Frederick Thomas Ford, remarqués à trois reprises, les 18 juillet 1972, 8 novembre 1972 et 23 janvier 1973, incidents sur lesquels Ford n'a pas témoigné et l'appelant Palmer n'a pas été contre-interrogé? La Cour d'appel a-t-elle erré en n'annulant pas les condamnations en conséquence?

La principale question plaidée devant cette Cour est la question nº 1. Il appert clairement tout de suite, bien sûr, que cette question ne met pas en jeu la conduite du procès et n'attaque pas la décision rendue alors par le juge. Le seul point litigieux a trait à la décision de la Cour d'appel.

A l'enquête préliminaire et au procès, Ford a témoigné qu'en juin 1971 il s'était adressé à Douglas Palmer, qu'il connaissait depuis environ quinze ans, pour obtenir un boulot dans le commerce des stupéfiants. Quelque temps plus tard, il a commencé à travailler et, avec les Palmer, il a fait le trafic d'héroïne pendant la période visée dans l'acte d'accusation. Il a dit avoir reçu, à plusieurs occasions, de grandes quantités d'héroïne de Douglas Palmer. Sa tâche consistait alors, avec l'aide d'autres personnes, à verser l'héroïne dans des capsules de gélatine, à les mettre par poignées dans des contenants de verre qu'il enterrait à des endroits dont il donnait les coordonnées à Palmer. Ainsi à la vente, Palmer, ou d'autres personnes sous ses ordres, pouvaient indiquer aux acheteurs où l'héroïne était cachée pour compléter l'opération. Pendant cette période, Douglas Palmer payait Ford pour ses services.

Ford a déclaré que pendant l'été 1972 il avait retenu les services de son neveu pour «planquer» l'héroïne pour lui. Le neveu s'est fait surprendre par la police et Ford a pu obtenir la libération de son neveu et l'abandon de la poursuite en donnant à la police des renseignements qui ont mené à l'arrestation de l'un de ses associés nommé DeRuiter. Il semble que c'est cette rencontre avec la police qui a amené Ford, à cette date ou peu après, à lui fournir des renseignements sur les activités des Palmer.

Ford a dit avoir reçu un appel de Douglas Palmer le 20 janvier 1973; ce dernier lui a donné

instructed to get together all the heroin in his possession and to meet another member of the organization for the purpose of getting rid of the heroin all at once so a purchase of newer stock could be made. In compliance with these instructions, the heroin was disposed of at night by throwing it from a moving car in a garbage bag. When this was completed, Ford reported to Palmer who told him that he was fired. He gave evidence at trial of the conversation which passed between them on this occasion in these words:

A. Well, I said "What do you mean?" He said, "Well, I found out that you are the one that set up De Ruiter for the bust" he said, "So you are fired." And I just said, you know, "I don't know what you are talking about." And then I said, "Well, what about my money you owe me?" and he said, "You are not getting any money." And I said, "Well, you know, you owe me the money" and he said, "Tough", you know.

Q. How much money did he owe you at that time?
A. Oh, 12,500 or something.

Q. Did you ever receive that from him?
A. No.

Q. Was there any further conversation on that occasion when he terminated your services?
A. Well, other than "If I ever find out for sure it was you . . .", you know, that's all. Other than that. I am lucky to be alive, that's all.

Q. I am sorry, would you speak up?
A. He said that I am lucky to be alive. If he finds out for sure that it's me that set up DeRuiter, I am in big trouble.

Ford continued trafficking independently until on January 6, 1975, he was shot in the street near his home. A police officer, one Steer, a member of the Vancouver City Police and not connected with the investigation of this case, attended at the scene of the shooting and had a conversation with Ford just before he was taken to hospital. Steer asked "Who shot you?". Ford replied "Pick up Doug Palmer". The officer then said "Did Palmer shoot you?". Ford said "Just pick up Doug Palmer". Ford was taken to hospital and while still in the emergency section had another conversation with a

instructions de ramasser toute l'héroïne en sa possession et de rencontrer un autre membre de l'organisation afin de s'en débarrasser immédiatement pour pouvoir acheter un nouveau stock. Conformément à ces instructions, ils se sont débarrassés de l'héroïne la nuit en la mettant dans un sac à déchets qu'ils ont jeté d'une voiture en marche. Ceci fait, Ford s'est présenté chez Palmer qui lui a dit qu'il était renvoyé. Au procès, il a rendu le témoignage suivant sur leur conversation à cette occasion:

[TRADUCTION] R. Eh bien, j'ai dit «Que veux-tu dire?» Il a dit, «Eh bien, j'ai découvert que c'est toi qui a monté le coup contre De Ruiter pour le faire pincer» il a dit, «Donc tu est renvoyé.» Et j'ai seulement répondu, vous savez «Je ne sais pas de quoi tu parles.» Et j'ai dit ensuite, «Bon, et l'argent que tu me dois?» Et il a dit, «Tu n'auras pas d'argent.» Et j'ai dit, «Eh bien, tu sais, tu me dois l'argent», et il a dit «C'est bien de valeur», vous savez.

Q. Combien d'argent vous devait-il à l'époque?
R. Oh, 12,500 ou à peu près.

Q. Vous a-t-il remis ce montant?
R. Non.

Q. Avez-vous parlé d'autres choses à cette occasion lorsqu'il vous a renvoyé?
R. Eh bien, à part de «Si jamais j'apprends que c'est vraiment toi . . .», vous savez, c'est tout. A part ça. Je suis chanceux d'être vivant, c'est tout.

Q. Excusez-moi, pouvez-vous parlez plus fort?
R. Il a dit que j'étais chanceux d'être vivant. Si jamais il apprend avec certitude que c'est moi qui a monté le coup contre DeRuiter, j'aurais de graves ennuis.

Ford a continué à faire seul le trafic de stupéfiants jusqu'à ce que le 6 janvier 1975, il soit atteint par une balle dans la rue près de chez lui. Steer, un agent de police de la ville de Vancouver, qui était sans lien avec l'enquête en l'espèce, est venu sur les lieux de la fusillade. Il a eu une conversation avec Ford juste avant qu'on ne l'emmène à l'hôpital. Steer a demande [TRADUCTION] «Qui a tiré sur vous?». Ford a répondu [TRADUCTION] «Arrêtez Doug Palmer». L'agent a alors dit [TRADUCTION] «Est-ce Palmer qui a tiré sur vous?». Ford a dit [TRADUCTION] «Arrêtez simple-

Vancouver police officer named Caros. The version given by the police officer follows:

CAROS: "Who shot you?"

FORD: "I don't know."

CAROS: "You mentioned a man at the scene of the shooting."

FORD: "Yes, Doug Palmer. He didn't do it, he's too chicken. He hired someone."

CAROS: "Why did he do it?"

FORD: "Guess he didn't like me."

CAROS: "How many men involved?"

FORD: "One."

CAROS: "Did he have two guns?"

FORD: "Yes."

CAROS: "Did you see a car?"

FORD: "No."

CAROS: "What did he look like?"

FORD: "He had a dark mask, a toque and a dark coat on."

CAROS: "Did you know him?"

FORD: "No."

I consider it significant that moments after the shooting Ford identified Palmer as either his assailant or the instigator of the attack. The circumstances of the shooting, the earlier dismissal from the organization coupled with the disagreement about money, furnish a motive for Ford's later conduct.

After Ford's dismissal by Palmer, he agreed to testify for the Crown. The precise date of such agreement is unclear. He gave evidence at the preliminary hearing and at the trial, and on each occasion his evidence was essentially the same. He was cross-examined closely on both occasions. He admitted that in return for his agreement to give evidence against Douglas Palmer, and for the actual giving of the evidence, he had been promised immunity from prosecution on certain charges which were outstanding against him and protection for himself and his family. To that end he said he had been paid an allowance of $1,200 per month up to the time of the trial. He said the

ment Doug Palmer». Ford a été amené à l'hôpital et alors qu'il était encore à l'urgence, il a eu une autre conversation avec un agent de la police de Vancouver nommé Caros. Voici la version relatée par l'agent de police:

[TRADUCTION] CAROS: «Qui a tiré sur vous?»

FORD: «Je ne sais pas.»

CAROS: «Vous avez mentionné un homme sur les lieux de la fusillade.»

FORD: «Oui, Doug Palmer. Il ne l'a pas fait, il est trop froussard. Il a payé quelqu'un pour le faire.»

CAROS: «Pourquoi a-t-il fait cela?»

FORD: «J'imagine qu'il ne m'aime pas.»

CAROS: «Combien d'hommes sont dans le coup?»

FORD: «Un.»

CAROS: «Avait-il deux armes?»

FORD: «Oui.»

CAROS: «Avez-vous vu une voiture?»

FORD: «Non.»

CAROS: «De quoi avait-il l'air?»

FORD: «Il portait un masque foncé, une toque et un manteau foncé.»

CAROS: «Le connaissez-vous?»

FORD: «Non.»

Je considère significatif que peu après la fusillage Ford ait identifié Palmer comme son assaillant ou comme l'instigateur de l'attaque. Les circonstances de la fusillade, le renvoi antérieur de l'organisation et le désaccord sur l'argent, fournissent un motif pour la conduite subséquente de Ford.

Après son renvoi par Palmer, Ford a accepté de témoigner pour le ministère public. La date précise de cette entente n'est pas claire. Il a témoigné à l'enquête préliminaire et au procès et à chaque occasion son témoignage est essentiellement le même. Il a subi dans les deux cas un contre-interrogatoire serré. Il a admis qu'en retour de son consentement à témoigner contre Douglas Palmer et de son témoignage proprement dit, on lui avait promis l'immunité pour certaines accusations qui pesaient contre lui ainsi que la protection de sa famille et la sienne. Il a dit qu'à cette fin on lui a versé une allocation de $1,200 par mois jusqu'au moment du procès. Il a dit que la police avait

police had agreed as well to provide for relocation and maintenance expenses after the trial for himself and his family until they were re-established in life and secure from danger.

The defence was a flat denial by Palmer of any involvement with drugs and with Ford. It was asserted that Ford's evidence was completely fabricated.

At the outset of the appeal, in which various other grounds were raised, the appellants moved under s. 610(1)(*d*) of the *Criminal Code* to have the Court receive evidence in the form of declarations from Douglas Palmer, Donald Palmer, Edith Twaddell and Thomas Ford. Section 610(1)(*d*) of the *Criminal Code* is set out hereunder:

> 610. (1) For the purposes of an appeal under this Part the court of appeal may, where it considers it in the interests of justice,
>
> . . .
>
> (*d*) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;

On this motion, the Court of Appeal had before it the various declarations referred to above and in addition affidavits in reply from Crown counsel and several police officers including affidavits from officers of the Vancouver Police Force concerning the words spoken by Ford after the shooting incident. Upon a consideration of this material, the Court refused the motion and disposed of the other grounds raised and dismissed the appeal.

The argument in this Court centered on the declarations made by Ford and the Crown affidavits in reply. The declaration of Edith Twaddell is of no significance and requires no further mention. The other declarations produced in support of the motion are largely explanatory of the events leading to the production of Ford's documents. Ford made four declarations dated, respectively, April 20, 1976, May 21, 1976, October 7, 1976, and October 13, 1976. In his first declaration, he said that he received $25,000 in cash from the R.C.M.P. in April 1976 for services rendered which he described as testifying in the Palmer drug conspiracy trial. He exhibited a receipt to the

également accepté de payer ses frais de réinstallation et d'entretien et ceux de sa famille après le procès jusqu'à ce qu'ils soient repartis dans la vie et à l'abri du danger.

En défense, Palmer a formellement démenti avoir eu quelque rapport avec Ford et avec le commerce des stupéfiants. On y a affirmé que le témoignage de Ford était complètement fabriqué.

Au début de l'appel, où ils invoquaient plusieurs autres moyens, les appelants ont présenté une requête conformément à l'al. 610(1)*d*) du *Code criminel* pour que la Cour reçoive les dépositions de Douglas Palmer, de Donald Palmer, d'Edith Twaddell et de Thomas Ford faites sous forme de déclarations. Voici le texte de l'al. 610(1)*d*) du *Code criminel*:

> 610. (1) Aux fins d'un appel prévu par la présente Partie, la cour d'appel peut, lorsqu'elle l'estime dans l'intérêt de la justice,
>
> . . .
>
> *d*) recevoir la déposition, si elle a été offerte, de tout témoin, y compris l'appelant, qui est compétent pour témoigner mais non contraignable;

A l'audition de cette requête, la Cour d'appel avait devant elle les différentes déclarations susmentionnées et, en plus, les affidavits produits en réponse par le substitut du procureur général et plusieurs agents de police, y compris des agents de la police de Vancouver, sur ce qu'avait dit Ford après la fusillade. Après avoir examiné ces documents, la Cour a refusé la requête, elle a considéré les autres moyens invoqués et a rejeté l'appel.

Les plaidoiries devant cette Cour sont centrées sur les déclarations faites par Ford et les affidavits du ministère public en réponse. La déclaration d'Edith Twaddell ne revêt aucune importance et il n'est pas nécessaire d'en parler davantage. Les autres déclarations produites à l'appui de la requête viennent surtout expliquer les événements qui ont mené à la production des documents de Ford. Ford a fait quatre déclarations datées, respectivement, des 20 avril 1976, 21 mai 1976, 7 octobre 1976 et 13 octobre 1976. Dans la première déclaration, il dit avoir reçu $25,000 comptant de la GRC en avril 1976 pour services rendus; il s'agissait, a-t-il dit, de son témoignage au procès

declaration prepared by the R.C.M.P. which he had signed. It was on a printed form acknowledging the receipt of $25,000 from R.C.M.P. Inspector Eyman. The printed words "Payment in full for services rendered" had been struck out and the words "Payment for services" had been written in.

In his second declaration, he referred to and verified a hand written statement which he had signed dated May 21, 1976, in these terms:

May 21, 1976.

To whom it may concern

Any evidence I gave at the Douglas Palmer trial in 1976 was not of my own free will. I was pressured into saying what I said and also promised payment of $60,000 dollars. I never had any drug dealings with Doug Palmer, Don Palmer, Tom Duncan or Jake Smith. Any drug dealings I had were on my own and had nothing whatsoever to do with the above mentioned names. In April 1976 I rec. $25,000 Cash from the R.C.M.P.

Fred Ford

Also I had dealings with Roy Twaddell and he asked me to introduce him to Doug Palmer and I said I knew nothing about him and as far as I know he only dealt with me in drugs until he went to jail. Fred Ford.

Witnessed: J. Wood
J. B. Clarke

In his third declaration dated October 7, 1976, he swore to the truth of another statement he had prepared and which bears date October 7, 1976, and which is in these terms:

Oct. 7/1976

To whom it may concern.

My name is Frederick Thomas Ford of Vanc. B.C. Everything I am about to write in this statement is the truth and I am writing it of my own free will without any threats or inducements from anyone! I started dealing in Heroin (drugs) in 1972. My nephew worked for me burying drugs and got caught, I went to the police and made a deal to turn someone in if they gave him a stay of proceedings (which they did). I talked with R.C.M.P. Staff Sgt. Jim Locker. He asked me if I knew a person named Doug Palmer, I said Yes and he said we

de Palmer sur l'accusation de complot pour faire le trafic de stupéfiants. Il a produit avec sa déclaration un reçu rempli par la GRC et signé de sa main. Il s'agit d'une formule imprimée dans laquelle il reconnaît avoir reçu $25,000 de l'inspecteur Eyman de la GRC. Les mots imprimés [TRADUCTION] «Paiement complet pour services rendus» y sont remplacés par les mots [TRADUCTION] «Paiement pour services».

Dans sa deuxième déclaration, il mentionne et confirme une déclaration écrite à la main qu'il a signée le 21 mai 1976, dont voici le texte:

[TRADUCTION] Le 21 mai 1976.

A qui de droit

Le témoignage que j'ai rendu au procès de Douglas Palmer en 1976 n'était pas volontaire. J'ai été contraint de dire ce que j'ai dit et on m'a également promis de me verser $60,000. Je n'ai jamais fait le trafic de stupéfiants avec Doug Palmer, Don Palmer, Tom Duncan ou Jake Smith. Tout trafic de stupéfiants que j'ai fait, c'est seul que je l'ai fait et je n'ai absolument rien à voir avec les personnes susmentionnées. En avril 1976 j'ai reçu $25,000 comptant de la G.R.C.

Fred Ford

J'ai également fait du trafic avec Roy Twaddell et il m'a demandé de le présenter à Doug Palmer et je lui ai dit que je ne le connaissais pas et, autant que je sache, il n'a fait le trafic de stupéfiants qu'avec moi jusqu'au moment de son incarcération. Fred Ford.

Témoins: J. Wood
J. B. Clarke

Dans sa troisième déclaration datée du 7 octobre 1976, il affirme sous serment la véracité d'une autre déclaration qu'il a rédigée et qui est datée du 7 octobre 1976 et dont voici le texte:

[TRADUCTION] Le 7 octobre 1976

A qui de droit.

Je m'appelle Frederick Thomas Ford de Vancouver, C.-B. Tout ce que je vais écrire dans cette déclaration est vrai et je l'écris de mon propre chef sans aucune menace ou incitation! J'ai commencé à faire le trafic d'héroïne (stupéfiants) en 1972. Mon neveu qui travaillait pour moi, enterrait des stupéfiants et s'est fait prendre, je suis allé à la police et j'ai proposé de dénoncer quelqu'un s'ils suspendaient les poursuites contre lui (ce qu'ils ont fait). J'ai parlé avec Jim Locker, un sergent d'état major de la G.R.C. Il m'a demandé si

want him for dealing in drugs and we will let you deal in drugs without getting caught if you can help us nail Doug Palmer. I didn't really know a thing about Doug Palmer but I saw an easy way for me to stay on the street and make money. I kept telling them different stories about Palmer none of them true! In Jan. 1975 I was shot in front of my home 3475 Triumph St. The R.C.M.P. (Neil McKay) came and saw me at the hospital he said it was a hired killer paid for by Doug Palmer. I knew this was not so but in order for me to get their protection I played along with what they said. In Feb. or Mar. 1975 I went to a Preliminary hearing concerning a drug case against Doug Palmer and some assoc. I got up on the stand and made up a bunch of lies only because I didn't want to go to jail also I was promised a large cash settlement new I.D. and transportation to anywhere I wanted to go. Naturally I would not turn this down.

The R.C.M.P. kept me and provided myself and family with $1200.00 per month to live on. In Jan. 1976. They took me to the Plaza 500 Hotel on 12th Ave Vanc. There Staff Sgt. Almrud, Neil McKay and other R.C.M.P. officers kept harrassing me and threatening me to get on the stand and say some things about Doug Palmer. By then I was in so deep I had to go along. Niel McKay said he could not tell me personally how much I would get but he told Corp. Hoivik to tell me I would get $60,000 some I.D. and relokate me. The Prosecutor Art McLennan and Neil McKay came to see me and threatened me with all kinds of charges if I did not give evidence at the trial of Doug Palmer. They said make sure I brought up Doug Palmer's name any chance I got. So I gave the same evidence was before (All Lies) After the trial they took me and my family to Victoria B.C. At the end of April 1976 they took me to there office on Heather St. and offered me $25,000 so I said no. Finally I went to the Bank of Commerce (Main Branch) Hastings St. with Inspector Elman and got $25,000. He said I would have to wait for the other $35,000 and take it up with Neil McKay when he got back from holidays. I'm still waiting! In regards to "Roy Twaddell" I sold him drugs for months and months. He owed me $2,000 I had him beat up to make him pay me. It was the day after that I was shot. I believe he had it done! There is no proof, but I heard through the grape vine it was him! He couldn't possibly have been getting drugs from anyone else as he had no money. I had to give him credit every time he got heroin off of me. I believe like me he was scared and promised lots of things

je connaissais une personne du nom de Doug Palmer, j'ai dit oui et il m'a dit qu'il le recherchait pour trafic de stupéfiants et qu'on me laisserait faire le trafic de stupéfiants sans m'arrêter si je les aidais à pincer Doug Palmer. Je ne savais vraiment rien de Doug Palmer mais j'ai vu là un moyen facile de rester libre et faire de l'argent. J'ai continué à leur raconter des histoires différentes sur Palmer, dont aucune n'était vraie! En janvier 1975 j'ai été blessé par un coup de feu devant ma maison 3475, rue Triumph. La G.R.C. (Neil McKay) est venu me voir à l'hôpital et il a dit que c'était un tueur à gages payé par Doug Palmer. Je savais que ce n'était pas vrai mais afin d'obtenir leur protection j'ai opiné à ce qu'ils disaient. En février ou mars 1975 je suis allé à une enquête préliminaire sur une affaire de stupéfiants visant Doug Palmer et compagnie. Je suis allé à la barre des témoins et j'ai inventé un tas de mensonges seulement parce que je ne voulais pas aller en prison et aussi parce qu'on m'avait promis un paiement comptant important, de nouveaux papiers d'identité et mon transport où je voudrais. Naturellement, je ne pouvais pas refuser.

La G.R.C. m'a pris sous sa protection et a versé une allocation d'entretien de $1,200 par mois pour ma famille et moi-même. En janvier 1976 ils m'ont amené à l'hôtel Plaza 500, sur la 12e av. à Vancouver. Là le sergent d'état major Almrud, Neil McKay et d'autres agents de la G.R.C. m'ont systématiquement harcelé et menacé pour que je témoigne contre Doug Palmer. J'étais alors tellement impliqué que j'ai dû céder. Neil McKay a dit qu'il ne pouvait m'informer personnellement du montant que je recevrais mais il a demandé au caporal Hoivik de me dire que je recevrais $60,000, des papiers d'identité et une réinstallation. Art McLennan, l'avocat de la poursuite, et Neil McKay sont venus me voir et m'ont menacé de toutes sortes d'accusations si je ne témoignais pas au procès de Doug Palmer. Ils m'ont demandé de prononcer le nom de Doug Palmer aussi souvent que je le pouvais. J'ai donc rendu le même témoignage qu'auparavant (rien que des mensonges). Après le procès ils m'ont amené avec ma famille à Victoria, C.-B. A la fin d'avril 1976 ils m'ont amené à leur bureau rue Heather et m'ont offert $25,000 et j'ai refusé. Finalement, je suis allé à la Banque de Commerce (succursale principale), rue Hastings, avec l'inspecteur Elman et j'ai reçu $25,000. Il m'a dit que je devrais attendre pour le solde de $35,000 et de le réclamer à Neil McKay à son retour de vacances. J'attends toujours! En ce qui concerne «Roy Twaddell» je lui ai vendu des stupéfiants pendant des mois et des mois. Il me devait $2,000. Je l'ai fait tabasser pour qu'il me paie. C'est le lendemain qu'on m'a tiré dessus. Je crois que c'est lui qui l'a fait! Il n'y a aucune preuve,

to induce him to take the stand against Doug Palmer. The Police (R.C.M.P.) told me time and again they would do anything to nail Doug Palmer.

This Statement is all true—

His final declaration dated October 13, 1976, contains serious charges against the police and Crown counsel. It takes the form of answers to a series of questions put to him in writing by solicitors acting for the appellants in the matter. The questions were not leading in nature, they merely directed Ford's attention to matters and incidents that he had apparently raised. Since the answers are contained in the declaration, and provide such evidence as the declaration is capable of giving, I have omitted the questions. I reproduce the declaration hereunder:

CANADA
PROVINCE OF
BRITISH COLUMBIA

IN THE MATTER OF FREDERICK THOMAS FORD AND DONALD PALMER, DOUGLAS GARNET PALMER, THOMAS DUNCAN, JOHN ALBERT SMITH, ROBERT PORTER AND CLIFFORD LUTHALA

TO WIT:

I, FREDERICK THOMAS FORD, of the City of Vancouver, in the Province of British Columbia, DO SOLEMNLY DECLARE:

1) I think I met Twaddell late 1973 or early 1974. Sold him drugs of and on for 1 yr. Was introduced to him through Oscar Hansen on the 1900 Turner St. I sold him drugs on credit!

2) Neil McKay and Art Mclennan [Crown counsel] came to the Plaza 500 Hotel in January 1976 and told me I had better testify at Doug Palmer's trial or I would have so many charges against me I would never see day light. Also they said you'll be killed as soon as you get in the Pen (jail). Also they said to use Doug P. name every chance I got!

mais la rumeur veut que ce soit lui! Il n'aurait pas pu obtenir de stupéfiants de quelqu'un d'autre puisqu'il n'avait pas d'argent. Je devais lui faire crédit chaque fois qu'il me prenait de l'héroïne. Je crois que, comme à moi, on lui a fait peur et qu'on lui a promis beaucoup de choses pour l'inciter à témoigner contre Doug Palmer. La police (G.R.C.) m'a dit maintes et maintes fois qu'elle ferait n'importe quoi pour pincer Doug Palmer.

Cette déclaration est entièrement vraie—

Sa dernière déclaration datée du 13 octobre 1976 contient de sérieuses accusations contre la police et le substitut du procureur général. Elle se présente sous forme de réponses à une série de questions que lui ont posées les procureurs représentant les appelants en l'espèce. Les questions ne sont pas de nature suggestive, elles ne font qu'attirer l'attention de Ford sur des points et des incidents qu'il avait apparemment soulevés. Puisque les réponses se trouvent dans la déclaration et fournissent toute la preuve que la déclaration est susceptible de donner, j'ai omis les questions. Je reproduis ci-après la déclaration:

[TRADUCTION]
CANADA
PROVINCE DE LA
COLOMBIE-BRITANNIQUE

DANS L'AFFAIRE DE FREDERICK THOMAS FORD ET DONALD PALMER, DOUGLAS GARNET PALMER, THOMAS DUNCAN, JOHN ALBERT SMITH, ROBERT PORTER ET CLIFFORD LUTHALA

SAVOIR:

Je, FREDERICK THOMAS FORD, de la ville de Vancouver, province de la Colombie-Britannique, DÉCLARE SOLENNELLEMENT:

1) Je crois avoir rencontré Twaddell à la fin de 1973 ou au début de 1974. Lui ai vendu occasionnellement des stupéfiants pendant un an. Lui ai été présenté par Oscar Hansen au 1900, rue Turner. Je lui ai vendu des stupéfiants à crédit!

2) Neil McKay et Art Mclennan [substitut du procureur général] sont venus à l'hôtel Plaza 500 en janvier 1976 et m'ont dit que j'avais intérêt à témoigner au procès de Doug Palmer sinon je devrais répondre à tellement d'accusations que je ne verrais plus la lumière du jour. Ils m'ont dit également que je serai tué dès que je me retrouverai en taule (prison). Ils m'ont dit également d'utiliser le nom de Doug P. chaque fois que je le pouvais!

3) They said not to mention money promised only to answer that I would be relocated elsewhere not to elaborate any further. This was said to me many times.

4) They came to me in Jan. 1976, at Plaza 500 and showed me pictures of Doug P., his brother, Roy Dorn, Tom Duncan, and many others and the same thing as before. Kept insisting I take stand and give evidence against Doug P. They said they really wanted him.

5) It was in 1975 Jan. I was shot! They put me into protective custody. I was really scared! I would have done or said almost anything at that point. They said they would pay me $25,000 and relocate me. I agreed! They are—Neil McKay and Art Mclennan.

6) Stayed at Plaza 500 1 wk. before and 1 wk. after. Corporal Art Hoivik was instructed to make sure I read transcripts and to memorize. He read me questions and I answered them.

7) Neil McKay came to see me after and kept on insisting I testify or I would be charged with many charges. He kept saying Doug P. had me shot and it was my only way to get even.

8) My nerves were shot. So the R.C.M.P. on Neil McKay's orders went to a doctor and get me sleeping pills (I was taking 3 at once) also I had codine pills 1 wk. before and 1 wk. after trial.

9) Same as question (2).

10) I had 2 robbery and poss. jewellery against me they said these would be dropped. But if I did not testify I would be charged with alot more than that!

11) Art Mclennan came to see me 2 or three times at Plaza 500. He also said I had no choice but to testify at Doug P. trial. He said you will make money and be clear of all charges. If you don't testify you will have many charges against you.

12) Neil McKay and Art Mclennan both told me I would be paid the date after I gave my evidence!

13) After I gave my evidence Neil McKay Art Hoivik and other R.C.M.P. officers were in room with me. They all said we have got Palmer for sure now.

14) While at Plaza 500 I told Staff Sgt. Almrud I would not testify for $25,000. He said how much do you

3) Ils m'ont dit de ne pas mentionner l'argent qui m'était promis, de simplement dire qu'on m'installerait ailleurs et de ne pas élaborer davantage. Cela m'a été répété plusieurs fois.

4) Ils sont venus me voir en janvier 1976, au Plaza 500 et m'ont montré des photos de Doug P., de son frère, de Roy Dorn, de Tom Duncan, et de beaucoup d'autres et la même chose qu'auparavant. Même insistance pour que j'aille témoigner contre Doug P. Ils ont dit qu'ils le voulaient vraiment.

5) C'était en janvier 1975. On m'a tiré dessus! Ils m'ont placé en détention par mesure de protection. J'avais vraiment peur! J'aurais fait ou dit presque n'importe quoi à ce moment-là. Ils ont dit qu'ils me verseraient $25,000 et me réinstalleraient. J'ai accepté! Ils, c'est-à-dire Neil McKay et Art Mclennan.

6) Suis demeuré au Plaza 500 une semaine avant et une semaine après. Le caporal Art Hoivik avait reçu instruction de s'assurer que je lise les transcriptions et que je les apprenne par cœur. Il me lisait les questions et j'y répondais.

7) Neil McKay est venu me voir par la suite et a encore insisté pour que je témoigne sinon plusieurs accusations seraient portées contre moi. Il répétait toujours que Doug P. m'avait fait descendre et que c'était ma seule chance d'être quitte.

8) J'étais à bout de nerfs. Aussi, la G.R.C. sur les ordres de Neil McKay est allée voir un médecin et a obtenu des somnifères (j'en prenais 3 à la fois) j'ai également pris des pilules de codéine une semaine avant et une semaine après le procès.

9) Voir la question 2).

10) Deux accusations de vol qualifié et de possession de bijoux pesaient contre moi et ils ont dit qu'ils n'y donneraient pas suite. Mais si je ne témoignais pas je serais accusé de beaucoup plus que cela!

11) Art Mclennan est venu me voir deux ou trois fois au Plaza 500. Il m'a également dit que je n'avais pas le choix, que je devais témoigner au procès de Doug P. Il m'a dit que je ferai de l'argent et serai libre de toute accusation. Si je ne témoignais pas plusieurs autres accusations seraient portées contre moi.

12) Neil McKay et Art Mclennan m'ont dit tous les deux que je serais payé le lendemain de mon témoignage!

13) Après mon témoignage, Neil McKay, Art Hoivik et d'autres agents de la G.R.C. étaient dans une pièce avec moi. Ils ont tous dit que maintenant Palmer était bel et bien coincé.

14) Alors que nous étions au Plaza 500 j'ai dit au sergent d'état major Almrud que je ne témoignerais pas

want? I said $60,000. He said I do not have the authority to authorize it, I'll be back later with answer. He came back a couple of hours later and said okay you can have $60,000 if you give evidence, Art Hoivik was there at the time. He also told me Neil McKay said $60,000 but for me not to mention money on stand.

15) Neil McKay told Corp. Hoivik to tell me about money as if he told me himself and was asked directly on stand about money and me he would have to answer truthfully, but if someone else told me he could say I never talked with Mr. Ford regarding any monies.

16) Same as No. (14).

17) Art Mclennan gave the transcripts to Neil McKay and he gave them to me. They both said to read trans. and to be more specific!

18) Neil McKay Art Mclennan and every R.C.M.P. officer I came in contact with kept saying I should testify against D. Palmer.

19) As I've said before—I was in 24 hr. contact with R.C.M.P. they all kept at me to testify and nail D. Palmer.

20) Went to Heather St. as it is main office. Inspector Ehman was there. He took me to Main Branch of C. Imperial Commerce on Hastings. Signed money draft and I was paid right in Bank. Cash and travellers cheques. I told him I was to get $60,000 not $25,000. He said he was not aware of this but to take it up with Neil McKay and Inspector White when they returned from holidays in 2 wks. Which I did. They said they were sorry but Ottawa would not pay anymore than $25,000. I'm still waiting for my other $35,000.00.

21) Met White after I was shot. He said in his office that any deals I was to make would be through Neil McKay.

22) Have telephoned Art Mclellan and he said he told R.C.M.P. to pay me the other $35,000. He can't understand why they haven't kept up there part of bargain!

23) Whenever I refer to D. Palmer or Doug P. in this statutory declaration I am in fact referring to Douglas Palmer.

AND I make this solemn declaration, conscientiously believing it to be true and knowing that it is of the same

pour $25,000. Il m'a dit combien voulez-vous? J'ai répondu $60,000. Il m'a dit qu'il n'avait pas le pouvoir de l'autoriser, mais qu'il reviendrait plus tard avec une réponse. Il est revenu environ deux heures plus tard et a dit que c'était d'accord, que j'aurais $60,000 si je témoignais, Art Hoivik était présent à ce moment-là. Il m'a également dit que Neil McKay avait dit $60,000 mais que je ne devais pas mentionner d'argent à la barre des témoins.

15) Neil McKay a dit au caporal Hoivik de me dire ce qu'il en était de l'argent parce que, s'il me le disait lui-même et qu'on lui posait une question directe à la barre des témoins sur l'argent et moi, il devrait répondre la vérité, mais si quelqu'un d'autre me le disait il pourrait dire qu'il n'avait jamais parlé d'argent avec M. Ford.

16) Voir le nº 14).

17) Art Mclennan a donné les transcriptions à Neil McKay qui me les a remises. Ils m'ont tous les deux dit de les lire et d'être plus précis!

18) Neil McKay, Art Mclennan et chaque agent de la G.R.C. avec lesquels j'ai été en contact ont dit avec insistance que je devrais témoigner contre D. Palmer.

19) Comme je l'ai déjà dit—j'étais en rapport avec la G.R.C. 24 heures sur 24, ils étaient tous après moi pour que je témoigne et qu'ils puissent pincer D. Palmer.

20) Suis allé rue Heather puisque c'est leur bureau principal. L'inspecteur Ehman y était. Il m'a amené à la succursale principale de la Banque Impériale de Commerce rue Hastings. Signature des traites et j'ai été payé à la banque. Argent comptant et chèques de voyage. Je lui ai dit que je devais recevoir $60,000 et non pas $25,000. Il m'a dit qu'il n'était pas au courant mais de le réclamer à Neil McKay et à l'inspecteur White à leur retour de vacances dans deux semaines. C'est ce que j'ai fait. Ils ont dit qu'ils étaient navrés mais qu'Ottawa ne paierait pas plus de $25,000. J'attends toujours mes $35,000.

21) Ai rencontré White après la fusillade. Il m'a dit, dans son bureau, que pour toute entente que je voulais faire je devais passer par Neil McKay.

22) J'ai téléphoné à Art Mclennan et il a dit qu'il avait demandé à la G.R.C. de me verser le solde de $35,000. Il ne peut pas comprendre pourquoi elle n'a pas respecté son engagement!

23) Lorsque je parle de D. Palmer ou de Doug P. dans cette déclaration je veux dire en fait Douglas Palmer.

JE fais cette déclaration solennelle croyant en toute conscience qu'elle est vraie et sachant qu'elle a la même

force and effect as if made under oath and by virtue of the "Canada Evidence Act".

DECLARED before me at the City of Vancouver, in the Province of British Columbia, this 13th day of October, A.D. 1976.

"Fred Ford"

Frederick Thomas Ford

" "

A commissioner for taking
Affidavits for British Columbia

In reply to this motion, the Crown filed extensive material. Arthur MacLennan, Crown counsel, denied, in his affidavit, all improprieties alleged by Ford. He swore that he saw Ford in the Plaza Hotel only once. They had an interview lasting three or four minutes during which he showed Ford some photographs and left a transcript of Ford's evidence taken at the preliminary hearing so any mistakes could be corrected. He explained his actions regarding money in paras. 6, 7 and 8 in these words:

6. THAT I at no time, nor did Sgt. McKay at any time in my presence, say to Ford that he would receive $25,000.00 or any sum whatsoever, nor that Ford would be paid the day after he gave his evidence, or at any time;

7. THAT in or about the month of May 1976, Ford telephoned me to request that I assist him in obtaining a further $35,000.00 from the RCM Police. At that time I had become aware that Ford had already received $25,000.00 in lieu of the re-location arrangements to which he had testified at the trial. I told Ford that notwithstanding he had himself elected after the trial to receive $25,000.00 instead of the re-location he had been promised, I had already tried to get for him some additional money because I felt he might come to harm if he remained in the Vancouver vicinity; that a lump sum payment totalling $60,000.00 was perhaps not excessive to keep him out of danger until he could establish himself elsewhere. I also informed Ford on that occasion that a superintendent of the RCM Police had refused to recommend payment of any further money as considered Ford's insistence on a further payment to be close to blackmail. Ford replied that he would never try to blackmail the RCMP; that he had already given his evidence and was not about to change that;

force et le même effet que si elle était faite sous serment en vertu de la "Loi sur la preuve au Canada".

DÉCLARATION faite devant moi en la ville de Vancouver, province de la Colombie-Britannique, ce 13 octobre 1976.

"Fred Ford"

Frederick Thomas Ford

" "

Commissaire à l'assermentation pour la Colombie-Britannique

En défense à cette requête, le ministère public a déposé une somme de documents. Arthur MacLennan, le substitut du procureur général, a nié dans son affidavit toutes les manœuvres incorrectes alléguées par Ford. Il a affirmé sous serment n'avoir vu Ford à l'hôtel Plaza qu'une fois. Ils ont eu un entretien de trois ou quatre minutes au cours duquel il lui on montré des photographies et lui a laissé une transcription du témoignage qu'il avait fait à l'enquête préliminaire afin que toute erreur puisse être corrigée. Dans les paragraphes 6, 7 et 8, il a expliqué sa façon d'agir au sujet de l'argent:

[TRADUCTION] 6. QUE je n'ai jamais dit à Ford, pas plus que le sergent McKay en ma présence, qu'il recevrait $25,000 ou quelque autre somme d'argent, ni qu'il serait payé le lendemain de son témoignage ou à un autre moment;

7. QUE pendant le mois de mai 1976, ou vers ce moment, Ford m'a téléphoné pour me demander de l'aider à obtenir un montant supplémentaire de $35,000 de la GRC. A ce moment, je savais que Ford avait déjà reçu $25,000 à la place du paiement des frais de réinstallation au sujet desquels il avait témoigné au procès. J'ai dit à Ford que, bien qu'il ait lui-même choisi de recevoir $25,000 après le procès au lieu de la réinstallation qu'on lui avait promise, j'avais déjà essayé d'obtenir pour lui une somme d'argent additionnelle parce que je pensais qu'il pouvait être en danger s'il demeurait dans la région de Vancouver; qu'une somme globale de $60,000 n'était peut-être pas excessive pour assurer sa sécurité jusqu'à ce qu'il puisse s'établir ailleurs lui-même. J'ai également informé Ford à cette occasion qu'un surintendant de la GRC avait refusé de recommander le paiement de toute somme supplémentaire parce qu'il considérait que l'insistance de Ford à obtenir un autre paiement s'apparentait à du chantage. Ford a répondu qu'il n'essaierait jamais de faire chanter la GRC, qu'il avait déjà témoigné et qu'il ne retirerait pas ce qu'il a dit;

8. THAT I never at any time told Ford I could not understand why the RCMP had not "kept up their part of the bargain;"

The various police officers mentioned by Ford in his declarations denied any impropriety in their affidavits. They denied any harassing of Ford or the putting of any pressures upon him. From their affidavits the Crown position is made clear. There was an arrangement with Ford that he would give evidence against the Palmers. At the preliminary hearing as at the trial Ford admitted the particulars of this arrangement. A condition of the arrangement was that the police would provide protection, and maintenance payments in the amount of $1,200 a month, until the trial was over. Thereafter provision would be made for the maintenance and relocation of Ford and his family, as well as for their protection until he could re-establish himself elsewhere. The payments made for relocation would have included travelling and moving expenses and, if necessary, a down payment on a new house. Pursuant to this arrangement, Ford gave evidence at the preliminary and no difficulties arose until just before the trial.

According to the police affidavits, at that time Ford seemed to have changed his mind. He decided that he wanted a cash payment rather than relocation expenses as agreed. He requested a sum in the neighbourhood of $50,000 and indicated that he would go to England to live after the trial and from this cash payment he would cover his own expenses. The police officers who were responsible for the immediate custody and protection of Ford agreed to take the matter up with superior officers and, in discussions between themselves, considered that a $60,000 payment would not be unreasonable in the circumstances. This figure would presumably have replaced all payments for maintenance, moving and relocation expenses until Ford was re-established after trial and what could be required for a down payment on a house. It is not clear from the evidence what recommendations were made to superior officers on this subject but the Crown, after the trial, was prepared to pay only $25,000. This payment was arranged by R.C.M.P. Inspector Eyman who met

8. QUE je n'ai jamais dit à Ford que je ne comprenais pas pourquoi la GRC n'avait «pas respecté son engagement;»

Dans leurs affidavits, les différents officiers de police mentionnés par Ford dans ses déclarations ont nié toute manœuvre incorrecte. Ils ont nié l'avoir harcelé ou avoir exercé des pressions sur lui. La position du ministère public se dégage clairement de leurs affidavits. Il y avait une entente avec Ford aux termes de laquelle il devait témoigner contre les Palmer. A l'enquête préliminaire et au procès, Ford a admis les détails de cette entente. Une condition de cette entente était que la police assurerait sa protection et lui verserait une allocation d'entretien de $1,200 par mois jusqu'à la fin du procès. Par la suite, des dispositions seraient prises pour assurer l'entretien et la réinstallation de Ford et de sa famille et leur protection jusqu'à ce qu'il puisse s'établir ailleurs. Les paiements de réinstallation auraient compris des dépenses de voyage et de déménagement et, au besoin, le paiement initial sur une nouvelle maison. Conformément à cette entente, Ford a témoigné à l'enquête préliminaire et aucune difficulté n'a surgi jusqu'à la veille du procès.

Selon les affidavits des policiers, Ford semblait alors avoir changé d'idée. Il avait décidé qu'il voulait un paiement comptant plutôt que le paiement de ses frais de réinstallation comme convenu. Il a demandé un montant d'environ $50,000 et a dit qu'il irait vivre en Angleterre après le procès et que ce paiement comptant servirait à couvrir ses dépenses. Les officiers de police directement responsables de la garde et de la protection de Ford ont accepté de soumettre l'affaire à des officiers supérieurs et, en discutant entre eux, ils ont jugé qu'un montant de $60,000 ne serait pas excessif dans les circonstances. Ce montant aurait, semble-t-il, remplacé tous les paiements pour l'entretien, le déménagement et la réinstallation jusqu'à ce que Ford soit à nouveau établi après le procès et le paiement initial éventuel sur une maison. La preuve n'indique pas clairement quelles recommandations ont été faites aux officiers supérieurs à cet égard mais le ministère public, après le procès, n'était pas disposé à payer plus de $25,000. L'inspecteur Eyman de la GRC s'est organisé pour

Ford, took him to the bank, procured $25,000 by cashing a cheque, and gave it to Ford in cash and travellers cheques. At the time of payment, he procured the receipt from Ford exhibited to Ford's first declaration. The Crown submits that Ford, dissatisfied by the payment of $25,000, and no doubt influenced by fear as well, has changed his story.

The Court of Appeal, when dealing with the motion, had before it in addition to the materials already referred to some fifty-four volumes of evidence from the preliminary hearing and the trial and therefore had a much greater knowledge of the evidence than could be drawn from the brief summary I have set out above. In dealing with the motion, McFarlane J. A., speaking for the Court, said:

> Section 610(1) provides that for the purposes of an appeal under Part XVIII of the Code the Court of Appeal may, if it considers it in the interests of justice, receive the evidence of any witness. Parliament has here given the Court a broad discretion to be exercised having regard to its view of the interests of justice. In my opinion it would not serve the interests of justice to receive the tendered evidence of Ford and Twaddell because it is simply not capable of belief. I am satisfied that it is untrue and that any intelligent adult would reject it as wholly untrustworthy. Moreover, the trial Judge was well aware of the weaknesses in the testimony of Ford and Twaddell. He had not found them to be honourable, upright witnesses but he accepted testimony which they gave because it was consistent with, and in harmony with, other testimony placed before him. He found the testimony, not the witnesses, to be credible. In my opinion the tendered evidence if adduced before the trial Judge or other tribunal of fact could not possibly affect the verdict. This view is in accord with the decision of this Court in *R. v. Stewart* (1972), 8 C.C.C. (2d) 137.

I have considered the judgments of the Supreme Court of Canada in *McMartin v. The Queen* [1964] S.C.R. 484 and *Horsburgh v. The Queen* [1967] S.C.R. 746. I find nothing in those judgments which requires me to accept this evidence. With particular reference to the latter judgment, I should add that I do not reject the evidence of Ford on the ground that he testified and was cross-examined at the trial.

effectuer ce paiement; il a rencontré Ford, l'a amené à la banque où il a encaissé un chèque de $25,000 qu'il a remis à Ford en espèces et en chèques de voyage. Au moment du paiement, il a obtenu le reçu de Ford qui est annexé à la première déclaration de ce dernier. Le ministère public prétend que Ford, mécontent du paiement de $25,000 et, indubitablement aussi influencé par la crainte, a changé sa version des faits.

Lorsqu'elle a examiné la requête, la Cour d'appel avait devant elle, en plus des documents déjà mentionnés, quelque cinquante-quatre volumes sur la preuve recueillie à l'enquête préliminaire et au procès; elle avait donc une bien meilleure connaissance de la preuve que ce que peut fournir le bref résumé que j'ai présenté plus haut. En statuant sur la requête, le juge McFarlane a dit au nom de la Cour:

> [TRADUCTION] La paragraphe 610(1) prévoit qu'aux fins d'un appel prévu par la Partie XVIII du Code, la Cour d'appel peut, lorsqu'elle l'estime dans l'intérêt de la justice, recevoir la déposition de tout témoin. Ici, le législateur a donné à la Cour un grand pouvoir discrétionnaire qu'elle doit exercer suivant sa conception de l'intérêt de la justice. A mon avis, il ne serait pas dans l'intérêt de la justice de recevoir les dépositions de Ford et de Twaddell parce qu'elles ne sont tout simplement pas dignes de foi. Je suis convaincu qu'elles sont fausses et que tout adulte intelligent les rejetterait comme pas du tout dignes de foi. De plus, le juge du procès était bien conscient des faiblesses du témoignage de Ford et de Twaddell. Il ne les a pas considérés comme des témoins respectables et intègres, mais il a accepté leurs témoignages parce qu'ils étaient compatibles et en harmonie avec les autres témoignages devant lui. Il a ajouté foi au témoignage mais non aux témoins. A mon avis, si les dépositions offertes avaient été produites devant le juge du procès ou un autre juge du fond, elles n'auraient vraisemblablement pas influé sur le verdict. Cette opinion est conforme à l'arrêt de cette Cour dans *R. v. Stewart* (1972), 8 C.C.C. (2d) 137.

J'ai examiné les arrêts de la Cour suprême du Canada *McMartin c. La Reine* [1964] R.C.S. 484 et *Horsburgh c. La Reine* [1967] R.C.S. 746. Je n'y trouve rien qui m'oblige à accepter ces dépositions. En ce qui concerne particulièrement le dernier de ces arrêts, j'ajouterai que je ne fonde pas mon rejet de la déposition de Ford sur le motif qu'il a témoigné et a été contre-interrogé au procès.

Parliament has given the Court of Appeal a broad discretion in s. 610(1)(*d*). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them—see for example *Regina v. Stewart*[1]; *Regina v. Foster*[2]; *Regina v. McDonald*[3]; *Regina v. Demeter*[4]. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*[5].

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

The leading case on the application of s. 610(1) of the *Criminal Code* is *McMartin v. The Queen*, *supra*. Ritchie J., for the Court, made it clear that while the rules applicable to the introduction of new evidence in the Court of Appeal in civil cases should not be applied with the same force in criminal matters, it was not in the best interests of justice that evidence should be so admitted as a matter of course. Special grounds must be shown to justify the exercise of this power by the appel-

[1] (1972), 8 C.C.C. (2d) 137 (B.C.C.A.).
[2] (1977), 8 A.R. 1 (Alta. C.A.).
[3] [1970] 3 C.C.C. 426 (Ont. C.A.).
[4] (1975), 25 C.C.C. (2d) 417 (Ont. C.A.).
[5] [1964] S.C.R. 484.

Par l'alinéa 610(1)*d*), le législateur a donné à la Cour d'appel un grand pouvoir discrétionnaire. On doit donner la prépondérance, dans cette disposition, à l'expression «l'intérêt de la justice» et il ne serait pas dans l'intérêt de la justice de permettre à un témoin, par la seule répudiation ou modification de ses dépositions au procès, de rouvrir des procès à volonté au détriment général de l'administration de la justice. Les demandes de cette nature sont fréquentes et les cours d'appel de diverses provinces se sont prononcées à leur égard—voir par exemple *Regina v. Stewart*[1]; *Regina v. Foster*[2]; *Regina v. McDonald*[3]; *Regina v. Demeter*[4]. Les principes suivants se dégagent de ces arrêts et d'autres dont plusieurs sont cités dans la jurisprudence susmentionnée:

(1) On ne devrait généralement pas admettre une déposition qui, avec diligence raisonnable, aurait pu être produite au procès, à condition de ne pas appliquer ce principe général de matière aussi stricte dans les affaires criminelles que dans les affaires civiles: voir *McMartin c. La Reine*[5].

(2) La déposition doit être pertinente, en ce sens qu'elle doit porter sur une question décisive ou potentiellement décisive quant au procès.

(3) La déposition doit être plausible, en ce sens qu'on puisse raisonnablement y ajouter foi, et

(4) elle doit être telle que si l'on y ajoute foi, on puisse raisonnablement penser qu'avec les autres éléments de preuve produits au procès, elle aurait influé sur le résultat.

L'arrêt fondamental sur l'application du par. 610(1) du *Code criminel* est *McMartin c. La Reine*, *supra*. Au nom de la Cour, le juge Ritchie y dit clairement que, bien que les règles applicables à la production de nouvelles preuves devant la Cour d'appel dans les affaires civiles ne doivent pas être appliquées aussi rigoureusement dans les affaires criminelles, il n'est pas dans l'intérêt de la justice que des dépositions soient ainsi admises automatiquement. Des motifs spéciaux doivent

[1] (1972), 8 C.C.C. (2d) 137 (C.A. C-B.).
[2] (1977), 8 A.R.1. (C.A. Alta.).
[3] [1970] 3 C.C.C. 426 (C.A. Ont.).
[4] (1975), 25 C.C.C. (2d) 417 (C.A. Ont.).
[5] [1964] R.C.S. 484.

late court. He considered that special grounds existed because of the nature of the evidence sought to be adduced and he considered that it should not be refused admission because of any supposed lack of diligence in procuring the evidence for trial. The test he applied on this question was expressed in these terms at p. 493:

> With the greatest respect, it appears to me that the evidence tendered by the appellant on such an application as this is not to be judged and rejected on the ground that it "does not disprove the verdict as found by the jury" or that it fails to discharge the burden of proving that the appellant was incapable of planning and deliberation, or that it does not rebut inferences which appear to have been drawn by the jury. It is enough, in my view, if the proposed evidence is of sufficient strength that it might reasonably affect the verdict of a jury.

The evidence was admitted and a new trial ordered.

In my view, the approach taken in the authorities cited above follows that of this Court in *McMartin*. The evidence in question in the case at bar was not available at trial and it would be, if received, relevant to the issue of guilt on the part of the Palmers. The evidence sought to be introduced in *McMartin* was evidence of an expert opinion not of matters of fact and therefore no issue of credibility in the ordinary sense arose. It is clear, however, that in dealing with matters of fact a consideration of whether, in the words of Ritchie J., the evidence possessed sufficient strength that "it might reasonably affect the verdict of the jury" involves a consideration of its credibility as well as its probative force if presented to the trier of fact.

Because the evidence was not available at trial and because it bears on a decisive issue, the inquiry in this case is limited to two questions. Firstly, is the evidence possessed of sufficient credibility that it might reasonably have been believed by the trier of fact? If the answer is no that ends the matter but if yes the second question presents itself in this form. If presented to the trier of fact and

être établis pour justifier l'exercice de ce pouvoir par une cour d'appel. Il a jugé que des motifs spéciaux existaient en raison de la nature de la preuve que l'on voulait produire et qu'on ne devait pas la refuser à cause d'un prétendu manque de diligence à la produire au procès. Le critère qu'il a appliqué sur cette question est énoncé dans les termes suivants à la p. 493:

> [TRADUCTION] Avec égards, je crois que la déposition offerte par l'appelant à l'occasion d'une requête comme celle-ci ne doit pas être jugée et rejetée au motif qu'elle «ne réfute pas le verdict prononcé par le jury» ou qu'elle ne réussit pas à établir que l'appelant était incapable de projeter et de commettre son acte de propos délibéré ou qu'elle ne réfute pas les déductions que le jury paraît avoir faites. Il suffit, à mon avis, que la déposition offerte ait suffisamment de poids pour qu'elle puisse raisonnablement influer sur le verdict du jury.

La déposition fut admise et un nouveau procès ordonné.

A mon avis, la façon dont les arrêts précités ont abordé la question suit celle adoptée par cette Cour dans *McMartin*. En l'espèce, la déposition en question n'était pas disponible au procès et, si on l'admettait, elle serait pertinente à la question de culpabilité des Palmer. La déposition que l'on voulait produire dans l'affaire *McMartin* était un témoignage d'expert et ne portait pas sur des points de fait de sorte qu'aucune question de crédibilité ne se posait au sens ordinaire de ce mot. Il est clair toutefois que lorsqu'il s'agit de points de fait, un examen de la question de savoir si la déposition a suffisamment de poids (pour reprendre les mots du juge Ritchie) «pour qu'elle puisse raisonnablement influer sur le verdict du jury» implique un examen de la crédibilité et de la force probante de pareille déposition si on la soumettait au juge du fond.

Puisque la déposition n'était pas disponible au procès et qu'elle porte sur une question décisive, l'étude en l'espèce se limite à deux points. Premièrement, la déposition présente-t-elle suffisamment de vraisemblance pour que le juge du fond ait raisonnablement pu la croire? Si la réponse est négative, la question est réglée, mais si elle est affirmative, il faut se poser la seconde question en

believed, would the evidence possess such strength or probative force that it might, taken with the other evidence adduced, have affected the result? If the answer to the second question is yes, the motion to adduce new evidence would have to succeed and a new trial be directed at which the evidence could be introduced.

It is evident that the Court of Appeal applied the test of credibility and found the evidence tendered as to the validity of Ford's trial evidence to be wholly unworthy of belief. It therefore refused the motion and in so doing made no error in law which would warrant interference by this Court. While it may not be necessary to do so in view of this conclusion, I express the view that the Court of Appeal was fully justified in reaching the conclusion it did upon a consideration of all the evidence adduced on the motion before it and the evidence appearing in the trial transcripts.

It was argued for the appellants that Ford's trial evidence was totally fabricated as a result of police pressures and inducements. In his declarations, Ford says that he was frightened and under pressure and accordingly when the time for the preliminary hearing came he merely got in the witness box and made up a bunch of lies. It should be noted, however, that at the trial, almost a year later, he gave the same evidence and, despite strenuous cross-examination on both occasions, no assertion is made that there was any significant difference in the evidence. The accurate repetition of extemporaneous inventions after such a long interval would be a remarkable performance on Ford's part under any circumstances but, when one adds the fact that the trial judge considered that his evidence was in harmony with the general picture of events which emerged from the evidence of many other witnesses, it becomes impossible to believe that the evidence was fabricated on the spur of the moment. Furthermore, it should be observed that the modification of the financial arrangements with Ford occurred, according to Ford's own declaration, after the preliminary hearing where he had given evidence and before the

ces termes. Si la déposition est présentée au juge du fond qui y ajoute foi, aura-t-elle un poids et une force probante tels qu'elle puisse, compte tenu des autres éléments de preuve produits, influer sur le résultat? Si la réponse à la seconde question est affirmative, la requête en production de nouveaux éléments de preuve doit être accueillie et un nouveau procès ordonné au cours duquel la déposition pourra être produite.

Il est évident que la Cour d'appel a appliqué le critère de crédibilité et a jugé que la preuve produite sur la validité du témoignage de Ford au procès n'était absolument pas digne de foi. Elle a donc rejeté la requête et, ce faisant, n'a commis aucune erreur de droit qui justifierait l'intervention de cette Cour. Bien que ce ne soit peut-être pas nécessaire de le dire compte tenu de cette conclusion, je suis d'avis que la Cour d'appel était tout à fait justifiée de conclure comme elle l'a fait après un examen de toute la preuve produite à l'occasion de la requête qu'on lui adressait et de la transcription des dépositions faites au procès.

On a allégué au nom des appelants que le témoignage de Ford au procès était entièrement fabriqué en raison des pressions et des incitations des policiers. Dans ses déclarations, Ford dit avoir eu peur et avoir été soumis à des pressions de sorte qu'au moment de l'enquête préliminaire, il est simplement allé à la barre des témoins et a inventé un tas de mensonges. Il faut remarquer toutefois qu'au procès, presqu'un an plus tard, il a rendu le même témoignage et, en dépit d'un contre-interrogatoire serré à ces deux occasions, on ne souligne aucune différence importante dans ses dépositions. Une répétition exacte de versions improvisées après un aussi long délai serait un exploit de la part de Ford dans n'importe quelle circonstance, mais lorsque l'on tient compte du fait que le juge du procès était d'avis que son témoignage concordait avec le tableau général des événements qui se dégage de plusieurs autres témoignages, il devient impossible de croire que la preuve a été fabriquée sous l'impulsion du moment. De plus, il faut remarquer que, selon la propre déclaration de Ford, les modifications des ententes financières ont été apportées après l'enquête préliminaire où il a rendu témoignage et avant le procès où, de l'aveu

trial when, it is conceded, he repeated it. It is impossible to believe that the nature of his evidence given at trial was affected by the payment or promise of money. Considering the suggestion that this arrangement was undisclosed and that the trial judge could therefore have been misled in his assessment of Ford's credibility, reference may be made to a passage in his reasons for judgment where he said:

> Ford testifies that the police promised to protect him and his family if he gave evidence on behalf of the Crown, and that they have fulfilled this promise by paying for the cost of relocating him and his family, and of maintaining them since February 1975. The cost of such maintenance said to have been $1,200 a month.

A careful review of the police evidence drawn from the affidavits filed confirms the version of the agreement made with Ford which he himself described in evidence at the trial. The police contention that Ford changed his mind shortly before the trial and wanted cash in lieu of unspecified relocation expenses is confirmed, at least in part, by Ford's later acceptance of the sum of $25,000 and his insistence upon more. It seems clear that he abandoned the original arrangement in favour of a sum of money as contended by the police. It was argued that the police had offered $60,000 when all that Ford had sought was $50,000. The police affidavits confirm that Ford requested a sum in the neighbourhood of $50,000. It also appears from the affidavits that the police officers themselves said, after some discussion between themselves, that they would recommend $60,000 to their superior officers. When it is considered that this payment was to be in lieu of all other provision for Ford after the trial and that it would serve to cover all the expenses involved in maintenance for Ford and his family including travel and relocation expenses and even a possible down payment on a new house, it does not seem an unreasonable amount.

The manner of payment of the $25,000 to Ford, which involved no secrecy and was done openly by cheque, negates improper motives on the part of the police. The use of the words "services rendered" and "services" on the receipt has, in my

général, il l'a répété. Il est impossible de croire que le paiement ou la promesse d'argent a influé sur la nature du témoignage qu'il a rendu au procès. Puisque l'on prétend que vu cette entente cachée, le juge du procès a donc pu être induit en erreur dans son appréciation de la crédibilité de Ford, il y a lieu de se reporter à un passage des motifs de son jugement où il dit:

> [TRADUCTION] Ford témoigne que la police lui a promis de protéger sa famille et lui-même s'il témoignait pour le ministère public, et qu'elle a respecté cette promesse en payant le coût de leur réinstallation ainsi que celui de leur entretien depuis février 1975. On a dit que ce dernier s'élevait à $1,200 par mois.

Un examen attentif des dépositions des policiers extraites des affidavits produits confirme la version de l'entente conclue avec Ford que ce dernier décrit dans son témoignage au procès. La prétention de la police que Ford a changé d'idée peu avant le procès et qu'il voulait de l'argent comptant au lieu d'un montant indéterminé pour ses frais de réinstallation est confirmée, du moins en partie, par l'acceptation subséquente par celui-ci d'un montant de $25,000 et son insistance pour obtenir davantage. Il semble clair qu'il a abandonné l'entente initiale en faveur d'un montant d'argent comme le prétend la police. On a allégué que la police avait offert $60,000 alors que Ford n'avait demandé que $50,000. Les affidavits des policiers confirment que Ford a demandé un montant d'argent d'environ $50,000. Il se dégage également des affidavits que les officiers de police eux-mêmes ont dit, après discussion entre eux, qu'ils recommanderaient le montant de $60,000 à leurs officiers supérieurs. Lorsque l'on considère que ce paiement devait remplacer toute autre aide pour Ford après le procès et qu'il devait servir à couvrir toutes les dépenses engagées pour l'entretien de Ford et de sa famille, y compris les frais de voyage et de réinstallation et possiblement le paiement initial sur une nouvelle maison, ce montant ne semble pas déraisonnable.

Le mode de paiement des $25,000 à Ford, qui n'a pas été fait en secret, mais ouvertement par chèque, fait échec à la thèse des motifs blâmables de la police. L'utilisation des mots «services rendus» et «services» sur le reçu n'a, à mon avis,

opinion, no sinister significance. It is evident that these words were employed to describe the arrangement here discussed. In my opinion, the rejection of Ford's evidence by the Court of Appeal was amply justified.

I cannot leave this part of the case without making some general remarks upon the situation it reveals. There can be no doubt that from time to time the interests of justice will require that Crown witnesses in criminal cases be protected. Their lives and the lives of their families and the safety of their property may be endangered. In such cases the use of public funds to provide the necessary protection will not be improper. When the need arises, the form of protection and the amount and method of the disbursement of moneys will vary widely and it is impossible to predict the precise form the required protection will take.

The dangers inherent in this situation are obvious. On the one hand, interference with witnesses cannot be tolerated because the integrity of the entire judicial process depends upon the ability of parties to causes in the courts to call witnesses who can give their evidence free from fears and external pressures, secure in the knowledge that neither they nor the members of their families will suffer in retaliation. On the other hand, the courts must be astute to see that no steps are taken, in affording protection to witnesses, which would influence evidence against the accused or in any way prejudice the trial or lead to a miscarriage of justice. However, in cases where the courts are, after careful examination, satisfied that only reasonable and necessary protection has been provided and that no prejudice or miscarriage of justice has resulted in consequence, they should not draw unfavourable inferences against the Crown, by reason only of this expenditure of public funds.

It must be recognized that when cases of this nature arise, charges of bribery of witnesses will, from time to time, be made. It is for this reason that the courts must be on guard to detect and to deal severely with any attempt to influence or corrupt witnesses. The courts must discharge this duty with the greatest care to ensure that while no impropriety upon the part of the Crown will be

aucune signification fatale. Il est évident que ces mots ont été employés pour décrire l'entente en question ici. A mon avis, la Cour d'appel était amplement justifiée de rejeter le témoignage de Ford.

Je ne peux clore le débat sur cet aspect de l'affaire sans faire des commentaires généraux sur la situation qu'il révèle. Il n'y a aucun doute qu'à l'occasion, les intérêts de la justice nécessitent la protection des témoins du ministère public dans les affaires criminelles. Leur vie, celle de leur famille et la sécurité de leurs biens peuvent être en danger. En pareils cas, l'utilisation de fonds publics pour assurer la protection nécessaire ne sera pas inappropriée. Lorsque le besoin se fait sentir, le mode de protection, le montant et la méthode de paiement varieront largement et il est impossible de prédire la forme précise que prendra la protection qui s'impose.

Les dangers inhérents à cette situation sont évidents. D'une part, on ne saurait tolérer l'intervention auprès des témoins parce que l'intégrité de tout le processus judiciaire dépend de la capacité des parties aux instances judiciaires de citer des personnes qui peuvent témoigner sans craintes ni pressions extérieures et dans l'assurance que leur famille et elles-mêmes ne subiront pas de représailles. D'autre part, les cours doivent être assez perspicaces pour s'assurer qu'en accordant une protection aux témoins, on ne fasse rien qui puisse influencer les témoignages à charge, nuire de quelque façon au procès ou entraîner un déni de justice. Toutefois, dans les affaires où, après un examen minutieux, les cours sont convaincues que l'on a seulement accordé une protection raisonnable et nécessaire et qu'aucun préjudice ou déni de justice n'en a résulté, elles ne devraient pas tirer de conclusions défavorables contre le ministère public du seul fait de cette utilisation de fonds publics.

Il faut reconnaître que, dans des affaires de cette nature, il arrivera que des accusations de corruption de témoins soient portées. C'est pourquoi les cours doivent faire preuve de vigilance dans la détection et la punition sévère de toute tentative d'influencer ou de corrompre des témoins. Les cours doivent s'acquitter de ce devoir avec le plus grand soin pour s'assurer que tout en

permitted, the provision of reasonable and necessary protection for witnesses is not a prohibited practice. In the United States, there are statutory provisions expressly contemplating such expenditure under the authority of the Attorney General.

I now turn to the second point raised in this appeal. There was evidence at trial, resulting from police surveillance, that Ford and Douglas Palmer met on three separate occasions. It was presumably led to afford some evidence of association between them. On July 18, 1972, Ford was seen to leave a car and walk up Palmer's driveway then return to the car in three or four minutes and depart. Ford, in giving evidence in chief, was not asked about this incident and he was not cross-examined about it. Palmer disclaimed any knowledge of Ford's visit. On November 8, 1972, Palmer was seen travelling in Ford's automobile as a passenger with Ford driving. Ford was not examined or cross-examined on this incident. Palmer said that he had been waiting at a bus stop near his home because he was going to pick up a truck which was under repair and Ford happened by in his car and gave him a lift. The event he said was not prearranged. On January 23, 1973, at 11:30 p.m., Ford was observed leaving his automobile from which he went down a driveway to Palmer's house and spoke to Douglas Palmer for a few minutes then returned to his car and left. Ford, as before, gave no evidence relating to this event and was not cross-examined upon it. Palmer said that Ford had come to his house and offered to sell some tires at a reasonable price and Palmer had merely sent him away. Palmer was not cross-examined on his evidence relating to the three meetings.

The trial judge found that Palmer was not a credible witness and indicated that he was not willing to accept his testimony on important matters. In dealing with this question, he made reference to these incidents as well as much other evidence. Counsel for Palmer objects to this on the basis that Palmer's version of what occurred on these occasions stands uncontroverted and, particularly in view of the Crown's failure to examine Ford upon these matters, it is argued that the trial

ne permettant aucune manœuvre incorrecte de la part du ministère public, la protection raisonnable et nécessaire des témoins ne soit pas une pratique interdite. Aux États-Unis, des textes de loi prévoient expressément ce genre de dépenses sous le contrôle du procureur général.

J'aborde maintenant la seconde question posée dans ce pourvoi. Il a été mis en preuve au procès, suite à la surveillance de la police, que Ford et Douglas Palmer se sont recontrés à trois reprises. Cela était possiblement destiné à fournir des éléments de preuve sur leur association. Le 18 juillet 1972, on a vu Ford descendre de sa voiture et emprunter l'allée de Palmer puis revenir à sa voiture trois ou quatre minutes plus tard et repartir. Dans son témoignage principal, Ford n'a pas été interrogé sur cet incident et il n'a pas été contre-interrogé à ce sujet. Palmer a nié toute connaissance de la visite de Ford. Le 8 novembre 1972, Palmer a été vu comme passager dans la voiture de Ford avec ce dernier au volant. Ford n'a pas été interrogé ni contre-interrogé sur cet incident. Palmer a dit qu'il attendait à un arrêt d'autobus près de chez lui parce qu'il allait chercher un camion en réparation et que Ford était passé en voiture et l'avait ramassé. Il a dit que ce n'était pas prévu. Le 23 janvier 1973 à 23h30, on a vu Ford descendre de sa voiture, emprunter l'allée de la maison de Palmer, lui parler pendant quelques minutes puis revenir à sa voiture et partir. Comme auparavant, Ford n'a fourni aucun témoignage sur cet événement et n'a pas été contre-interrogé à ce sujet. Palmer a dit que Ford était venu chez lui et avait offert de lui vendre des pneus à un prix raisonnable et qu'il l'avait simplement renvoyé. Palmer n'a pas été contre-interrogé sur son témoignage relatif à ces trois rencontres.

Le juge du procès a conclu que Palmer n'était pas un témoin digne de foi et a indiqué qu'il n'avait pas l'intention d'accepter son témoignage sur des points importants. En examinant cette question, il a fait référence à ces incidents et à plusieurs autres éléments de preuve. L'avocat de Palmer objecte que la version de Palmer sur ce qui s'est produit à ces occasions n'est pas contestée et, compte tenu particulièrement de l'omission du ministère public d'interroger Ford sur ces points, il

judge should have accepted Palmer's version of events and not drawn inferences adverse to him. The point was summarized in the appellants' factum in these words:

> It is submitted that the Court of Appeal for British Columbia erred in concluding that it was not necessary for the prosecution to have examined Ford in-chief with respect to the three incidents and that it was not necessary to cross-examine the Appellant Douglas Garnet Palmer when he testified with respect to the said three incidents. Had the Court of Appeal for British Columbia found that the learned trial Judge had erred in rejecting the testimony of Douglas Garnet Palmer with respect to the said three incidents then the basis for the learned trial Judge's acceptance of Ford's testimony would have disappeared and the Court of Appeal would then have quashed the convictions against the Appellants.

In dealing with this argument in the Court of Appeal, McFarlane J.A. said for the Court:

> The second ground of appeal argued was that the trial Judge should have found that the evidence of Douglas Palmer raised at least a reasonable doubt of his guilt. With particular reference to the three occasions to which I have just referred, it was said that Palmer's evidence was not shaken in cross-examination and it is suggested he was not specifically questioned about one or two of them. Reference was made to *Browne v. Dunn* (1894) The Reports 67 and to *Rex v. Hart* (1932) 23 C.A.R. 202. I respectfully agree with the observation of Lord Morris in the former case at page 79:
>
> > I therefore wish it to be understood that I would not concur in ruling that it was necessary in order to impeach a witnesses' credit, that you should take him through the story which he had told, giving him notice by questions that you impeached his credit.
>
> In my opinion the effect to be given to the absence or brevity of cross-examination depends upon the circumstances of each case. There can be no general or absolute rule. It is a matter of weight to be decided by the tribunal of fact, vide: *Sam v. Canadian Pacific Limited* (1976) 63 D.L.R. (3d) 294 and cases cited there by Robertson, J.A. at 315-7. In the present case Douglas Palmer was cross-examined extensively. It seems to me the circumstances are such that it must have been foreseen his credit would be attacked if he testified to his innocence. In any event, this was made plain when he was cross-examined. The trial Judge gave a careful explanation for his acceptance of the story of Ford and

prétend que le juge du procès aurait dû accepter la version des événements donnée par Palmer et ne pas en tirer de conclusions défavorables à ce dernier. Le point est résumé comme suit dans le mémoire des appelants:

> [TRADUCTION] Nous soutenons que la Cour d'appel de la Colombie-Britannique a commis une erreur en concluant qu'il n'était pas nécessaire que la poursuite interroge Ford sur les trois incidents en interrogatoire principal, et qu'il n'était pas nécessaire de contre-interroger l'appelant Douglas Garnet Palmer, lorsqu'il a témoigné, sur les trois incidents susmentionnés. Si la Cour d'appel de la Colombie-Britannique avait conclu que le savant juge du procès avait commis une erreur de droit en rejetant le témoignage de Douglas Garnet Palmer sur les trois incidents susmentionnés, le fondement sur lequel s'est appuyé le savant juge du procès pour accepter le témoignage de Ford aurait disparu et la Cour d'appel aurait alors annulé les déclarations de culpabilité prononcées contre les appelants.

En examinant cet argument, le juge McFarlane a dit au nom de la Cour d'appel:

> [TRADUCTION] Selon le second moyen d'appel, le savant juge du procès aurait dû conclure que le témoignage de Douglas Palmer soulevait au moins un doute raisonnable sur sa culpabilité. Pour ce qui est en particulier des trois occasions susmentionnées, on a dit que le témoignage de Palmer n'a pas été ébranlé en contre-interrogatoire et on a prétendu qu'il n'a pas été spécifiquement interrogé sur l'un ou l'autre de ces événements. On a cité *Browne v. Dunn* (1894) The Reports 67 et *Rex v. Hart* (1932) 23 C.A.R. 202. Avec égards, je souscris à la remarque de lord Morris dans le premier de ces arrêts à la p. 79:
>
> > Je veux donc qu'il soit clair que je ne souscris pas à la conclusion qu'il est nécessaire, pour attaquer la crédibilité d'un témoin, qu'on l'interroge sur l'histoire qu'il a racontée, en le prévenant par des questions qu'on met en doute sa crédibilité.
>
> A mon avis l'effet à donner à l'absence de contre-interrogatoire ou à sa brièveté dépend des circonstances de chaque affaire. Il ne peut y avoir de règle générale ou absolue. C'est une question de poids à être tranchée par le juge des faits, voir: *Sam v. Canadian Pacific Limited* (1976) 63 D.L.R. (3d) 294 et la jurisprudence citée par le juge Robertson de la Cour d'appel aux pp. 315 à 317. En l'espèce, Douglas Palmer a fait l'objet d'un contre-interrogatoire en profondeur. Il me semble que les circonstances sont telles qu'on doit avoir prévu que sa crédibilité serait contestée s'il protestait de son innocence. Quoi qu'il en soit, c'est devenu évident pendant son contre-interrogatoire. Le juge du procès a soigneuse-

rejecting that of Douglas Palmer. I cannot give effect to this ground of appeal.

I am in full agreement with these words and I do not consider it necessary to add to them save to emphasize that the finding against the credibility of Palmer was made upon much more than the evidence of these three events. It was based upon a consideration of the whole of the evidence including the full examination and cross-examination of Palmer. I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Walsh, Micay & Co., Winnipeg.

Solicitor for the respondent: Roger Tassé, Ottawa.

ment expliqué pourquoi il acceptait la version de Ford et rejetait celle de Douglas Palmer. Je ne peux donner effet à ce moyen d'appel.

Je souscris entièrement à cette opinion et je n'estime pas nécessaire d'y ajouter quoi que ce soit, sauf pour souligner que la conclusion à l'encontre de la crédibilité de Palmer était fondée sur bien plus que la preuve relative à ces trois événements. Elle s'appuyait sur un examen de l'ensemble de la preuve, y compris l'interrogatoire et le contre-interrogatoire complets de Palmer. Je suis d'avis de rejeter le pourvoi.

Pourvoi rejeté.

Procureurs des appelants: Walsh, Micay & Co., Winnipeg.

Procureur de l'intimée: Roger Tassé, Ottawa.

Tab 9

Case Name:

Mason Capital Management LLC v. TELUS Corp.

IN THE MATTER OF Section 291 of the Business Corporations Act S.B.C. 2002, c. 57, as Amended
AND IN THE MATTER OF a Proposed Arrangement involving TELUS Corporation and its Non-Voting Shareholders
Between
Mason Capital Management LLC, Petitioner, and
TELUS Corporation, Respondent

[2012] B.C.J. No. 2682

2012 BCSC 1919

Dockets: S125864 and S126123

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

S.C. Fitzpatrick J.

Heard: November 7-9, 2012.
Judgment: December 18, 2012.

(440 paras.)

Corporations, partnerships and associations law -- Corporations -- Share capital -- Arrangement -- Petition by Telus for approval of shareholder arrangement allowed -- Telus proposed exchange of non-voting shares for common shares on one-to-one basis to alleviate corporate governance issues associated with dual share structure -- Mason sought to block proposal, as it had acquired large common share position in anticipation of arbitraging historical premium at which common shares traded -- Arrangement was brought forward in procedurally fair manner and was compliant with statutory requirements -- Arrangement was fair, reasonable and undertaken for valid business purpose -- Dilution of common shares was thoroughly considered in context of well-established benefits to all shareholders -- Business Corporations Act, ss. 288, 289, 291, 291(2)(b).

Petition by Telus for approval of a proposed shareholder arrangement. Telus sought to revamp its shareholding structure in order to maintain its competitive position in the Canadian telecommunications marketplace. Telus employed a dual common and non-voting share structure that was initially adopted to comply with foreign ownership restrictions. The structure proved to pose corporate governance issues and reduced share liquidity, indirectly affecting performance and competitiveness. Telus proposed an arrangement with the non-voting class whereby their shares would be exchanged for common shares on a one-for-one basis. An overwhelming majority of shareholders supported the proposal and its announcement resulted in an increase of the price for both classes of shares. However, Mason Capital, a hedge fund manager, opposed the proposal. Following the announcement of an initial proposal, Mason acquired a significant common share position hedged by short-selling non-voting shares. It stood to financially benefit from either blocking the proposal, thereby driving up the historical premium paid for common shares, or by preventing any conversion unless a premium was paid for common shares or a discount was accepted for non-voting shares. Mason accepted that Telus had acted in good faith and that there were valid business reasons for the arrangement. Mason raised conflict of interest issues on the part of the Telus Board and the Special Committee established to consider the arrangement. Mason further raised issues as to whether the statutory requirements were met. Mason submitted that the arrangement was not fair and reasonable to it and the common shareholders. The hearing also involved appeals by Mason from three interim orders.

HELD: Appeals dismissed and Petition allowed. With respect to the interim orders under appeal, there was no clear error in the setting of the voting threshold and the effect of that order. No error was established with respect to the timing and setting of procedures and scope related to the use of proxies at the joint meeting or the refusal of an adjournment of the meeting. Mason's contention that it was prejudiced by being forced to attend the meeting lacked substance given its use of significant publicity to outline its position over the previous six months. To challenge the conduct of the meeting following its occurrence and the voting by shareholders would result in significant prejudice to Telus. With respect to the fairness hearing, Telus satisfied the requirements for approval of the arrangement. The manner in which the arrangement was brought forward was procedurally fair, particularly as it pertained to Mason. The shareholdings of directors and management involved in the process were not material in the context of the overall arrangement and the context of widely-held shareholdings in the company. The shareholdings of the officers and directors were disclosed in publicly available documents prior to announcement of the arrangement. There was no evidence of the relevant members acting in self-interest. No bad faith was proven with respect to the proposal of the arrangement. There was a thorough consideration of the balancing of the interests of the common shareholders in relation to the dilution of their voting power and lack of payment of a premium. Those factors were weighed against the interests of the non-voting shareholders and the benefits to be achieved by all shareholders, with a very extensive consideration of the appropriate exchange ratio. There was comprehensive and compelling analysis that non-voting shareholders were unlikely to pay a premium for common shares given the relative meaninglessness of voting rights attached to widely held shares. The positive vote by all shareholders was a strong indication that the benefits, which were established to be real and substantial, outweighed negative aspects. The arrangement was fair and reasonable and undertaken for a valid business purpose. Telus satisfied all statutory requirements. An order approving the arrangement was stayed for five days to permit contemplation of appeal proceedings and a further stay.

Statutes, Regulations and Rules Cited:

Broadcasting Act, S.C. 1991, c. 11,

Business Corporations Act SBC 2002, CHAPTER 57, s. 147(1), s. 186, s. 259(2), s. 271(6), s. 288, s. 288(1)(a), s. 288(1)(b), s. 288(1)(g), s. 289, s. 289(1)(a), s. 289(1)(b), s. 289(3), s. 289(3.1), s. 290, s. 290(1)(a)(ii), s. 291, s. 291(2), s. 291(2)(b), s. 291(2)(b)(ii), s. 291(2)(e), s. 291(4), s. 301(1), s. 308(1)

Radiocommunication Act, R.S.C. 1985, c. R-2,

Telecommunications Act, S.C. 1993, c. 38,

Appeal From:

On appeal from: Supreme Court of British Columbia, Master's Decisions dated October 15, 2012: TELUS Corporation (Re), 2012 BCSC 1539 and Mason Capital Management LLC v. TELUS Corporation, 2012 BCSC 1540 and dated October 17, 2012: Mason Capital Management LLC v. TELUS Corporation, 2012 BCSC 1619.

Counsel:

Counsel for TELUS Corporation: G.K. Macintosh, Q.C., R.S. Anderson, Q.C., O. Pasparakis, E. Miller.

Counsel for Mason Capital Management LLC: I.G. Nathanson, Q.C., S.R. Schachter, Q.C., G.B. Gomery, Q.C.

Reasons for Judgment

1 **S.C. FITZPATRICK J.**:-- The telecommunications industry in Canada, and in other parts of the world, is extremely competitive. As a significant industry player, the petitioner TELUS Corporation seeks to maintain and enhance its own competitiveness in the Canadian marketplace. Failure to do so may have adverse consequences for the future of the company.

2 One factor negatively affecting TELUS' business model has been its dual share structure, which was put in place over a decade ago to comply with foreign ownership restrictions. In particular, the dual share structure poses corporate governance issues for TELUS and reduces share liquidity, which indirectly affects company performance and hence, its competitiveness. TELUS shareholders hold either common shares or non-voting shares. Although both types of shares have the same economic attributes, historically, the common shares have traded at a premium to the price of the non-voting shares.

3 In order to rid itself of this encumbrance, TELUS has proposed an arrangement with the non-voting class of shareholders which would result in the non-voting shares being exchanged for common shares on a one-for-one basis. Aside from one significant shareholder, Mason Capital Management LLC, the overwhelming majority of both common and non-voting shareholders support this proposal. Mason opposes the proposal despite it being well acknowledged by both TELUS and Mason that there are significant benefits to TELUS and its shareholders in achieving this result.

4 The marketplace has already reacted favourably to the proposal in that the share price for both common and non-voting shares has increased.

5 Despite its significant share position, Mason has a limited financial stake in TELUS arising from an arbitrage strategy which it employed after TELUS announced its intention to collapse its dual class share structure. Mason is indifferent to the increase in the share prices as a result, and its primary intention is not to enhance the value of its shares in TELUS. Rather, it aims to profit from the historical trading spread as between the two classes of shares. Accordingly, Mason will reap significant financial benefits either from blocking the TELUS proposal (in which case the historical premium for the common shares is expected to re-emerge) or alternatively, by exerting sufficient leverage to prevent any conversion unless a premium is paid for the common shares (or alternatively, a discount is accepted for the non-voting shares).

6 The arrangement has been proposed by TELUS pursuant to the *Business Corporations Act*, S.B.C. 2002 c. 57 (the "*Act*"), and TELUS now seeks court approval of it. In the leading case of *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, the Court established a three-part test in considering approval of an arrangement: whether the arrangement is made in good faith, whether the statutory requirements have been met and finally, whether the arrangement is fair and reasonable.

7 Mason concedes that TELUS is acting in good faith and that, as part of the fair and reasonable test, there are valid business reasons for the arrangement. Mason contends, however, that there are conflict of interest issues on the part of both TELUS' Board and the Special Committee established to consider the arrangement. Mason also raises numerous issues relating to whether the statutory requirements under the *Act* have been met. Finally, Mason contends that the arrangement is not fair and reasonable to the common shareholders, and in particular to Mason.

8 This hearing also involved appeals from orders of Master Muir of this Court dealing with various interim matters leading to the meeting of the shareholders on October 17, 2012. The issues arising in those appeals overlap to some extent with issues arising in the fairness hearing.

II. BACKGROUND FACTS

A. Circumstances of TELUS

9 TELUS is a leading Canadian telecommunications company incorporated under the *Act* and headquartered in Vancouver, British Columbia. TELUS is a reporting issuer in all Canadian provinces.

10 TELUS has a multiple class share structure. It is authorized to issue up to 1,000,000,000 common shares (the "Common Shares"), 1,000,000,000 non-voting shares (the "Non-Voting Shares") and certain preferred shares. Currently, there are no issued and outstanding preferred shares. The Common Shares are traded on the Toronto Stock Exchange ("TSX") and the Non-Voting Shares are traded on both the TSX and the New York Stock Exchange ("NYSE").

11 As detailed below, the Non-Voting Shares were created to allow foreigners to participate economically in TELUS without running afoul of foreign ownership restrictions. The Non-Voting Shares are virtually identical in all material respects to the Common Shares. Specifically, they are equal with each other with respect to the payment of dividends and the distribution of assets of TELUS on a liquidation, dissolution or winding up of TELUS. Further, the Articles of TELUS (the "Articles") provide that the holders of Non-Voting Shares and Common Shares are equally entitled

to receive notice of, attend and be heard at all general meetings of TELUS and to receive all notices of meetings, information circulars and other written information from TELUS.

12 The sole distinguishing characteristic between the two classes of shares -- the difference which Mason says requires TELUS to offer a premium to Common Shareholders on any conversion or exchange is the Common Shares carry voting rights in all circumstances and Non-Voting Shares do not. Despite being entitled to the same dividend and equity participation, being widely held and having similar liquidity, Non-Voting Shares have generally traded at a discount to the trading price of Common Shares. Measured over the last three years, the difference between the two classes was approximately 4.5%.

13 TELUS' dual class share structure was born out of several corporate mergers in the late 1990s. At that time, the industry was governed by provisions which restricted foreign control such that no more than one-third of TELUS' issued and outstanding voting shares could be owned by non-Canadians. Responding to concerns that the transactions would result in levels of foreign ownership beyond what was allowed, certain amendments were made to the Articles to create the Non-Voting Share class and in 2000, TELUS issued a significant number of Non-Voting Shares.

14 In 2004, foreign ownership of TELUS shares dropped significantly. Since that time, further reductions have occurred so that total foreign ownership is now below the regulatory limit. In addition, TELUS says that while it remains unclear whether and when the government may make comprehensive changes to legislation to remove foreign ownership restrictions on entities such as TELUS, the federal government has indicated in the past that it is interested in liberalizing these foreign ownership rules. Certain market analysts agree that additional liberalization is likely.

15 Accordingly, TELUS has found itself in a position where the dual class structure, and in particular the need for the Non-Voting Shares, is no longer required to maintain compliance with current foreign ownership requirements; and based on indications from the federal government, it appears that these requirements could soon be loosened or altogether eliminated.

16 This new reality was recognized by several of TELUS' largest shareholders, who began to express concern about the impact of the dual structure on the liquidity and trading volumes of TELUS shares. These concerns were brought to the attention of the executive and management of TELUS, which provided the impetus for TELUS to consider collapsing its dual class share structure into a single voting class and in that event, on which terms such a conversion should occur.

17 As of September 4, 2012, TELUS' outstanding and issued share capital was comprised of 174,910,546 Common Shares and 150,902,132 Non-Voting Shares.

B. The Initial Proposal

18 By December 2011, TELUS had determined that extending full voting rights to all of TELUS' shareholders through a collapse of the dual class share structure warranted careful consideration. Management began to analyze the matter and prepare a proposal to the Board. In its preliminary analysis, which was prepared with the assistance of TELUS' lawyers, management reviewed and considered precedent transactions and potential structures under which such a collapse could be implemented.

19 On January 25, 2012, TELUS' Board established a Special Committee of independent directors to determine the implications of collapsing the dual class share structure, whether TELUS should proceed with such a proposal, and, if so, the most appropriate way to do so. The Special

Committee was mandated to review, direct and supervise TELUS' assessment of the proposal to collapse the share structure, and to take such steps as it determined in its business judgment were necessary and appropriate in making its recommendation to the Board. The members of the Special Committee were Brian Canfield (Chair), Charlie Baillie, John Butler, Rusty Goepel, John Lacey and Bill MacKinnon. The Committee was assisted by considerable input from both Canadian and U.S. legal counsel.

20 The Special Committee held its initial meeting on February 1. At that time, TELUS' management presented an overview of options to consider in deciding how best to collapse the dual class structure. The Special Committee discussed and reviewed with TELUS management: (i) information relating to the creation, attributes, and historical trading price and volumes of the Common Shares and the Non-Voting Shares; (ii) issues relating to the share conversion ratio and the impact of that ratio on share price, dividend yield, the number of outstanding Non-Voting Shares and Common Shares, forecasted earnings per share ("EPS"), and dividend payout; and (iii) the implications for both Non-Voting Shareholders and Common Shareholders.

21 Further, the Special Committee retained an independent financial advisor, Scotia Capital Inc. ("Scotia"). As an independent financial advisor, Scotia gave presentations to the Special Committee on February 8, 25 and 21 providing its views and its conclusions on the proposed conversion of Non-Voting Shares to Common Shares.

22 Scotia's presentations to the Special Committee focused on determining an appropriate conversion ratio and the potential approaches to determine the appropriate share conversion ratio. Scotia also provided its initial observations on share value and liquidity as compared with other industry players with single class share structures and dual class share structures. With respect to the fairness of the conversion ratio, Scotia evaluated and assessed the following factors: (i) the legal rights attached to the Common Shares and the Non-Voting Shares; (ii) market precedents for share consolidation transactions of this type; (iii) value implications; and (iv) the benefits flowing from a share consolidation to the Common Shares and the Non-Voting Shares.

23 After considering a range of different possible conversion ratios and providing its perspective on what effect these different ratios may have on share price, EPS, dividend yield and share dilution, Scotia was of the opinion that, in the circumstances, a one-for-one conversion ratio was most appropriate as being fair, from a financial point of view, to both the holders of Non-Voting Shares and the holders of Common Shares (the "First Fairness Opinion").

24 After receiving and considering the First Fairness Opinion, and after discussing a range of issues relating to the collapse of the dual class share structure, the Special Committee unanimously concluded that a one-for-one conversion of the Non-Voting Shares for Common Shares was in the best interests of TELUS, was reasonable and fair in the circumstances, and should be recommended to the Board and shareholders. By late February, the Special Committee prepared a report to the Board which unanimously recommended that TELUS adopt and implement an arrangement involving a one-for-one conversion of Non-Voting Shares for Common Shares (the "Initial Proposal"). The Initial Proposal involved an amendment to TELUS' Articles.

25 Based on the Special Committee's recommendations and other considerations, and after Scotia's presentation of its First Fairness Opinion, the Board determined that the Initial Proposal was in the best interests of TELUS and was reasonable and fair in the circumstances.

26 On February 21, TELUS issued a news release outlining the key terms of the Initial Proposal. The shareholder vote on the Initial Proposal was set to be held at the annual and special meeting of shareholders scheduled for May 9. Given that the Initial Proposal required amendments to certain Articles, approval required a special majority (i.e. 2/3) of the votes cast by the holders of the Non-Voting Shares and the holders of the Common Shares, each voting separately as a class.

27 The Board met again on March 14 and confirmed that the Initial Proposal was in the best interests of TELUS and was reasonable and fair in the circumstances. The Board approved proceeding with the Initial Proposal and recommended that shareholders vote in favour of the Initial Proposal at the May 9 meeting.

28 On March 20, TELUS filed a petition in this Court and immediately obtained from Master Tokarek an *ex parte* interim order which established the parameters for the holding of the May 9 meeting to consider approval of the Initial Proposal (the "First Interim Order"). The First Interim Order, as amended, provided that the Initial Proposal would be adopted if it received the affirmative vote of not less than 2/3 of the votes cast by the holders of both the Common Shares and the Non-Voting Shares, each voting separately as a class. This voting threshold was consistent with requirements in the Articles when changes to the Articles were being proposed. The record date for the purposes of voting at the meeting was set for April 3.

29 By all accounts, the market reacted favourably to the February 21 announcement of the Initial Proposal. The spread between the trading price of the Non-Voting Shares and the Common Shares narrowed from a discount of approximately 3.8% on February 21 to a discount of approximately 0.9% the next day. Until August 30, the spread maintained an average of approximately 2%.

30 Additionally, shares of both classes rallied after the announcement. The trading price of Non-Voting Shares and Common Shares closed up 2.4 and 5.5%, respectively, representing an increase of approximately $675 million in TELUS' equity value. This outstripped both the broader market and close competitors. While Mason disputes whether the increase was due to the announcement or other factors, I accept that the increase was in large measure due to the announcement.

C. Mason's Arbitrage Strategy

31 Mason Capital Management LLC is a hedge fund manager based out of New York. It provides investment advice to various hedge funds who now own shares in TELUS. For the purposes of these reasons, I will simply refer to this corporate group or related companies collectively as "Mason".

32 The narrowed spread remained at approximately 1% until Mason initiated a short-term arbitrage strategy -- arbitrage being the practice of taking advantage of a price difference between two or more markets or striking a combination of matching deals that capitalize upon the imbalance, the profit resulting from the difference between the market prices. This strategy was accomplished in the face of the delay from the initial announcement by TELUS on February 21 (at which time Mason owned no TELUS shares) and the April 3 record date set by the notice of meeting to consider the Initial Proposal. During this time frame, Mason acquired a large number of Common Shares while simultaneously hedging its position by short selling an equivalent number of Non-Voting Shares and Common Shares.

33 Needless to say, evidence of significant trading in the shares after the announcement was an alarming development for TELUS. On March 21, a research analyst acting on behalf of Mason approached TELUS with confirmation that Mason had acquired a significant position and that it

would not support the Initial Proposal unless a premium was paid for the Common Shares. The Board declined to enter into negotiations with Mason.

34 TELUS issued a press release on March 22 advising of this development and in particular an unusual accumulation of TELUS shares in the hands of non-Canadian shareholders. The press release stated in part:

> The catalyst for this announcement is recent significant buying interest by non-Canadian investment firms presumed to have short-term, event-driven trading tactics related to TELUS' February 21, 2012 proposal to convert Non-Voting Shares into Common Shares. TELUS believes one of the principal tactics being deployed by these event-driven foreign firms is acquiring the Common Shares and shorting the Non-Voting Shares. The result is little to no real net economic interest in TELUS. The sole purpose appears to be to exert influence over the proposed share conversion and to increase the share trading spread for near term profit. Since 2004, the level of non-Canadian ownership of Common Shares has been generally below 20 per cent and the current level is an exceptional development.
>
> [Emphasis added.]

35 On April 10, Mason disclosed publicly for the first time that it had acquired a significant number of TELUS shares. Mason reported that, as at March 31, it owned 32,722,329 Common Shares and 602,300 Non-Voting Shares, representing approximately 18.7% and 0.4% of the issued shares of each class, respectively. Mason further reported that it also had obligations under securities lending agreements to return to lenders a total of 10,963,529 Common Shares and 21,672,700 Non-Voting Shares.

36 As a result, Mason controlled a significant amount of the Common Shares (some $2 billion worth), yet its financial stake in TELUS was relatively small. In aggregate, Mason was simultaneously long 33,324,629 TELUS shares and short 32,636,229 TELUS shares, such that its net investment represented only 0.21% of TELUS' capital.

37 By early April, Mason's intentions with respect to this arbitrage strategy were clear; namely, it had executed its arbitrage plan for the purpose of voting against the Initial Proposal, which would allow it to profit from the re-emergence of the historical premium attached to the Common Shares once the Initial Proposal was defeated or withdrawn. Put bluntly, Mason's investment in TELUS was structured in such a way that its economic interest in TELUS primarily related to the *spread* of the share prices as between the two classes, not to the price of the shares themselves.

D. Efforts to Approve (and Defeat) the Initial Proposal

38 From the time of Mason's first public disclosure on April 10, the battle was joined as between TELUS and Mason. What followed was a very public and, to some extent, acrimonious dispute between them while both parties engaged in a long, extensive and aggressive campaign to garner shareholder support.

39 On April 13, TELUS forwarded its information circular to all 225,000 shareholders highlighting the benefits of the Initial Proposal and urging shareholders to vote in favour of the arrangement, supported by Scotia's First Fairness Opinion.

40 On April 16, Michael Martino, Principal and Co-Founder of Mason, had a conference call with Brian Canfield, the Chairman of TELUS' Board, to discuss Mason's position and the reasons for Mason's concerns. The results of that call were communicated to the Special Committee.

41 With TELUS uninterested in entering into negotiations, Mason circulated a lengthy and detailed dissident proxy circular on April 20 urging TELUS shareholders to vote against the Initial Proposal (the "First Mason Dissident Circular"). Mason engaged Kingsdale Shareholder Services Inc. ("Kingsdale") as its proxy solicitation agent. Mason's fundamental position was, as it asserts on this application, that since buyers of Common Shares had consistently paid a premium over a long period of time for their right to vote, the one-for-one conversion would be unfair as it would take away this value without proper compensation. Mason asserted:

> Buyers of Voting Shares have consistently paid a premium over a long period of time. The premium has averaged 4% to 5% over any relevant time period in the five years before the Proposal was announced, and has been as high as 10%.
>
> Voting Shares have more value because they have more rights the right to vote, to control the board, to control the Company and to convert into Non-voting Shares.
>
> The superior value of voting or multiple voting shares in dual class structures has been recognized in numerous other transactions where holders of such shares received a premium on the elimination of the dual-class structure.
>
> As the voting class controls the potential sale of TELUS, the Voting Shares should also be entitled to a control premium ...
>
> A one-for-one conversion ratio takes this value away from holders of Voting Shares and confers a windfall benefit on holders of Non-voting Shares.
>
> This transfer of value was recognized by the market when the transaction was announced as the long-standing spread between the price of Voting Shares and Non-voting Shares immediately collapsed.
>
> The historical trading spread should be the starting point in setting a fair premium for the Voting Shares as compensation for permanently diluting their voting rights.
>
> [Emphasis added.]

42 Mason further argued that the Initial Proposal would dramatically reduce the permitted level of foreign ownership, thereby hurting the stock's liquidity.

43 Moreover, Mason said that the process adopted by TELUS' board was flawed because it failed to ensure the interests of the holders of Common Shares were fully and independently considered. It asserted that: (i) the Special Committee's mandate did not require it to determine whether the transaction was fair to Common Shareholders; (ii) the Special Committee failed to consider the historical trading premium between the two classes of shares; (iii) the Initial Proposal disproportionately benefited TELUS' management and directors, who predominantly owned Non-Voting Shares; and (iv) Scotia's Fairness Opinion was not independent, and TELUS did not otherwise obtain an independent fairness opinion.

44 Finally, Mason disputed many of TELUS' claims, including: (i) that the Non-Voting Shares and Common Shares are similar; (ii) that the Initial Proposal benefits both classes, as evidenced by the increase in market prices of both after the February 21 announcement; (iii) that a premium is unjustified, given the dual class structure was created to deal with foreign ownership rules; (iv) that TELUS has, for the most part, treated the two classes of shares similarly by extending voting rights to holders of Non-Voting Shares on various issues; and (v) that the Initial Proposal would enhance the liquidity and marketability of TELUS shares.

45 Mason concluded by urging TELUS shareholders to vote against the Initial Proposal. After release of the First Mason Dissident Circular, Mason continued its campaign to defeat the Initial Proposal through further public communications to the shareholders, including a press release on April 23 outlining similar arguments.

46 On April 24, TELUS announced that two independent proxy advisory firms, Institutional Shareholder Services Inc. ("ISS") and Glass, Lewis & Co., LLC ("Glass Lewis"), had issued reports on the Initial Proposal. Both companies recommended that TELUS shareholders vote for the Initial Proposal. In particular, ISS concluded that a vote in favour of the Initial Proposal was warranted, "[a]s the [Initial Proposal] would align voting rights with economic interest, offers shareholders meaningful economic opportunity through increased trading liquidity and a dual-listing [of the Common Shares] on the NYSE, and has been ratified by a strong market response -- and as the provisions in the company's Articles effectively preclude any exchange ratio other than the proposed one-for-one exchange." Glass Lewis also recommended that shareholders vote in favour of the Initial Proposal, noting, "the potential long term financial benefits of a simplified share class structure, which will replace a share structure that was established to address foreign ownership restrictions that are no longer a major concern for the Company, outweigh any short term dilutive effects or costs resulting from the Conversion."

47 Mason issued a press release on April 24 asserting that the reports issued by ISS and Glass Lewis were flawed because they failed to consider Mason's rationale for voting against the Initial Proposal.

48 On April 26, TELUS sent a letter to shareholders via a press release extolling the benefits of the Initial Proposal and highlighting the positive support that the Initial Proposal had received from ISS and Glass Lewis. TELUS also went on the offensive, stating its position that Mason was an "empty voter" by taking a position inimical to the interests of "legitimate" TELUS shareholders:

> The proposal is opposed by [Mason], an opportunistic, event-driven hedge fund that recently amassed a large voting position in TELUS following the announcement of the proposal with a view to profiting from a short-term trading strategy. Mason has employed an "empty voting" strategy that involves taking long and

> short positions in TELUS' shares in order to vote shares in which it does not have a net economic interest, and Mason is expected to exit its position opportunistically in the near future.
>
> ...
>
> As referenced by ISS, "if announcement of the transaction itself increased the company's market value higher, voting down the transaction should logically result in the loss of some or all of that incremental market value." Despite this, Mason is seeking to defeat the proposal because it believes that the trading price of the Non-Voting Shares will decrease more than the trading price of the Common Shares and therefore Mason will profit. Why? Because the gain on its Non-Voting Share short position would exceed any loss on its offsetting Common Share position. This is in stark contrast to other holders of Common Shares and Non-Voting Shares whose interest is in seeing the shares appreciate in value.

49 Further press releases followed. TELUS issued two press releases on April 27 and 30 informing shareholders that ISS and Glass Lewis had updated their reports after considering the First Mason Dissident Circular and that they continued to reject Mason's position while reconfirming their recommendation that TELUS shareholders vote in favour of the Initial Proposal. Mason followed with a press release on April 30, reiterating its position that the Initial Proposal failed to recognize the valuable premium that Common Shareholders were entitled to. It summarized its position:

> At the heart of our decision to vote against the proposal are three simple but very important facts:
>
> > **1. Votes Are Valuable.** There is no dispute that holders of the Voting shares have more rights - the right to vote, to control the board, to control the Company and to convert into Non-Voting shares of TELUS from time to time at the OPTION of the Voting shareholder. *We refuse to let TELUS trivialize the distinctive value of the Voting shares* - voting rights are the foundation of the Company's corporate governance and are a privilege exclusively owned by the holders of the Voting shares.
> >
> > **2. Holders of the Voting Shares Paid a Premium for Their Rights.** Buyers of Voting shares have consistently paid a premium over a long period of time for their right to elect directors and to make other important decisions affecting the Company. This premium has averaged 4% to 5% over any relevant time period in the five years before TELUS announced its Proposal, and has been as high as 10%. If anything, that premium has only increased during that period and become more consistent.
> >
> > **3. TELUS' Proposal Takes Away these Valuable Rights for No Consideration.** Given the significant value carried by the ability to vote and the premium paid historically by holders of the Voting shares, TELUS' one-for-one proposal is a gift to the Non-Voting shareholders. Investors in each class of TELUS shares for many years have made an informed deci-

> sion to either pay more for Voting stock or less for Non-voting stock. It is unfair for TELUS to take away the rights that the holders of the Voting shares have paid for without any compensation whatsoever and confer a windfall benefit on the holders of the Non-Voting shares.

50 In addition to all the above communication strategies, TELUS engaged the services of Laurel Hill Advisory Group to provide assistance with respect to a "call-out program", which involved contacting shareholders via telephone or e-mail to provide information regarding the Initial Proposal. Evidence from TELUS representatives indicate that arising from these communications: (i) shareholders were "generally very aware of the positions of both TELUS and Mason"; (ii) many shareholders were "quick to identify the exchange ratio as a main difference between the TELUS and Mason positions"; and (iii) many shareholders indicated that they supported the Initial Proposal, specifically the one-for-one conversion ratio.

51 Mason issued two further press releases in advance of the meeting, on May 2 and 3, confirming its intention to vote against the Initial Proposal because of TELUS' failure to recognize any premium for the Common Shares.

52 Despite its considerable efforts, TELUS realized that the Initial Proposal would not be approved in the face of Mason's opposition and its inevitable vote against it. Accordingly, on May 8, TELUS announced that it had withdrawn the Initial Proposal. TELUS indicated publicly, however, that it remained committed to a one-for-one exchange of Non-Voting Shares for Common Shares and that it was considering alternate means to effect this result in due course.

53 Although there was no formal vote on the Initial Proposal, many shareholders had already sent in their proxies. These votes were tallied. Ignoring Mason, the shareholders overwhelmingly supported the Initial Proposal. Factoring out Mason's votes, 92.4% of all voted shares were in support of the Initial Proposal, with 84.2% of the Common Shares and 98.6% of the Non-Voting Shares voting in favour.

E. The New Proposal

54 Although Mason had successfully defeated the Initial Proposal, TELUS remained publicly committed to achieving a similar result, *albeit* by other means. It appears that in light of this clear intention, the market maintained some expectation that the share reorganization would still happen. Accordingly, the historical spread between the trading values of the Non-Voting Shares and Common Shares did not reappear. This prevented Mason from closing out its position.

55 In order to push TELUS to abandon its share reorganization plans and the one-for-one exchange ratio, commencing immediately after the May 9 meeting, Mason engaged in an unrelenting campaign to disrupt any efforts by TELUS to develop an alternate plan.

56 Immediately after the meeting, Mason sought to inspect the proxies deposited by the voting shareholders, claiming that TELUS had misrepresented or misled the public as to the results of the vote. TELUS initially refused, but later provided redacted copies of the proxies to Mason's counsel. On May 15, Mason wrote to the TSX complaining in part about disclosure issues related to the withdrawn vote, including TELUS' failure to disclose the alternate means by which it would effect the one-for-one exchange ratio. On May 16, Mason sought an order from the British Columbia Registrar of Companies for the inspection of TELUS' records, which was rejected.

57 In June, Mason publicly accused TELUS of not being in compliance with non-Canadian ownership restrictions and requested that TELUS disclose its foreign ownership levels and the steps it had taken to ensure compliance. TELUS responded in July, advising that there was "no merit whatsoever to Mason's allegations concerning TELUS' foreign ownership levels". Mason responded the next day, issuing a Petition in this Court seeking an order giving Mason access to unredacted copies of the proxies submitted in respect of the Initial Proposal. The Petition was not pursued any further.

58 On August 2, CDS Clearing and Depository Services Inc. ("CDS"), at Mason's request, delivered a requisition to TELUS in respect of a general meeting of shareholders (the "Requisition"). Mason's intention underlying the Requisition was to call a meeting of Common Shareholders so as to consider the "ground rules" for a future conversion of Non-Voting Shares to Common Shares. The Requisition set out certain resolutions on which the Common Shareholders would vote (collectively, the "Mason Resolutions"), which can be summarized as follows:

a) The first two resolutions contemplated amendments to TELUS' Articles which would enshrine an exchange ratio of either 1.08 or 1.0475 applicable to any future exchange of Non-Voting Shares for Common Shares, except where approved by an "Exceptional Resolution" (defined as an 80% majority of the votes cast by Common Shareholders) or otherwise in accordance with the existing Articles (i.e. in the case of a regulatory change or a takeover offer); and

b) If neither of the above resolutions were passed, Common Shareholders would then vote on ordinary resolutions that would, if passed, result in an advisory opinion that TELUS not proceed with any future exchange of Non-Voting Shares for Common Shares unless done at one of the two above exchange ratios.

59 Mason also publicly announced the Mason Resolutions in an August 2 press release, with a detailed description of what was intended to be achieved by a positive vote on the Mason Resolutions.

60 By the summer of 2012, TELUS had already made significant efforts to develop an alternate plan in the face of Mason's opposition. These efforts had continued despite the substantial steps taken by Mason over the spring and summer of 2012 to derail any new proposal. As early as March, when it learned that Mason was seeking to interfere with the Initial Proposal, TELUS, in consultation with its legal advisors, began inquiring into alternative ways by which the two classes could be collapsed into the Common Shares. TELUS devised the current proposal to only the Non-Voting Shareholders, which involves a court-approved plan of arrangement that provides for a one-time exchange (as opposed to a conversion) of all the outstanding Non-Voting Shares for Common Shares on a one-for-one basis (the "New Proposal" or "Arrangement"). Under the New Proposal, the Non-Voting Shareholders will be compelled to exchange their shares for Common Shares.

61 TELUS argues that although the New Proposal achieves the same outcome as the Initial Proposal, unlike the Initial Proposal it does not require any amendments to the Articles to remove the Non-Voting Shares from TELUS' authorized share structure. Rather, the Articles would continue to authorize TELUS to issue Non-Voting Shares and Common Shares on exactly the same terms; there simply would be no issued and outstanding Non-Voting Shares if the New Proposal is implemented. TELUS further says that there is nothing in its Articles preventing it from exchanging Non-Voting

Shares for Common Shares and maintaining an empty Non-Voting Share class. It points to the fact that its Articles include certain preferred share classes, both of which currently do not have any issued and outstanding shares.

62 As for the requisite shareholder approval, the New Proposal calls for approval by 2/3 of the votes cast by the Non-Voting Shareholders voting separately as a class at a class meeting, and a simple majority of the votes cast by Common Shareholders at a general meeting.

63 The Board and Special Committee began considering the New Proposal in April. In accordance with its mandate, the Special Committee continued to review, direct and supervise the process for the New Proposal, focusing on the new structure and the appropriateness of the new voting thresholds being proposed for Common Shareholders. The Special Committee held further meetings on April 17, August 17 and August 21 to discuss the New Proposal, again with the assistance of both legal counsel and Scotia as its financial advisor.

64 At a final meeting on August 21, the Special Committee received a presentation from Scotia, in which Scotia reviewed the factors that it had considered in assessing the fairness of a one-for-one exchange ratio, from a financial point of view, to the holders of Non-Voting Shares and the holders of Common Shares. Scotia presented its fairness opinion with respect to the New Proposal (the "Second Fairness Opinion"). As with the Initial Proposal, Scotia concluded that the proposed one-for-one exchange ratio was fair, from a financial point of view, to the holders of both classes of shares.

65 The Special Committee determined, based on its overall consideration of procedural and substantive factors relating to the New Proposal, that it was in the best interests of TELUS and each class of shareholders and was fair in the circumstances. The Special Committee unanimously recommended that the Board approve the New Proposal and recommend shareholders vote in favour of it.

66 Similar to the benefits arising from the Initial Proposal, the Special Committee identified the benefits to be achieved by the New Proposal, concluding that it would: enhance the liquidity and marketability of TELUS' Shares, including through the listing of the Common Shares on the NYSE for the first time; address concerns expressed by shareholders about the impact of TELUS' dual class share structure on liquidity and trading volumes; enhance TELUS' leadership in respect of good corporate governance practices by granting the right to vote to the Non-Voting Shareholders, who have the same economic interests as the Common Shareholders; align the capital structure of the Company with what is generally viewed as best practice; continue TELUS' ongoing ability to comply with the foreign ownership restrictions; and not affect the EPS and dividend paid per Common Share and Non-Voting Share.

67 On August 21, the Board met and considered Scotia's Second Fairness Opinion and the Special Committee's recommendation. The Board determined that the New Proposal was in the best interests of TELUS and was fair in the circumstances. The Board authorized, subject to receiving a satisfactory interim order from this Court, the calling of a class meeting of holders of Non-Voting Shares and a general meeting on October 17 to consider the New Proposal.

68 On August 21, the Board also considered the earlier Requisition sent by CDS and Mason regarding the Mason Resolutions. It refused to call a meeting to consider those Resolutions.

69 On the same day, August 21, counsel for TELUS appeared *ex parte* before Master Scarth seeking an interim order for the New Proposal. Master Scarth granted an interim order (the "Second Interim Order") directing TELUS to hold and conduct a separate class meeting of the Non-Voting Shareholders and a general meeting of the Common Shareholders on October 17 at 2:00 p.m. (collectively, the "TELUS Meetings") to consider and vote upon the terms of the Arrangement. The record date of the TELUS Meeting was set as September 4.

F. Efforts to Approve (and Defeat) the New Proposal

70 On August 21, after obtaining the Second Interim Order, TELUS issued a news release outlining the key terms of the New Proposal and calling the TELUS Meetings.

71 Mason was quick to signal to TELUS and the broader market that it did not consider itself defeated. In an August 22 news article published in the Globe and Mail, Mr. Martino remained defiant and signalled that Mason would not, as the saying goes, 'go gently into that good night'. Mr. Martino made it clear that Mason would continue its opposition, and he was quoted as saying that the Board should be concerned about Mason's response.

72 On August 30, CDS called a meeting to vote on the Mason Resolutions (the "Mason Meeting"). The notice sent to shareholders contained details regarding the Mason Resolutions and a complete reproduction of the actual Mason Resolutions. Mason also issued a press release to that effect on August 31, highlighting the provisions of the Mason Resolutions and also Mason's vigorous opposition to the New Proposal:

> Today's action furthers Mason's efforts to protect the rights of all TELUS voting shareholders. Given the oppressive actions taken by TELUS to disenfranchise an entire class of shareholders, it is critical that voting shareholders have the opportunity to vote on a binding change to TELUS' articles to establish an appropriate minimum premium to be paid in any dual-class collapse transaction. Moreover, TELUS' recycled proposal demonstrates the lengths the company is willing to go to circumvent the protections afforded to the voting shareholders under the law. Mason will continue to vigorously oppose TELUS' latest attempts to take value from voting shareholders and transfer it to non-voting shareholders ...
>
> [Emphasis added.]

73 The Mason Meeting was scheduled to be held on the same day as the TELUS Meetings, but earlier in the day and at a different location. The record date for the Mason Meeting was set for August 31.

74 Notably, by August 31, Mason had taken steps to reduce its position. On that date, Mason beneficially owned or controlled 32,765,829 Common Shares (approximately 18.73%), but had disposed of all Non-Voting Shares. Further, Mason had short sold 14,658,129 Common Shares and 18,036,800 Non-Voting Shares. Accordingly, as of August 31, Mason was simultaneously long 32,765,829 TELUS shares and short 32,694,929 TELUS shares, representing a net holding of 70,900 Common Shares and a reduction in its position in the overall capital of TELUS from the previous level of 0.21% to 0.021% of TELUS' issued and outstanding shares.

75 On September 6, TELUS sent the notices of the TELUS Meetings, an extensive management information circular (attaching the Second Fairness Opinion), and forms of proxy relating to the TELUS Meetings. TELUS also sent a letter to all shareholders on August 30 encouraging them to vote for the Arrangement.

76 Consequently, three shareholder meetings were scheduled to be held on October 17: (i) the Mason Meeting at 10:00 a.m. to consider and vote on the Mason Resolutions; and (ii) the TELUS Meetings (Common Shares and Non-Voting Shares) at 2:00 p.m. to consider and vote on the New Proposal.

77 With the meetings set, the two sides once again recommenced or, perhaps more accurately, continued their aggressive campaigns to solicit support from shareholders in favour of their respective positions, by distributing information circulars, issuing press releases and initiating call-out campaigns. Again, both campaigns can be described as extensive and aggressive; and the tenor of the debate would continue to the time of the meeting, with each side vigorously describing the other in quite negative terms.

78 On September 11, Mason suffered a setback. Justice Savage of this Court refused to give effect to the Requisition, a matter that will be discussed in more detail below. Nevertheless, Mason continued with its campaign.

79 On September 24, Mason filed its second dissident circular outlining the reasons why shareholders should vote against the New Proposal and seeking proxies in support of its position (the "Second Mason Dissident Circular"). The Second Mason Dissident Circular attached an analysis from Professor Bernard Black and a detailed report from Blackstone Advisory Partners L.P. which provided a precedent analysis implying that a conversion ratio greater than one-to-one was appropriate (the "Blackstone Report"). Mason also issued a news release advocating for its premium exchange ratio.

80 Although Mason argued forcefully on this application that the issue in this case is more nuanced than whether shareholders should have voted 'for or against' a one-for-one exchange ratio, the Second Mason Dissident Circular heavily emphasized the importance of the historical premium, which Mason contends is "a reflection of the inherent superior economic value of the voting shares". In fact, the Second Mason Dissident Circular discussed at length Mason's commitment to "defend the rights" of the holders of Common Shares. Further, it stressed that Mason's objective was not to influence management decisions or seek other changes relating to the underlying enterprise of TELUS; rather, its primary objective was to "ensure that the dual-class collapse is implemented fairly and in a manner that does not result in a transfer of wealth from the voting class to the non-voting class".

81 That no exchange should occur absent a Common Share premium is a consistent theme throughout the Second Mason Dissident Circular:

> Instead of simply proposing a neutral exchange ratio that avoided a transfer of wealth between the classes and which all shareholders could accept, TELUS management appears prepared to take any action to push through a one-to-one conversion ratio. Mason will take all appropriate steps to oppose such actions, which not only disregard the interests of an entire class of shareholders but are plainly coercive.

> Mason will continue its efforts to redress the failure of corporate governance that has occurred at TELUS and seek a fair exchange ratio for the benefit of all voting shareholders. We intend to vote our shares against TELUS' current one-to-one proposal. We ask you to do the same. Your vote will send a clear message to TELUS management that the rights of the voting shareholders must be respected and that the dual-class collapse must be done on the basis of an exchange ratio that is fair to the holders of the voting shares.
>
> [Emphasis added.]

82 It is significant that the Second Mason Dissident Circular included a complete description of the Mason Resolutions and why Mason had proposed them. Mason also advised it was seeking to appeal Savage J.'s decision prior to the meetings.

83 On September 27, Mason held an investor call during which it reiterated its position with respect to a minimum exchange ratio. Again, Mason argued that the Non-Voting Shares must be exchanged for Common Shares either at a discount of 8%, a value identified by Blackstone, or at a discount of 5%, which Mason says would properly recognize the "average historical trading premium" of 4.83%.

84 On October 1, TELUS issued a letter to shareholders via a news release, again reviewing the benefits of the New Proposal. It also addressed Mason's claims in the Second Mason Dissident Circular. In particular, TELUS underscored the efforts it had undertaken to develop the New Proposal and reiterated its view that a one-for-one exchange ratio was fair, from a financial point of view, to both classes of shares. It also summarized a new report issued by ISS (the "Second ISS Report"), in which ISS recommended that shareholders vote for the New Proposal. As highlighted by ISS in the Second ISS Report, the market gains had proven durable. As at market closing on September 27, Non-Voting Shares and Common Shares had risen by 14.8% and 11.2%, respectively, since the announcement. This again beat both the market and TELUS' peers by a consistent margin. Finally, TELUS attacked Mason's "empty voting" tactics.

85 On October 2, Mason wrote to shareholders encouraging them to reject the New Proposal because Common Shareholders would have to give up the premium they paid for those shares.

86 On October 5, TELUS issued a press release announcing that Glass Lewis recommended that shareholders vote in favour of the New Proposal (the "Second Glass Lewis Report"). TELUS reiterated its views on Mason's "empty voting" strategy and asked shareholders to vote for the New Proposal.

87 Also on October 5, Mason sent yet another letter to shareholders with what it said was further support for its position. The theme was consistent with its earlier press releases and letters, stating in part:

> If approved, TELUS' flawed proposal would result in you giving up the premium that you paid for your voting shares and a 46% reduction in your voting power - with no compensation whatsoever. In fact, TELUS' proposal would rank among the worst Canadian share collapse transactions.

> Professor Ronald Gilson of Stanford Law School and the Columbia School of Law has stated that "voting rights attached to shares are valuable" and that "the premium associated with TELUS voting common shares is well recognized by the market." Professor Gilson notes that TELUS' proposal would have the effect of "transferring value from the existing holders of common shares with voting rights to the existing holders of non-voting shares."
>
> With such clear negative implications for an entire class of shareholders, we cannot help but question the motives behind TELUS' proposal.

88 Mason issued a news release on October 11, again urging shareholders to reject the New Proposal.

89 On October 11, TELUS issued an investor bulletin via e-mail to approximately 1,000 institutional investors and analysts, and posted it to its website for shareholders to view. TELUS also filed slides on SEDAR from a presentation setting out the benefits of voting in favour of the New Proposal. The presentation primarily addressed the issue of what constitutes a fair exchange ratio. TELUS noted that all of Scotia, ISS and Glass Lewis supported a one-for-one exchange ratio and once more denounced Mason's "empty voting" strategy as being misaligned with shareholders interests.

90 As with the campaign in respect of the Initial Proposal, TELUS engaged the services of Laurel Hill to communicate with TELUS shareholders, which Laurel Hill did in two rounds: the first to bring awareness to shareholders about the TELUS Meetings, and the second in response to the Second Mason Dissident Circular. On this application, TELUS provided evidence from the Laurel Hill communications that many shareholders were already "generally very aware" of both parties' positions with respect to the Initial Proposal, the New Proposal, the Requisition and the Mason Resolutions. In fact, it appears that several shareholders were becoming frustrated or "saturated" by the volume of information they had received from both TELUS and Mason. In addition, there is evidence that shareholders understood that the dispute between TELUS and Mason primarily related to the appropriate exchange ratio.

91 Similarly, Mason again led its own vigorous solicitation campaign against the New Proposal in the weeks leading up to October 17 with the assistance of its proxy solicitation agent, Kingsdale.

92 As will be discussed at length below, TELUS contends that through its aggressive solicitation campaign, Mason made its position -- that there should be no exchange without payment of a premium to Common Shareholders -- crystal clear to all shareholders such that there is no reasonable possibility that any shareholder could still be confused as to what he or she was being asked to vote on at the October 17 meetings.

G. TELUS' Action to Quash the Mason Meeting

93 There were a number of court proceedings involving TELUS and Mason in the months leading up to this fairness hearing. Some of the background of this dispute has already been set out in detail in previous decisions of this Court and the Court of Appeal. For the purpose of considering some issues arising on these applications, however, it is useful to again set out the relevant procedural history.

94 On August 31, TELUS commenced a proceeding for a declaration that the Requisition sent by CDS and Mason in relation to the Mason Meeting was non-compliant with s. 167 of the *Act* and that

the Mason Meeting should not be held. That issue was argued before Savage J. on September 6 and 7, and reasons were issued on September 11: *TELUS Corporation v. CDS Clearing and Depository Services Inc.*, 2012 BCSC 1350 (the "*Savage Reasons*"). Justice Savage ordered that the Mason Meeting not proceed given defects he found relating to the Requisition.

95 On October 12, the British Columbia Court of Appeal overturned Savage J.'s Order as it related to the validity of the Requisition. In addition, the Court also found that Mason's status as an "empty voter" did not disentitle Mason from asserting its position under s. 167 of the *Act* with respect to shareholder requisitions for general meetings: *TELUS Corporation v. Mason Capital Management LLC*, 2012 BCCA 403 (the "*BCCA Reasons*"). Although the Court of Appeal recognized that its decision could lead to a "confusing and unwieldy" process, it refused to cancel the Mason Meeting and left it to the parties to work out the logistics for both the Mason Meeting and the TELUS Meetings, with the assistance of this Court, as necessary.

H. Mason's Efforts to Vary the Second Interim Order and Delay the Meetings

96 On September 2, Mason gave TELUS notice of its intention to commence an application before Savage J. to vary the Second Interim Order. Mason took no further steps in respect of this application. Further, on September 4, Mason commenced a proceeding for directions concerning the conduct of the Mason Meeting (Action No. S126123).

97 On September 26, Mason launched a second application seeking to discharge and vary the Second Interim Order on the basis of non-disclosure by TELUS. That matter was argued before Master Muir on October 11 and she reserved her decision.

98 Following the release of the *BCCA Reasons*, two applications were filed: firstly, Mason sought to postpone both the TELUS Meetings and the Mason Meeting to an unspecified date; secondly, TELUS sought directions from the court that the meetings proceed as scheduled as a joint meeting and it also sought additional orders as to the conduct of those meetings.

99 On October 15, Master Muir released her decision dismissing Mason's application to vary the Second Interim Order based on non-disclosure: *TELUS Corporation (Re)*, 2012 BCSC 1539 ("*Muir Reasons #1*"). Master Muir found no basis for Mason's allegations of non-disclosure. Also, at paras. 40-59, she found that the voting thresholds for the Common Shares provided for in the Second Interim Order were appropriate. Mason is not pursuing the non-disclosure allegations, but continues to take issue with the voting threshold set out in the Second Interim Order by way of an appeal from *Muir Reasons #1*.

100 Immediately after the release of *Muir Reasons #1*, the parties argued Mason's applications to postpone the meetings and TELUS' applications for directions. Mason argued that the meetings should be adjourned to allow it to send an information circular to shareholders and solicit proxies for the Mason Resolutions as it would have done in the normal course. As on this application, Mason argued that Savage J.'s Order enjoining the Mason Meeting negatively affected its ability to oppose the New Proposal and solicit support for the Mason Resolutions until the decision was overturned on October 12. That contention is addressed below in the context of the appeal from the Master's Order concerning the meetings and also in the context of the fairness hearing, particularly with respect to procedural fairness.

101 Master Muir delivered oral reasons dismissing Mason's applications and granting TELUS' applications: *Mason Capital Management LLC v. TELUS Corporation*, 2012 BCSC 1540 ("*Muir Reasons #2*"). She held that Mason would not be prejudiced by having the Mason Meeting proceed along with the TELUS Meetings. Accordingly, she ordered that the TELUS Meetings and the Mason Meeting proceed on October 17 as a joint meeting. She also made certain orders in relation to the procedures to be followed at the meetings.

102 On October 17, an hour before the meetings were to begin, the parties appeared before Master Muir to settle the terms of Master Muir's October 15 Order concerning the conduct of the meetings. Master Muir dismissed Mason's further arguments on that issue, and in particular with respect to the use of the proxies at the meeting: *Mason Capital Management LLC v. TELUS Corporation*, 2012 BCSC 1619 ("*Muir Reasons #3*").

103 Mason also appeals from the decisions arising from *Muir Reasons #2* and *#3*.

104 On October 23, the parties appeared before me and made submissions as to whether Mason's appeals from the decisions of Master Muir should proceed prior to the fairness hearing or be adjourned to the fairness hearing. Exercising my statutory discretion under s. 291(2) of the *Act*, I adjourned the appeals to be heard in conjunction with this fairness hearing: *Mason Capital Management LLC v. TELUS Corporation*, 2012 BCSC 1582 (the "*Fitzpatrick Reasons*").

I. The October 17 Meetings

105 The meetings proceeded on October 17, as ordered by Master Muir.

106 With respect to the vote on the New Proposal, the necessary quorum requirements were met in that approximately 73.7% of Common Shares (24,556 shareholders representing 128,865,344 Common Shares) and approximately 84.6% of Non-Voting Shares (9,757 shareholders representing 127,693,578 Non-Voting Shares) participated in person or by proxy.

107 On a combined basis, 78.7% of votes in relation to issued and outstanding shares were cast, with 81.1% of those votes in favour of the New Proposal and 18.9% against.

108 In accordance with Master Muir's previous direction, the forms of proxy solicited by TELUS and Mason in relation to the TELUS Meetings were used for all of the business considered at the meetings.

109 The results of the vote on the New Proposal were as follows:

Summary of Votes on the New Proposal

	Non-Voting Shareholders	Common Shareholders
"For"	127,013,409 (99.5%)	81,060,235 (62.93%)
"Against"	639,086 (0.5%)	47,751,327 (37.07%)

Total	127,652,495	128,811,562

110 As can be seen, the voting thresholds for both the Non-Voting Shares (2/3) and the Common Shares (simple majority) were met in accordance with the thresholds established in the New Proposal and in the Second Interim Order.

111 Excluding Mason's vote, 76.3% of votes in relation to all issued and outstanding shares were cast, with 93% in favour and 7% against. Again excluding Mason, 84.4% of the Common Shareholders voted in favour of the New Proposal. This analysis also applies if the calculations are based on Mason's net position in accordance with its arbitrage strategy.

112 At the start of the meetings, counsel for Mason spoke on the record. He stated that Mason was participating in the meetings "under protest" because, in Mason's view, the decision of the Court of Appeal vindicated its position. Mason's counsel said that many proxies were deposited before the *BCCA Reasons*, at a time when proceedings under the Mason Resolutions had been halted. Mason's counsel took the position that TELUS should have adjourned the joint meeting to allow voting shareholders more time to consider the nature and consequences of the Mason Resolutions and the New Proposal. Mason's counsel then asked whether shareholders attending the meeting had read the Mason Resolutions, to which many shareholders responded in the affirmative.

113 Mason placed the Mason Resolutions before the Common Shareholders at the Mason Meeting by moving and seconding the relevant motions. The results of the vote were as follows: 128,811,562 votes were counted, with 37.1% voting in favour and 62.9% voting against in respect of each Resolution. Resolutions 1 and 2 (to set a new voting threshold for an established conversion ratio) were not approved by the required 2/3 of votes cast. Resolutions 3 and 4 were not approved by the required simple majority of votes cast. Accordingly, all of the Mason Resolutions failed.

III. PROCEDURAL APPEALS FROM THE MASTER'S ORDERS

A. Applicable Tests

114 As stated above, there are appeals from both of Master Muir's Orders granted in these proceedings on October 15.

115 The first appeal arises from the Second Interim Order of August 21 and Master Muir's refusal on October 15 to set it aside in relation to the voting threshold that was ordered for the vote by the Common Shareholders. The second and third appeals arise from Master Muir's Orders on October 15 in relation to the conduct of the October 17 meetings, in particular her refusal to adjourn the TELUS Meetings and her order that the Mason Meeting proceed. Her decision also allowed certain voting procedures at the meetings under the proxies then in the hands of the parties.

116 In the *Fitzpatrick Reasons*, at paras. 20-26, I outlined the applicable standard of review in relation to a decision of the Master. In summary, where a decision is on a point of law, the standard of review is "correctness"; where the decision involves an exercise of discretion, the standard of review is whether the Master was "clearly wrong".

B. Did the Second Interim Order Set an Incorrect Voting Threshold?

117 In the *Fitzpatrick Reasons*, I addressed the interplay between the issue arising under the first appeal and the issue arising on the fairness hearing as to whether the statutory requirements under the *Act* had been met with respect to the voting threshold for the Common Shares: see paras. 28-44. I concluded that the issues were the same in that a decision in the context of the fairness hearing would inevitably dictate whether the voting threshold proposed by TELUS and incorporated in the Second Interim Order was appropriate.

118 Accordingly, this issue is fully canvassed below in relation to the fairness hearing.

119 I do not understand what Mason gains by continuing to advance this argument as an appeal of the Master's decision. If Mason is correct in its contention, then the requisite majority vote by the Common Shareholders was not obtained and TELUS did not obtain the necessary votes to approve the New Proposal. If so, whether the Second Interim Order was correct or not is of little concern since the Arrangement was not approved by the shareholders, let alone by the court.

120 Nevertheless, what remains for consideration is whether these types of issues should be addressed at the preliminary stage or at a later stage, such as at the fairness hearing.

121 I have already cited in the *Fitzpatrick Reasons* the authorities that express the view that the obtaining of an interim order is intended to be a preliminary step in the proceedings to set the wheels in motion towards the ultimate step of seeking court approval of the arrangement at the fairness hearing. The voting threshold here was set by TELUS in the New Proposal, and Master Scarth was asked to exercise her discretion to set the procedures for the meeting to consider the Arrangement. I do not consider that, by doing so, she "set" or "established" the appropriate voting threshold, since that matter was intended to be addressed in a fulsome manner at the fairness hearing.

122 Accepting Mason's arguments that this issue should be fully considered and decided at the interim order stage would completely negate the preliminary and summary procedures in relation to these arrangements that have been in place for some time, not only in British Columbia but in other parts of Canada. As was noted by Madam Justice Neilson (as she then was) in *Pacifica Papers Inc. (Re)*, 2001 BCSC 701 at para. 36, these interim applications usually proceed *ex parte* "due to the administrative burden of notifying all shareholders of the application".

123 If one accepts that an interim order has the effect of settling a substantive matter, then one must also accept that proper service on all parties affected would be required. This would impose a substantial burden on companies, particularly public companies, in terms of proposed arrangements, not only in terms of the timing in effecting service on parties but also the cost. The comments of Blair J. (as he then was) in *First Marathon Inc. (Re)*, [1999] O.J. No. 2805 (S.C.J.) are apposite:

> [8] ... Because of the very nature of such transactions - particularly in relation to publicly traded companies - there is often a tight timing dynamic to them. The provisions of the Act should be construed and applied in a fashion which facilitates the fair and effective processing of the application in a manner that is consistent with their "real time" nature as business transactions. To require the corporation to serve notice on all shareholders before taking any steps seems to me to introduce unnecessary expense, duplication, and delay into the procedure.

124 The process relating to an interim application is such so as to avoid this delay and cost while also ensuring that proper safeguards are established to make certain that procedurally, the arrangement is put before the affected stakeholders in a fair and proper manner. This approach was adopted

in *First Marathon* where the court found that the adequacy of an information circular was best left for consideration at the fairness hearing: para. 11.

125 I agree that in proper circumstances, the court may reconsider on a comeback hearing the procedures ordered in an interim order if they are so manifestly in error. Beyond that, however, any procedural issues should be considered at the fairness hearing. The hearing for an interim order is not an opportunity for a stakeholder to micromanage the process or cause undue delay and cost.

126 The matter of the voting threshold here is both a procedural and a substantive matter. TELUS set the voting threshold for the Common Shares in the New Proposal; and in accordance with the New Proposal, TELUS agreed that procedurally, it needed to obtain at least that voting threshold in order to proceed to apply for court approval. This was adopted in the Second Interim Order.

127 Similar to the comments of the court in *First Marathon* concerning the adequacy of the circular, however, the Second Interim Order did not "approve" that voting threshold from a substantive point of view; it only acknowledged the voting threshold set by TELUS. I agree with Master Muir in *Muir Reasons #1*:

> [49] The *Business Corporations Act* in s. 291(2) is clear that the order being made is in respect of a proposed arrangement. It is quite different from the wording of s. 289 which deals with the adoption of an arrangement.
>
> [50] I do not consider that by making an order under s. 291(2) the Court is necessarily making an order regarding the method of adoption of an arrangement ...

128 The Second Interim Order should not be reconsidered on a comeback hearing with respect to issues that are properly addressed at the fairness hearing. Substantive issues, such as those that are raised by Mason here, are best left to the fairness hearing, by which time the vote will have been taken and proper service on all affected stakeholders will have been completed. If that is the case, no prejudice will have been suffered by any stakeholder. Its rights to argue that statutory requirements have not been met are still preserved until that time.

129 The approval of the preliminary procedures for the purpose of informing shareholders, calling the meeting and obtaining a vote on the arrangement is exactly what the Second Interim Order achieved. I would note that even if the voting threshold set by the Second Interim Order was wrong, it had no effect on the voting itself. In other words, the voting proceeded in a proper fashion and it remained to be determined whether TELUS' proposed threshold was the correct one. Mason suffers no prejudice as a result of this interpretation of the Second Interim Order.

130 In conclusion, I find that Master Scarth was not clearly wrong in setting the voting threshold for the Common Shares in the Second Interim Order, and it follows that I agree with Master Muir's conclusions at the comeback hearing as to the effect of the Second Interim Order.

131 The first appeal is accordingly dismissed.

C. Should the October 17 Meetings Have Taken Place?

132 Once the Court of Appeal's decision confirmed that Mason was entitled to proceed to a meeting to consider the Mason Resolutions, the issue after October 12 became how that could be accom-

plished. Both TELUS and Mason agreed that a joint meeting to consider both the New Proposal and the Mason Resolutions was appropriate.

133 However, Mason contends that Master Muir was clearly wrong in exercising her discretion in dismissing Mason's applications to adjourn the TELUS Meetings and the Mason Meeting scheduled for October 17, and in setting certain procedures relating to the use of proxies at the joint meeting as requested by TELUS: see *Muir Reasons #2* and *#3*. As a result, Mason contends that all business conducted at the October 17 meetings with respect to both the New Proposal and the Mason Resolutions is invalid and of no force and effect.

1. Are the Appeals Moot?

134 As a preliminary matter, TELUS contends that since the meetings took place on October 17 -- as a result of which the shareholders voted and the results were announced -- these appeals are moot.

135 Mason made no application for a stay of the Second Interim Order regarding the TELUS Meetings pending the hearing of its appeal from Savage J.'s Order. It is, however, the case that during the appeal, Mason's counsel raised the prospect that if it was successful, and depending on when the decision was rendered, the parties would have to address the mechanics as to when and how the meetings would be held. Mason suggested that it may seek an adjournment of the meetings. TELUS indicated that it would oppose any adjournment.

136 Mr. Justice Groberman specifically referred to any potential issues concerning the meetings in the *BCCA Reasons*:

> [82] TELUS's final contention is that there are difficulties with the record date specified in CDS's notice of meeting, and that the holding of two meetings on the same day at different places and under different rules will be confusing and unwieldy.
>
> [83] I agree that the problems identified by TELUS are genuine. The issue of the appropriate record date for the meeting called by CDS must be resolved. As well, it would seem that a practical solution should be found to ensure that the October 17, 2012 meetings can proceed without undue confusion or inconvenience to shareholders.
>
> [84] These concerns, however, do not entitle the court to cancel the meeting called by CDS, nor do they justify prohibiting Mason from putting its resolutions before the shareholders.
>
> [85] Counsel for Mason has advised that the parties will appear before the Supreme Court for the purposes of obtaining a court order giving directions as to the conduct of the October 17, 2012 meeting or meetings. It seems to me that s. 186 of the *Business Corporations Act* (quoted above) gives the court ample powers to give directions and make orders to ensure that the meetings take place in an orderly manner and without causing undue confusion. In my view, it is appropriate to allow the parties to work out the logistics for the scheduled meetings, with the assistance of the Supreme Court, as necessary.

[Emphasis added]

137 When the Court of Appeal released its reasons on October 12, the parties immediately asked this Court to address that matter. That gave rise to the hearing before Master Muir and the release of *Muir Reasons #2* on October 15, by which she ordered that the joint meeting should proceed. Again, Mason says that it did not seek a stay of her order that the joint Meetings proceed because it was impractical to attempt to obtain a stay with the impending Meetings only two days away.

138 TELUS says that it is too late for Mason to now challenge Master Muir's Orders regarding the conduct of the meetings on the basis that they have been fully performed. TELUS cites various authorities in support of its position that there is no right of appeal in circumstances where an order has already been performed.

139 In *Norcan Oils Ltd. et al. v. Fogler*, [1965] S.C.R. 36, an appeal had been taken from an order approving an amalgamation. However, no stay of proceedings was obtained and the transactions to accomplish the amalgamation were completed. In those circumstances, the Court held that the order had been fulfilled and rights and interests were acquired by persons. As such, no appeal could be taken: p. 44. Similarly, in *Galcor Hotel Managers v. Imperial Financial Services Ltd.* (1993), 81 B.C.L.R. (2d) 142 (C.A.), the court was addressing an order that had been fully performed by the distribution of partnership assets to the limited partners.

140 Appeals from orders regarding the taking of votes have also been found to be moot. In *Sparling v. Northwest Digital Ltd.*, [1991] B.C.J. No. 487 (C.A.), a director filed a petition seeking an order restraining the respondents from voting at a meeting of the company. The day before the meeting, the chambers judge dismissed the application. When the appeal was heard some months later, the British Columbia Court of Appeal quashed the appeal as moot, noting that there was no longer any "live" controversy. In *Scion Capital, LLC v. Gold Fields Ltd.*, [2006] O.J. No. 466 (S.C.J.), an issue arose concerning the validity of the voting of certain shares. Mr. Justice Morawetz held that deciding the issue had no practical effect given that the outcome of the meeting did not depend on whether the shares were voted: paras. 44-53.

141 I am not convinced that the concept of mootness is applicable in these circumstances. Unlike *Norcan* and *Galcor Hotel Managers*, there were no actions taken under the Orders of Master Scarth and Master Muir, nor were any rights obtained as a consequence of the meetings such that it is impossible to 'unring the bell'. Furthermore, voting at the meetings was not the only issue raised by Mason. Mason's fundamental position was that it was not appropriate to allow the meetings to proceed in circumstances where Mason could not fairly and properly solicit support for the Mason Resolutions and have a proper vote in respect of those Resolutions, hence the position taken by Mason's counsel at the meetings that it was putting the Mason Resolutions forward and voting on all matters "under protest".

142 Accordingly, I do not consider the issue to be moot even in light of the fact that the meetings were held and the votes were taken. If Mason prevails in its position, then it is possible to have the parties recommence the necessary procedures to call, hold and conduct meetings in place of the October 17 meetings.

2. The Proxy Issue

143 Part of the relief sought by TELUS on the October 15 application before Master Muir related to the use of the proxies at the joint meeting. As I have outlined above, by that time both parties had undertaken extensive campaigns to solicit proxies for their respective positions in respect of the TELUS Meetings.

144 By October 14, TELUS' proxies had been received representing 82,914,665 Common Shares, which accounted for 47.4% of Common Shares excluding the shares owned by Mason. If shares associated with Mason were included, proxies had been received representing 115,680,494 Common Shares or 66.14% of Common Shares. As of October 14, TELUS' proxies had been received representing 122,874,824 Non-Voting Shares or 81.43% of Non-Voting Shares. The final deadline for the submission of proxies was 2:00 p.m. on October 15.

145 On October 15, Master Muir rejected Mason's contention that it needed more time to solicit proxies for the Mason Resolutions. A key factor relevant to her determination was her finding that the proxies for the TELUS Meetings could be used, as it was "common ground that these proxies are sufficiently broad to allow voting on the Mason Resolutions": *Muir Reasons* # 2 at para. 8.

146 There was a clear basis upon which the Master made that statement, given that Mason had specifically acknowledged that the use of the existing proxies was possible. Despite Mason's current contention that this was only a "prediction of what TELUS would do", Mason's counsel gave evidence on October 12 that, based on information from and the belief of Mason's securities lawyer, he believed that:

> The proxy form issued to shareholders by TELUS in respect of the meeting it called gives discretion to the proxyholder to vote the proxy in respect of any unspecified business that comes before the meeting. If TELUS proposes to have the resolutions proposed by Mason considered by the shareholders at this meeting, it will be able to vote the management proxies against the resolutions proposed by Mason ...
>
> [Emphasis added]

147 Further, on September 25, Ivan Ross, a research analyst at Mason, gave evidence on the effect of para. 13 of the Second Interim Order, which provided that TELUS was authorized to amend, modify or supplement the "Meeting Materials" as it may determine. "Meeting Materials" was defined in para. 6 of the Second Interim Order to include materials relating to the TELUS Meetings. Mr. Ross said that, in his view, this provision:

> ... allows TELUS to change, at will, the meeting business or its commentary on important items of business and advertise those in any way it wishes. If changes are made, proxies solicited and completed before the changes will count as if the changes had been brought to the attention of the proxyholder on a timely basis. In my opinion it is an unusual and unreasonable power.

148 Accordingly, Master Muir's October 15 Orders allowed the existing proxies to be used by TELUS and Mason such that a management proxy in favour of the New Proposal (or neutral) could be used by management to vote on the Mason Resolutions in its discretion (i.e. against them), and a dissident proxy against the New Proposal (or neutral) could be used by Mason to vote on the Mason

Resolutions in its discretion (i.e. in favour of them). If any proxy gathered by a party was against its position, then it was required to be voted in support of the opposing resolution(s).

149 The Order specified:

> 7. All proxy holders of dissident proxies (the "Dissident Proxies") received with respect to the TELUS Meeting from holders of Common Shares that indicate a voting intention against the Arrangement Resolution, or that do not indicate a voting intention, be entitled to vote at the discretion of the holders of the Dissident Proxies on the Mason Resolutions provided that if a Dissident Proxy indicates a vote in favour of the Arrangement Resolution the proxy holder will vote the proxy against the Mason Resolutions;
> 8. All proxy holders of management proxies (the "Management Proxies") received with respect to the TELUS Meeting from holders of Common Shares indicate a voting intention in favour of the Arrangement Resolution, or do not indicate a voting intention, be entitled to vote at the discretion of the holders of the Management Proxies on the Mason Resolutions provided that if a Management Proxy indicates a vote against the Arrangement Resolution the proxy holder will vote the proxy in favour of the Mason Resolutions.

150 Despite Mason's stated position on TELUS' ability to vote the proxies in respect of the Mason Resolutions, it resiled from that position not two days later. On October 17, just hours before the meeting, Mason tried a different argument before Master Muir, despite the fact that that hearing was simply to settle the terms of her October 15 Order. Mason argued that it was an error in law to allow the proxies for the TELUS meeting to be used for voting on the Mason Resolutions.

151 Both the management and dissident proxy forms stated:

> This proxy confers discretion on the proxyholder with respect to amendments to matters identified in the [TELUS] Notice of General Meeting and other matters that may properly come before the meeting or any adjournment or postponement, in each instance to the extent permitted by law, whether or not the amendment or other matter that comes before the meeting is or is not routine and whether or not the amendment or other matter that comes before the meeting is contested.
>
> [Emphasis added.]

152 Mason contended at this later time that Master Muir's earlier ruling on October 15 was inconsistent with National Instrument 51-102 (the "Instrument"), a rule adopted by Canadian securities regulators relating to proxies and information circulars. In s. 9.1 of the Instrument, requirements are set out for the forwarding of proxies and information circulars in respect of a proposed meeting:

> 9.1(1) If management of a reporting issuer gives notice of a meeting to its registered holders of voting securities, management must, at the same time as or before giving that notice, send to each registered holder of voting securities who is entitled to notice of the meeting a form of proxy for use at the meeting.

(2) Subject to section 9.2, a person or company that solicits proxies from registered holders of voting securities of a reporting issuer must,

(a) in the case of a solicitation by or on behalf of management of a reporting issuer, send an information circular with the notice of meeting to each registered security holder whose proxy is solicited; or
(b) in the case of any other solicitation, concurrently with or before the solicitation, send an information circular to each registered securityholder whose proxy is solicited.

153 Section 9.4 of the Instrument addresses the matter of the form of the proxy:

9.4(4) A form of proxy sent to securityholders of a reporting issuer must provide an option for the securityholder to specify that the securities registered in the securityholder's name will be voted for or against each matter or group of related matters identified in the form of proxy, in the notice of meeting or in an information circular, other than the appointment of an auditor and the election of directors.

(5) A form of proxy sent to securityholders of a reporting issuer may confer discretionary authority with respect to each matter referred to in subsection (4) as to which a choice is not specified if the form of proxy or the information circular states in bold-face type how the securities represented by the proxy will be voted in respect of each matter or group of related matters.

...

(8) A form of proxy sent to securityholders of a reporting issuer may confer discretionary authority with respect to

(a) amendments or variations to matters identified in the notice of meeting; and
(b) other matters which may properly come before the meeting, if,
(c) the person or company by whom or on whose behalf the solicitation is made is not aware within a reasonable time before the time the solicitation is made that any of those amendments, variations or other matters are to be presented for action at the meeting; and
(d) a specific statement is made in the information circular or in the form of proxy that the proxy is conferring such discretionary authority.

[Emphasis added.]

154 It is apparent that proxies were only obtained either by TELUS or Mason with respect to the Arrangement. No proxies were sent to the shareholders, either by TELUS or Mason, in relation to the Mason Resolutions because of the effect of Savage J.'s Order and the later delivery of the *BCCA Reasons* just prior to the meeting date that had been set since August. By the time the Court of Ap-

peal released its reasons on October 12, it was too late to send out further information circulars and proxy forms specifically in relation to the Mason Resolutions if the meetings were to proceed.

155 Mason contends that s. 9.4 of the Instrument should be interpreted such that the discretionary power in s. 9.4(8) is read as subject to ss. 9.4(4) or (5), which tie a proxy to a specific "matter" identified in the proxy form, the notice of meeting or the information circular. Accordingly, Mason says that the discretionary power in s. 9.4(8)(a) has no application to the Mason Resolutions because they were not amendments or variations to the "matters" identified in the TELUS Notice of Meeting, which only referred to the proposed arrangement for a one-for-one exchange of shares. Further, Mason says that with respect to s. 9.4(8)(b), "other matters which may properly come before the meeting" refers only to minor matters such as matters of procedure or matters ancillary to the "matter" in the New Proposal, which would not include the Mason Resolutions.

156 Mason cites no authority in support of this interpretation of the Instrument other than an excerpt from H.R. Nathan & M.E. Voore, *Corporate Meetings: Law and Practice* (Toronto: Carswell, 2010) ("*Nathan and Voore*") at pp. 19-8 to 19-9:

> The inclusion of substantial new items [to the agenda of a meeting] should be declined where shareholders have had no prior notice, with the result that they were not in a position to determine whether or not to attend, deposited proxies are silent on the issues and shareholders present in person may not be prepared sufficiently to deal with the issues on short notice. ...

157 Mason's interpretation of the provisions of the Instrument was rejected by Master Muir in *Muir Reasons #3*:

> [7] I am satisfied that my discretion is broad enough under s. 186 of the *Business Corporations Act*, S.B.C. 2002, c. 57 to make the order that I have made, which is that the application go in terms of paragraphs 1(a) through (g) of the TELUS notices of application and I am not persuaded that there is any binding authority that prevents me from doing that.

158 I accept the proposition that generally speaking, proxies solicited for certain matters should not be used for voting on other matters if prior notice has not been given to the shareholders so that they may consider any such "new" matter. It is reasonable to surmise that a proxy is given by a shareholder in the expectation that it will be used to vote on a particular matter. This is consistent with both the underlying intent behind the Instrument and the comments in *Nathan and Voore*.

159 Nevertheless, I do not accept Mason's argument that s. 9.4(8) of the Instrument is to be so strictly construed such that any "other matter" must be procedurally and directly related to or "ancillary" to the "matter" in the original notice of meeting. Depending on the issues involved and the specific circumstances, there may be any number of "other matters" that may be brought before the meeting. The Instrument provides that very flexibility by its express terms in s. 9.4(8), which allows certain "other matters" to be voted on by the proxies if those other matters "properly" come before the meeting.

160 Whether a matter *properly* comes before the meeting will, in my view, depend on the particular circumstances of each case. Factors will include how substantive the other matter is, whether the Board has considered the matter, and what prior notice of such matter has been received by the

shareholders. It may be appropriate to bring a matter before the meeting on the basis that it is so inextricably connected -- but not necessarily procedurally connected or ancillary -- to the matters which were raised in the notice of meeting that a consideration by the shareholders of that "other matter", whether in person or under the proxies already provided, does not give rise to any element of unfairness or prejudice to the shareholders.

161 The clear terms of s. 9.4(8)(b) of the Instrument, the wording of which was copied into the proxies gathered by both TELUS and Mason, provide that same flexibility in this case.

162 Accordingly, I do not consider that Master Muir erred in considering that, as a matter of law, the proxies obtained by both TELUS and Mason allowed discretion on the part of the proxy holders to vote the proxies on the Mason Resolutions as an "other matter" that came before the meeting.

163 As Mason points out, the Order relating to the use of the proxies was a fundamental aspect of the Master's reasoning in relation to the issue of prejudice to the shareholders, including Mason, as considered on the adjournment application. Accepting my decision above that, in appropriate circumstances, the proxies could be used in this fashion, the issue becomes whether the Master should have made that order. This issue involves a review of the factors considered by Master Muir which led her to order that the meetings proceed and that the proxies be used.

3. Was it Unfair and Prejudicial to Mason that the Meetings Proceeded on October 17?

164 The notice for the Mason Meeting to consider the Mason Resolutions was forwarded to shareholders on September 1. The ability of Mason to proceed with the Mason Resolutions was suspended, however, as a result of Savage J.'s Order on September 11. After the *BCCA Reasons* were issued on October 12, Mason filed an application that day for an order adjourning both the TELUS and Mason meetings. Mason contended that it was only upon the successful outcome of the appeal proceedings that it was entitled to proceed properly in relation to the Mason Resolutions.

165 The Master refused Mason's application to adjourn both the TELUS and Mason Meetings. It appears that Mason did not offer any alternative proposal as to when and how the meetings could proceed, except for that they should be delayed.

166 Master Muir's October 15 decision was an exercise of her statutory discretion under s. 186 of the *Act*, which reads as follows:

> 186(1) The court may, on its own motion or on the application of the company, the application of a director or the application of a shareholder entitled to vote at the meeting,
>
> (a) order that a meeting of shareholders be called, held and conducted in the manner the court considers appropriate, and
> (b) give directions it considers necessary as to the call, holding and conduct of the meeting.
>
> (2) The court may make an order under subsection (1)
>
> ...

(c) for any other reason the court considers appropriate.

[Emphasis added]

167 The Master's decision also followed upon the directions from the Court of Appeal (quoted above) to address "the logistics of the scheduled meetings" and to find a "practical solution" so that the meetings could proceed in such a way as to avoid confusion on the part of shareholders.

168 Accordingly, the appropriate standard of review is that I am to interfere with the Master's decision only if she was "clearly wrong".

169 The parties agree that the correct test to have been applied on the adjournment application was whether an adjournment of the meetings was in the best interests of shareholders.

170 Mason contends that it was unfairly prejudiced by the Master's decision that the meetings proceed because it was unable to send out an information circular regarding the Mason Resolutions or solicit proxies in support of the Mason Resolutions. Mason argues that Savage J.'s Order setting aside the Requisition precluded it from sending out a circular explaining the Mason Resolutions and their interrelationship to the New Proposal. Mason points out that many shareholder proxies for the TELUS Meetings had been deposited by Friday, October 12, a short time before the deadline for the deposit of proxies on Monday, October 15. Mason says that given this timing, Savage J.'s Order effectively "killed its campaign" against the New Proposal because it could not solicit any proxies in support of the Mason Resolutions until October 12; and even then, it was unable to act in any meaningful way until Monday, October 15. As such, Mason contends that an adjournment of the meetings was appropriate.

171 Mason also says that the Master's decision concerning the use of the proxies was fundamental to her determination that both the New Proposal and the Mason Resolutions could be brought forward to the shareholders at the October 17 joint meeting and that there could be a meaningful vote on the Mason Resolutions. Mason says that the only basis on which the court could have held that there was no prejudice to Mason in having the Mason Resolutions proceed at the meetings was that the proxies solicited by Mason against the New Proposal were equivalent to the proxies Mason would have been able to solicit in support of the Mason Resolutions if given additional time to do so.

172 The circumstances leading up to the adjournment application are critically important in considering the reasoning of the Master. The Master agreed that other circumstances may have dictated that an adjournment was appropriate, but in the specific circumstances at that time she was satisfied that no prejudice to Mason arose: *Muir Reasons #2* at paras. 4-5.

173 From the time that Mason publicly surfaced in April 2012, both TELUS and Mason engaged in extensive and aggressive campaigns to win the hearts and minds of the Common Shareholders in support of their respective positions. Mason especially undertook a massive solicitation campaign to garner support for its position that there should be no exchange of shares without a premium being paid.

174 Furthermore, it is abundantly clear that Mason's campaign, both before and after September 11, addressed the issue that is at the heart of the Mason Resolutions -- namely, that there should be no exchange of Non-Voting Shares for Common Shares without a premium for the Common

Shares. Justice Savage's Order did not prevent or deter Mason from continuing its campaign to win over holders of Common Shares to defeat the New Proposal.

175 As already outlined in these reasons, after September 11 and continuing to the date of the meetings, Mason continued its solicitation campaign in the same extensive and aggressive manner as it had before. In particular:

a) on September 24, Mason issued the extensive Second Mason Dissident Circular that included the Blackstone Report and a lengthy third party opinion on TELUS' allegations of empty voting. In that Circular, Mason again advocated for a premium on the exchange;
b) further press releases were issued on September 24 and October 11;
c) further letters were sent to shareholders on October 2 and 5;
d) Mason hosted various investor and shareholder calls, including a call on September 27; and
e) in addition to the "call-out" program by Kingsdale, Mason representatives called TELUS' Common Shareholders to discuss Mason's position.

176 TELUS argues, and I agree, that far from being silenced during this interim period, Mason was able to and did continue to make its position very clear that shareholders should oppose any exchange of Non-Voting Shares for Common Shares that did not provide for the necessary premium.

177 Further, the evidence before Master Muir was that many shareholders had already received enough, if not too much, information on the warring positions from both sides. Evidence from certain large institutional investors indicated that they had read and understood the respective positions from the various communications; and with that disclosure in hand, they clearly favoured TELUS' position over Mason's competing position.

178 I agree with TELUS that, in substance, the Mason Resolutions raise the very same issue that is raised by the New Proposal. Although technically there was no exchange of information circulars by TELUS and Mason specifically directed to the Mason Resolutions, I am hard pressed to see how they would have materially differed from the materials circulated to shareholders leading up to the October 17 meetings.

179 At the end of the day, whether in the New Proposal or in the Mason Resolutions, the issue before shareholders is the same: should the Non-Voting Shares be exchanged with Common Shares on a one-for-one basis, or should there only be an exchange if a premium is paid for the Common Shares? The Court of Appeal commented on the fundamental issue in the *BCCA Reasons* as follows:

> [2] Underlying the dispute is the issue of whether, and at what rate, non-voting shares of TELUS will be converted to, or exchanged for, common shares. The Board of Directors of TELUS has proposed plans that would see the non-voting shares converted into or exchanged for common shares at the rate of 1:1. The clients of Mason Capital Management LLC ("Mason") oppose those plans, and have an interest in keeping the value of the common shares higher than that of the non-voting shares.

180 In my view, Mason's argument that it was prejudiced by being forced to proceed to the meetings lacks any substance. Starting from the time Mason declared its opposition to the Initial Proposal on April 10, the battle lines were clearly drawn very publicly as between the respective positions of TELUS and Mason. As is apparent from the factual background outlined above, the respective positions of Mason and TELUS were set out in substantial public documentation, including information circulars, letters and press releases. Any shareholder wishing to understand the issues had a plethora of information to consider.

181 With respect to Mason, it clearly set out in its materials the contention that the conversion ratio should be higher than that proposed by TELUS. It was well known that Mason took the position that if there was to be any conversion, the Common Shareholders should be entitled to a premium.

182 Similarly, the form and substance of the Mason Resolutions had been clearly communicated to the shareholders through press releases on August 2 and 31 and in the notice materials relating to the Mason Meeting on September 1. There was also other substantial information available to the public, particularly to shareholders, that the Mason Resolutions had been proposed. Many shareholders at the meetings confirmed that they had read the Mason Resolutions. The Second Mason Dissident Circular dated September 24 expressly referred to the Mason Resolutions:

> Due to the failure of the TELUS directors to protect the voting class, Mason called a meeting of the shareholders of TELUS to give voting shareholders the opportunity to express their views on the appropriate minimum premium in a dual-class collapse transaction. At the requisitioned meeting, voting shareholders would be entitled to vote on a binding amendment to the Articles of TELUS to require TELUS to obtain shareholder approval by exceptional resolution (80%) to issue voting shares in a dual-class collapse transaction, unless the exchange ratio of non-voting shares for voting shares was above certain specified levels. This step was aimed at addressing the collective action problem, effectively providing the voting shareholders with the collective means to set ground rules for a fair exchange ratio in advance of a specific transaction being presented to the shareholders for approval.

183 Mason's contention is that the Mason Resolutions constituted a "third option" that was a matter that should logically have been considered by the Common Shareholders prior to the New Proposal. The substance of Mason's argument is that if it had had more time to educate the Common Shareholders about the Mason Resolutions, it would have garnered sufficient support to raise the voting threshold to 80%. If so, then obviously TELUS' later efforts to approve the New Proposal would not have received the necessary support.

184 The fallacy of Mason's argument is it completely ignores the approximately six month campaign that was waged between these two parties to persuade and convince the Common Shareholders to accept their respective positions.

185 At the end of the day, TELUS garnered support from almost 63% of the Common Shareholders. That being so, those Common Shareholders were in support of the one-for-one exchange proposed by TELUS. Assuming that level of support for an exchange of the shares on that basis, it defies logic that those same Common Shareholders would have voted for the Mason Resolutions, whether those Resolutions were considered before or at the same time as the New Proposal. The

Mason Resolutions did not propose an arrangement, but simply proposed that the voting threshold with respect to any conversion within a range be raised to 80%. Logically though, a Common Shareholder in support of the New Proposal, whatever the voting threshold may be, would vote against the Mason Resolutions. In other words, for a Common Shareholder in support of the New Proposal, the voting threshold was of no consequence since they were prepared to vote in favour of the Arrangement so as to implement it *at this time*. It would be illogical to suggest that that same Common Shareholder would vote in favour of a resolution to raise the voting threshold in respect of some future arrangement that might be proposed.

186 In the above circumstances, the solution offered by TELUS in respect of the use of the proxies made perfect sense. In other words, Common Shareholders were really only choosing between two alternate positions. Mason had substantial opportunities to garner support for its position. Assuming, as Master Muir did, that the substantial campaigns had resulted in significant shareholder knowledge of those two positions, the order that the proxies be used either for or against those respective positions was indeed the "practical solution" that the Court of Appeal encouraged be found.

187 Mason does not offer any evidence that any Common Shareholder or group of Common Shareholders did not understand the choices that were offered as between TELUS and Mason or that they would have acted differently if they received further information.

188 As such, the proxies that had been deposited in relation to the New Proposal were directly related to the issue raised by the Mason Resolutions. In these circumstances, the use of the proxies at the meetings was fair and reasonable.

189 One might infer, as TELUS suggests I do, that Mason's strategy was simply to delay the meetings in the hopes that the uncertainty in the marketplace would result in the re-emergence of the historical spread in the share trading prices. In my view, there is considerable merit in this suggestion. I would note again that Mason did not offer any alternate plan to Master Muir as to how the meetings could take place within a reasonably short period of time. Its proposal was simply a delay.

190 Mason also submits that it was prejudiced by the fact that TELUS, until only a few days before the vote, could rely on what was found to be erroneous reasoning (i.e. the *Savage Reasons*) to support its position with respect to the New Proposal and to besmirch Mason's position. It argues that TELUS used the *Savage Reasons* to unfairly persuade shareholders that: (i) Mason had engaged in an invalid manoeuvre in attempting to requisition and call the Mason Meeting; (ii) Mason's tactic was successfully challenged in court; (iii) the court decided overwhelmingly in favour of TELUS and found that Mason's actions were contrary to law; and (iv) the court confirmed that Mason was an "empty voter". Essentially, Mason complains that the *Savage Reasons* provided TELUS with ammunition to unfairly demonize Mason in "personal and unwarranted attacks" in its solicitation for support of the New Proposal and support against the Mason Resolutions.

191 Mason also submits that it was prejudiced by not being able to properly respond to TELUS' pejorative comments in the press describing its "empty voting" position. Mason points to letters forwarded by TELUS to the shareholders on September 29 and October 1, which describe Mason's position in fairly negative terms. At that time, TELUS was obviously in a position to rely upon the *Savage Reasons* and his comments on the empty voting issue. Mason says that the Court of Appeal's comment that Mason had a "cogent position" which could reasonably be advanced was not something Mason could reasonably communicate to the shareholders before the meeting.

192 I find Mason's argument on this last point unpersuasive. Whether Mason was described as an "empty voter" in the *Savage Reasons* is really beside the point. Justice Savage did not rely on Mason's status as an "empty voter" in determining that the Requisition was non-compliant. Furthermore, the Court of Appeal did not excuse or otherwise endorse Mason's strategy. The Court of Appeal did not say that Mason was not an "empty voter". To the contrary, the Court stated a number of times that Mason's limited financial stake in TELUS was a "cause for concern" in light of its opposition to the New Proposal and its ability to vote its Common Shares. The only positive comment from the Court of Appeal related to Mason having a "cogent position" in relation to the exchange ratio issue. Other than that, the reasons of both Savage J. and the Court of Appeal negatively refer to the substance of Mason's position in the sense of it having substantial voting power with a limited economic interest, a fact which is not disputed by Mason and which cannot be disputed, whether one agrees or not with labelling Mason as an "empty voter".

193 Mason further argues that there was insufficient publicity by TELUS about the *BCCA Reasons*. However, Mason issued a press release on October 12 announcing the results of the Court of Appeal's decision to the extent that it assisted in persuading Common Shareholders of its "cogent position". Notably, and somewhat hypocritically, there was no mention in Mason's press release of the Court's comments that there was "cause for concern" about its position.

194 It is also the case that TELUS was not the only person who publicly described Mason's arbitrage position in less than glowing terms. One well-known New York law firm commented generally on the case and stated that, in its view, Mason's strategy was "deeply pernicious".

195 In these circumstances, I fail to see how giving Mason further time by delaying the meetings would have allowed Mason to rehabilitate its image in the eyes of the Common Shareholders and gain further support for its position.

196 While the *BCCA Reasons* might have provided some shareholders further food for thought, there is no evidence that any shareholders called back their proxies before the voting deadline on October 15 for any reason, let alone because they needed further time to reconsider their vote.

197 Master Muir found that Mason had had sufficient time to solicit support from the Common Shareholders in *Muir Reasons #2*:

> [6] Mason has already extensively solicited TELUS shareholders with respect to its position on the proposed one-to-one exchange of non-voting common shares and argued for its position that the right to vote the common shares is a valuable right that can be quantified by the difference in the cost of non-voting versus common shares and therefore that there should be a premium in the exchange.
>
> [7] On September 24, 2012, Mason issued a dissident proxy circular in response to the TELUS proposal. It set out Mason's position and urged shareholders to vote against the proposal. In addition Mason has held conferences, issued news releases, and contacted shareholders to advocate its position.
>
> [8] Shareholders have already had a lengthy period to consider the differing views and proxies have been returned in accordance with both the information circular and the dissident circular. ...

198 Further, Master Muir considered substantial evidence that any postponement of the TELUS Meetings would have prejudiced TELUS and would have confused and inconvenienced the shareholders. TELUS argued that:

(i) shareholders had voted with the reasonable expectation that the issues would proceed and be decided upon on October 17;
(ii) TELUS had undertaken significant preparations for the holding of the TELUS Meetings, including renting equipment, contracting out for various services, and making travel arrangements. It was also anticipated that many shareholders had made travel or other arrangements to attend the TELUS Meeting;
(iii) the market expected and understood that shareholders would resolve the question of whether there would be an exchange of the shares on a one-for-one basis (and thus a rejection of Mason's position) on October 17. In particular, the investor community had prepared for the TELUS Meetings, including the two proxy advisory firms, ISS and Glass Lewis, who had issued reports summarizing their recommendations to shareholders;
(iv) TELUS had spent an inordinate time in the very public battle with Mason, and many shareholders were concerned about the need to refocus on TELUS' business and customers without having to address the continued disruption caused by Mason; and
(v) delay would invariably lead to the shareholder confusion and inconvenience that the Court of Appeal sought to avoid.

199 In *Muir Reasons #2*, the Master accepted this evidence and found that prejudice to the shareholders would have been considerable:

> [8] ... Plans for the meeting are complete. Considerable disruption would be caused to the shareholders of TELUS should the meeting be adjourned. I do not consider it necessary, either in the interest of justice or in the best interests of the shareholders of TELUS that an adjournment be ordered.

200 The Master's approach in considering the adjournment application is supported by the authorities. The court will not lightly interfere with the conduct of a shareholder meeting which is properly called and, in particular, will not lightly order that a properly called meeting not proceed. In *Trans Mountain Pipe Line Company Ltd. v. Inland Natural Gas Co. Ltd.* (1983), 49 B.C.L.R. 126 at 129 (C.A.), Carrothers J.A. stated:

> It has been clear company law for a century that there must be a very strong case indeed to authorize and justify a court in restraining a meeting of shareholders called to settle their own affairs. As Lindley L.J. in *Isle of Wight Ry. Co. v. Tahourdin* (1883), 25 Ch. D. 320, 53 L.J. Ch. 353 at 359-60 said:
>
> > One must bear in mind the decisions in equity and other cases, and bear in mind also that this Court has constantly and consistently refused to interfere with shareholders' relief where they have done the best they can by calling meetings to manage their own affairs. Bear in mind that line of decision on the one side, and see what position the shareholders would be in

> if there was to be another line of decision prohibiting the meeting of shareholders to consider their own affairs. It appears to me that it must be a very strong case indeed to authorise and justify this Court in restraining a meeting of shareholders.

201 In exercising the broad discretion found in the *Act* to make orders in relation to company meetings, the court must exercise that discretion reasonably: *Brio Industries Inc. v. Clearly Canadian Beverage Corp.*, [1995] B.C.J. No. 1441 (S.C.) at paras. 12 and 16; *Proprietary Industries Inc. v. eDispatch.com*, 2001 BCSC 1850 at paras. 18-27. Prejudice will be a key consideration in the exercise of that discretion.

202 The consequences of acceding to Mason's position are significant. A good portion of the 225,000 TELUS shareholders have now voted. This voting took place after what can only be described as an extensive solicitation campaign on the part of both TELUS and Mason. The votes have been recorded and publicly reported and the market has, understandably, reacted to the outcome. Mason's proposal is that the entire process, beginning with the Second Interim Order, be set aside and that TELUS be forced to go back to square one in terms of scheduling meetings and restarting the solicitations. In my view, such an outcome would result in substantial prejudice to TELUS and the shareholders as a whole in the face of a complete lack of prejudice to Mason. There is simply no reasoned basis for such a result where fully informed shareholders, by way of a long and no doubt expensive process, have registered their position on the issues in the expectation that their votes will be considered.

203 I conclude that, in light of all the circumstances that were before the Master, she exercised her discretion in a reasonable manner and that accordingly, she was not "clearly wrong" in granting the orders that she did. There was no reason to delay the meetings on October 17, and clear prejudice to TELUS and all its shareholders would have resulted in that event.

204 The second and third appeals are dismissed.

IV. THE FAIRNESS HEARING

A. Statutory Framework

205 The relevant portions of the *Act* are as follows:

> **Arrangement may be proposed**
>
> **288**(1) Despite any other provision of this Act, a company may propose an arrangement with shareholders, creditors or other persons and may, in that arrangement, make any proposal it considers appropriate, including a proposal for one or more of the following:
>
> (a) an alteration to the memorandum, notice of articles or articles of the company;
> (b) an alteration to any of the rights or special rights or restrictions attached to any of the shares of the company;
>
> ...

(g) an exchange of securities of the company held by security holders for money, securities or other property, rights and interests of the company or for money, securities or other property, rights and interests of another corporation;

(2) Before an arrangement proposed under this section takes effect, the arrangement must be

(a) adopted in accordance with section 289, and
(b) approved by the court under section 291.

Adoption of arrangement

289(1) Despite sections 264 and 265, an arrangement is adopted for the purposes of section 288 (2) (a) if,

(a) in respect of an arrangement proposed with the shareholders of the company,

(i) the shareholders approve the arrangement by a special resolution, or
(ii) if any of the shares held by the shareholders who under subsection (2) are entitled to vote on the resolution to approve the arrangement do not otherwise carry the right to vote, the shareholders approve the arrangement by a resolution passed at a meeting by at least a special majority of the votes cast by the shareholders, if at least the prescribed number of days' notice of the meeting and of the intention to propose the resolution has been sent to all of the shareholders,

(b) in respect of an arrangement proposed with the shareholders holding shares of a class or series of shares of the company, those shareholders approve the arrangement by a special separate resolution of those shareholders,

...

(3) If the court orders, under section 291(2)(b)(i), that a meeting be held to adopt an arrangement in addition to or in substitution for a meeting contemplated by subsection (1) of this section, the arrangement must not be submitted to the court for approval until after

(a) the arrangement has been adopted at that court ordered meeting, ...

(3.1) If the court orders, under section 291(2)(b)(ii), that a separate vote of specified persons be held to adopt an arrangement in addition to or in substitution for a

meeting contemplated by subsection (1) of this section, the arrangement must not be submitted to the court for approval until after

(a) the arrangement has been adopted by that vote, or
(b) all of the persons who were entitled to vote in that separate vote consent to the arrangement in writing.

...

Information regarding arrangement

290(1) If a meeting is called to adopt an arrangement, the company must, unless the court orders otherwise,

(a) include with any notice of the meeting that is sent to a person who is entitled to vote at the meeting, a statement

(i) explaining, in sufficient detail to permit the recipient to form a reasoned judgment concerning the matter, the effect of the arrangement, and
(ii) stating any material interest of each director and officer, whether as director, officer, shareholder, security holder or creditor of the company, or otherwise, and

(b) include in any advertisement of the meeting,

(i) the statement required by paragraph (a), or
(ii) a notification that the persons who are entitled to vote at the meeting may, on request, obtain copies of the statement before the meeting.

...

Role of court in arrangements

291(1) If an arrangement is proposed, the court may make an order respecting that arrangement under subsection (2)

(a) on its own motion,
(b) on the application of the company, or
(c) on the application, made on notice to the company, of

(i) a shareholder of the company,
(ii) a creditor of the company, or
(iii) a person who is a member of the class of persons with whom the arrangement is proposed.

(2) The court may, in respect of a proposed arrangement, make any order it considers appropriate, including any of the following orders:

(a) an order determining the notice to be given to any interested person, or dispensing with notice to any person, in relation to any application to court under this Division;
(b) an order requiring the company to do one or both of the following in the manner and with the notice the court directs:

(i) call, hold and conduct one or more meetings of the persons the court considers appropriate;
(ii) hold a separate vote of the persons the court considers appropriate;

(c) an order permitting shareholders to dissent under Division 2 of Part 8 or in any other manner the court may direct;
(d) an order appointing a lawyer, at the expense of the company, to represent the interests of some or all of the shareholders;
(e) an order directing that an arrangement proposed with the creditors or a class of creditors of the company be referred to the shareholders of the company in the manner and for the approval the court considers appropriate.

...

(4) Without limiting subsections (1) to (3) but despite any other provision of this Act, on an application to court for approval of the arrangement,

(a) if the arrangement has been adopted under section 289 and, if required, approved by the shareholders in accordance with an order made under subsection (2) (e) of this section, the court may make an order approving the arrangement on the terms presented or substantially on those terms or may refuse to approve that arrangement ...

B. The *BCE* Decision

206 As stated in the Introduction, *BCE* is the leading authority relating to approval of arrangements. It establishes a three-part test: whether the arrangement is made in good faith, whether the statutory requirements have been met and finally, whether the arrangement is fair and reasonable. The onus lies on TELUS to satisfy all elements of this test. In considering whether an arrangement is fair and reasonable, there are two prongs or questions to answer: (1) Is there a valid business purpose?; and (2) Does the arrangement resolve objections in a fair and balanced way?

207 *BCE* provides considerable guidance in the application of the test, particularly as it relates to the fair and reasonable issue. I will refer to the specific portions of *BCE* as relevant to this decision within the context of the specific issues to be addressed, as below.

C. Has TELUS Satisfied the Requirements to Approve the Arrangement?

1. The Good Faith Requirement

208 TELUS asserts that the Arrangement has been proposed in good faith.

209 An historical review reveals that there was good reason at this time to consider a different approach with respect to TELUS' capital structure. TELUS' dual class share structure was introduced in the late 1990s to address its significant non-Canadian shareholder base. It was always anticipated that this dual class structure would eventually fall away once it was no longer required. By 2011, TELUS' shareholder base had changed and TELUS no longer needed the dual class structure to comply with the regulatory limits on foreign ownership. There is evidence that arising from this new circumstance, some shareholders had encouraged TELUS to update its capital structure. That encouragement was based upon the expectation that an update in the share structure would increase liquidity if there was only a single class of shares. It is also well taken that from a corporate governance point of view, a collapse of the dual class structure was preferable and, in fact, is considered a "best practice".

210 It was in this environment that the Board embarked upon a *bona fide* consideration of options to achieve these benefits. That the Board embarked upon this task not only to improve corporate governance but to improve profitability and competitiveness of TELUS is hardly surprising. It is of some significance that the Board did not approach the issue in a cursory manner. Those procedures can be summarized as follows:

(i) a preliminary analysis by TELUS management;
(ii) the establishment of the Special Committee comprised of experienced and knowledgeable individuals, to study and report to the Board on possible legal structures for the exchange of TELUS Non-Voting Shares into Common Shares. The qualifications of the gentlemen on that Special Committee are beyond question and indicate a significant effort to bring considerable talent to consider the issue;
(iii) an extensive process undertaken by the Special Committee, in which it considered whether to proceed with an exchange and, if so, the appropriate terms of that exchange;
(iv) advice from legal and independent financial advisors;
(v) the consideration of a broad range of factors, including different possible exchange ratios, precedent transactions, trading price history, legal considerations, and the best interests of TELUS and each of its shareholder classes;
(vi) two fairness opinions relating to both the Initial Proposal and the New Proposal; and
(vii) specific consideration by the Board and the Special Committee of whether to pursue the New Proposal in light of the involvement of Mason and the withdrawal of the Initial Proposal. Despite concerns from many shareholders that this very public fight with Mason was adversely affecting management, the Board reconfirmed its commitment to the New Proposal and took steps to bring it forward to the shareholders as soon as possible. Again, the Special Committee received and relied upon the advice of its independent financial and legal advisors.

211 An extensive and robust process to consider an arrangement has been found to support the contention that an arrangement is put forward in good faith: *Magna International Inc. (Re)*, 2010 ONSC 4123 at para. 108 ("*Magna SCJ*"), aff'd 2010 ONSC 4685 (Div. Court) ("*Magna Appeal*"); *Gazit America Inc. (Re)*, 2012 ONSC 4549 at paras. 10-11.

212 Mason concedes that TELUS is acting in good faith. This is consistent with the fact that at the May 9 meeting, it voted its shares to appoint the present Board members. However, Mason now somewhat incongruously alleges that the Board and management of TELUS are in a conflict of interest in respect of the Arrangement. In particular, Mason alleges that the directors and management stand to benefit personally from the one-for-one share exchange because those directors and management hold Non-Voting Shares.

213 TELUS' response to these allegations is twofold: firstly, that the interests of the directors and management are trivial in the context of the Arrangement and secondly, that all interests of management and directors were disclosed to shareholders in the public communications relating to the Arrangement.

214 Section 147(1) of the *Act* sets out when a director or senior officer has a "disclosable interest":

> **Disclosable interests**
>
> **147**(1) For the purposes of this Division, a director or senior officer of a company holds a disclosable interest in a contract or transaction if
>
> (a) the contract or transaction is material to the company,
> (b) the company has entered, or proposes to enter, into the contract or transaction, and
> (c) either of the following applies to the director or senior officer:
>
> (i) the director or senior officer has a material interest in the contract or transaction;
> (ii) the director or senior officer is a director or senior officer of, or has a material interest in, a person who has a material interest in the contract or transaction.
>
> [Emphasis added.]

215 The *Act* does not address what constitutes a "material interest".

216 TELUS cites various authorities which provide some guidance on this issue. *Black's Law Dictionary* (9th ed.) defines "material" as "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential". Bruce Welling in *Corporate Law in Canada: The Governing Principles*, 3d ed. (London, Ontario: Scribblers Publishing, 2006) at pp. 439-440 states:

> ... The purpose is to identify negotiations in which a corporate manager might not be able to bargain effectively on behalf of the corporation. Any personal relationship or monetary interest he may have on the other side might be an inhibiting

> factor. The question to ask is whether disclosure of the relationship or interest might be relevant to the corporate decision to involve, or not involve, the particular manager in the negotiations. Whether to participate in a proposed transaction is a corporate decision and the corporation is entitled to full disclosure permits fiduciaries of all facts that might affect that decision. ...
>
> ...
>
> On the other hand, relationships of a tenuous nature and financial involvements such as holding a pitifully small number of shares of a large corporation whose shares are widely distributed will not be "material" and therefore will not be caught by the section.
>
> [Emphasis added.]

217 In my view, the interests (i.e. Non-Voting Shares) held by the directors and management of TELUS can hardly be described as material. It is undisputed in this case that the shares in TELUS are widely held, and the amount of shares held by the officers and directors can hardly be described as "material" in the context of this overall arrangement.

218 In any event, given the overwhelming support by the Non-Voting Shareholders for the Arrangement, it is clear that a positive vote by the officers and directors would not have had a significant impact. The shareholdings of the officers and directors in Common Shares was also not extensive in light of the overall shareholdings, which are widely held. It cannot be rationally suggested that the votes by the officers and directors were sufficient to alter the overall voting.

219 Mason says that the significance must be looked at in the context of the shareholdings of the directors and management and the significance for that director and officer, rather than in the context of TELUS' overall capitalization. The uncontroverted evidence, however, is that the total net potential gain or benefit under the Initial Proposal was less than 3% of the value of the total TELUS stockholdings of each director and officer. Under the New Proposal, that dropped to less than 1.5% for half of them and less than 1% for the others.

220 Accordingly, while the officers and directors had an "interest" in the New Proposal, and on the face of matters had a conflict of interest, I do not consider that the conflict was "material" enough to justify any of Mason's concerns.

221 Even if it could be said that the Arrangement was significant for the officers and directors, it was equally significant for all of the shareholders given the benefits that were expected to be gained generally by both classes of shares. In that regard, the conflict of interest provisions in the *Act* must be read in conjunction with the arrangement provisions of the *Act*. Section 288(1) provides that a company may propose an arrangement despite any other provision of the *Act*. Section 290(1)(a)(ii) expressly provides that if a meeting is called, the company must include certain meeting materials and those materials must include a statement of any "material interest" of each director and officer.

222 Accordingly, it is evident that even if a director or officer has a "material interest", that will not prevent a company from proposing an arrangement. It is, however, mandatory in such a situation that full disclosure of any "material interest" be given to the shareholders so that the shareholders can consider that matter in relation to the proposed arrangement. Further, even assuming a con-

flict of interest, the arrangement provisions provide considerable safeguards, including the shareholder vote, the independent opinions that might be obtained and finally, the consideration by the court as to whether the arrangement is brought in good faith and whether it is fair and reasonable, in accordance with the *BCE* test.

223 TELUS' evidence supports the finding that the shareholdings of the officers and directors were disclosed in publicly available documents for some time even before the Arrangement was announced. This is not a revelation, given that TELUS is a public company and as such is required to publicly disclose that information on a regular basis. It was therefore open to shareholders to consider approval of the Arrangement in light of those disclosed facts.

224 Such allegations on Mason's part were raised in the course of these proceedings and before the vote of the shareholders. In TELUS' September 29 letter to shareholders, it stated:

> Similarly, it is disingenuous of Mason to suggest that our Special Committee should have been comprised of members of our Board who were not in some way exposed to the performance of TELUS' non-voting shares. **Most directors of leading Canadian companies -- including TELUS -- are expected to have direct or indirect exposure to the performance of the shares of their company in order to align their interests with those of the company and its shareholders.** ...
>
> The fact a TELUS Director has direct or indirect exposure to the performance of TELUS' non-voting shares should only be of concern if that interest is sufficiently material that the Director would be susceptible to having that interest influence their decision in a manner that might prevent them from putting TELUS' interests ahead of their own. The level of economic exposure to the non-voting shares that members of TELUS' Board and the Special Committee have is fully disclosed in our public disclosure and does not constitute a material interest.
>
> [Underlining added. Bold in original.]

225 The issue was also addressed by the independent proxy firms, ISS and Glass Lewis. Upon reviewing the directors' ownership of TELUS shares, ISS acknowledged that such ownership was "overwhelmingly skewed to the non-voting shares". ISS was unconvinced, however, that this raised any conflict issues. It concluded:

> It is conceivable a board could skew an exchange ratio ... to the benefit of the class to which the directors have significantly greater exposure. It would be a long row to hoe for so little crop. The board's realistic options for an exchange ratio were likely limited to somewhere between the long-term average market discount of 4.5 percent for the non-voting shares, and the flat parity of the 1.0 exchange ratio it ultimately selected.
>
> [Emphasis added.]

226 Glass Lewis was less forgiving. It questioned TELUS' determination that the potential gains are immaterial and expressed concern with the personal interest of TELUS' executives and direc-

tors. It was further of the opinion that TELUS could reasonably provide more thorough disclosure regarding the potential gains of each executive and director resulting from the New Proposal. However, though it questioned TELUS' disclosure, when it considered TELUS' historical practice of compensating its executives and directors with Non-Voting Shares, Glass Lewis ultimately concluded that the potential gains were "more of a by-product than a driving force in the board's determination".

227 Mason's only "smoking gun" on this issue is a press release issued by TELUS on April 26, which stated that 59% of the share ownership of Darren Entwistle, TELUS' President and CEO, was in the form of Common Shares. Mason says that this ignored that 70% of his overall share ownership was in Non-Voting Shares through his deferred stock units and options. This anomalous argument is made in the face of the substantial disclosure that is contained in all of TELUS' publicly disclosed documentation as to the shareholdings of the officers and directors, including that of Mr. Entwistle. Mason's argument seems to ignore that fact and instead focuses on the fact that TELUS, in its information circulars and press releases relating to the Arrangement, did not specifically advise of the shareholdings and the net benefits that the directors and senior management stood to gain personally if the Arrangement was adopted.

228 In the face of what I consider adequate disclosure of these interests to the shareholders, I see little merit in Mason's argument that the potential benefit to the officers and directors should have been highlighted in the press releases and information circulars. Certainly, Mason as an interested investor had no difficulty in discerning what those interests were and what the potential gains might be. In addition, there is no suggestion or evidence that other shareholders were misled by the information circulars or press releases about the shareholdings of the officers and directors. It would appear as a matter of common sense and logic that the benefits received by the Non-Voting Shareholders would inevitably accrue to those officers and directors holding Non-Voting Shares (as disclosed). It also follows, accepting Mason's argument, that it would be apparent that those officers and directors holding Non-Voting Shares would receive a benefit by reason of the lack of any premium on the exchange.

229 There is no evidence that the members of the Board and Special Committee acted out of self interest. This is not a case where the officers and directors had only recently acquired significant Non-Voting Shares in the hopes of profiting from the imminent completion of the Arrangement. The shareholdings had been in place for some time, again to the knowledge of all shareholders, including Mason.

230 TELUS relies on *Scion Capital v. Bolivar Gold Corp.*, 2006 YKSC 17, aff'd 2006 YKCA 1. In that case, the court was considering objections to an arrangement which would have provided certain benefits to the directors in the form of severance and bonus payments. At para. 89, the trial judge noted that those benefits that were to accrue had been in place for some time and were not created "overnight" in anticipation of the offer that was the subject of the arrangement. The court also noted that those interests were fully disclosed in the information circular and that it was open to the security holders to determine whether they were excessive or putting management in a conflict of interest.

231 The findings of the Yukon Supreme Court were upheld on appeal. Chief Justice Finch stated:

> [17] It is clear that the directors have a financial interest dependent on completion of the arrangement. Those interests arise from their contracts of employ-

> ment, entered into long before the negotiations that led to the arrangement. The security holders, including those who dissent, were aware of those interests. But those interests are not in conflict with the interests of the security holders. Their interests are aligned or coincide with those of the security holders. A significant part of the benefits the directors will obtain on completion depend directly on the consideration received by the security holders under the arrangement. The remainder of the benefits are routine severance benefits.
>
> [18] In any event, the financial benefits the management directors will receive were fully disclosed in the information circular. It was for the security holders to decide, after hearing the arguments of the dissenters, whether the arrangement was acceptable to them. Those who disapproved, whether because they considered the benefits to the directors were excessive, or for any other reason, were free to vote against the arrangement. Some, including the appellants, did. The requisite majority, however, exercised their judgement by voting in favor of the arrangement.
>
> [Emphasis added.]

232 It is evident that the interests of the directors and senior management were fully disclosed in communications to the shareholders. In light of that disclosure, it was for TELUS' shareholders to decide, just as the shareholders did in *Bolivar Gold*, whether to give any credence to the interests held by the directors and management in relation to whether they would support or reject the Arrangement.

233 At the end of the day, Mason's point is fairly nominal. Mason agrees that the directors can propose an arrangement in which they have a conflict or potential conflict, but Mason further says that the conflict bears on TELUS' ability to maintain that the process has been "exemplary", as TELUS suggests. In my view, whether the process can be called "exemplary" is a quibble that does not materially advance the debate. Mason concedes that the Board is acting in good faith. Whether the process was adequate to address the balancing of interests that is required under the "fair and reasonable" prong of the test is another matter that I will address below.

234 I find that TELUS has satisfied the requirement of proving that it acted in good faith in proposing the Arrangement.

2. The Statutory Requirements

235 Mason takes the position that the Arrangement is one with the Common Shareholders which required a Special Resolution (2/3) of both the Common Shareholders and the Non-Voting Shareholders. A number of arguments are advanced in support of this contention:

(a) The Arrangement affects the legal rights of the Common Shareholders because it creates a new right for Non-Voting Shareholders to exchange those shares for Common Shares, resulting in an amendment to Article 27.9.

(b) The Arrangement affects the legal rights of the Common Shareholders because it would constitute a "reclassification" of the Non-Voting Shares, which is prohibited by Article 27.3.

(c) The Arrangement seeks to alter TELUS' capital structure in a significant way which affects all shareholders. It is therefore an arrangement which is proposed to each class of shareholders.
(d) Since TELUS obtained the Second Interim Order providing for a vote by the Common Shareholders to adopt the Arrangement, the Arrangement was one with the Common Shareholders.
(e) The *Act* requires that any class vote of the Common Shareholders required the approval of at least 2/3 of the votes cast.

236 I will address each of these arguments in turn. The arguments under (a) and (b) focus on the form of the Arrangement, while the argument in (c) focuses on the substance.

(a) Does the Arrangement affect the legal rights of the Common Shareholders because it creates a new right for Non-Voting Shareholders to exchange those shares for Common Shares, resulting in an amendment to Article 27.9?

237 TELUS' Article 27 addresses certain matters in relation to Common Shares and Non-Voting Shares and provides that "Common Shares and the Non-Voting Shares shall have attached thereto the following rights, privileges, restrictions and conditions".

238 The Articles provide two circumstances in which Non-Voting Shareholders have the right to convert all or part of their Non-Voting Shares into Common Shares on a one-for-one basis. First, Article 27.5 provides a "coat tail" provision for such a conversion in the event of a take-over offer that is made to Common Shareholders on different terms than to Non-Voting Shareholders. Second, Article 27.6 provides for such a conversion in the event of a regulation change relating to foreign ownership of Common Shares. It is undisputed that no such events have occurred to trigger such conversion rights.

239 Mason relies on other portions of Article 27 which set out that both types of shares shall have the same "rights and attributes", subject to these specified rights of conversion:

27.9 Same Attributes

Save as aforesaid, each Common Share and each Non-Voting Share shall have the same rights and attributes and be the same in all respects.

27.10 Amendment Rights

The provisions of this Article 27, may be deleted, amended, modified or varied in whole or in part upon the approval of any such amendment being given by the holders of the Common Shares, by a special separate resolution of 2/3 of the votes cast thereon and by the holders of the Non-Voting Shares by special separate resolution of 2/3 of the votes cast thereon and as required by the *Business Corporations Act.*

240 Mason submits that other than in these two instances, there is no right of conversion from Non-Voting Shares to Common Shares and the Arrangement, to the extent that it grants another right of conversion, is amending the Articles. Mason argues that the Arrangement would, in substance, create an additional right of "conversion" not presently found in Article 27. As such, Mason

contends that the Arrangement would allow an amendment to Article 27 and that accordingly, a 2/3 vote by the Common Shareholders was also required pursuant to Article 27.10.

241 It is not disputed by TELUS that any amendment of the Articles requires a vote by a 2/3 majority of the shareholders, including the Common Shareholders. It is also not disputed that the Initial Proposal called for a "conversion" of the shares that would have resulted in an amendment of the Articles. Article 2.2(b) of the Initial Proposal provided that the Initial Proposal would result in the "deeming" of the conversion of Non-Voting Shares into Common Shares.

242 In contrast, Article 2.2(b) of the New Proposal contemplates that each Non-Voting Share will be "deemed" to have been "exchanged" for one Common Share, as a result of which the rights of the holders of the Non-Voting Shares "shall cease". Thereafter, the holders of Non-Voting Shares "shall be treated for all purposes" as having become the holder of Common Shares.

243 The nub of Mason's argument is that "conversion" is equivalent to "exchange" on a true characterization of the New Proposal. I do not accede to this argument.

244 Section 288(1)(g) of the *Act* specifically contemplates an arrangement being proposed as a result of "an exchange of securities of the company ... for ... securities of the company". This type of arrangement is separate and distinct from other types of arrangements allowed under the *Act* which include alterations to the articles or alteration to the rights attached to shares: see ss. 288(1)(a) and (b).

245 In *The Canadian Oxford Dictionary*, "convert" is defined as a "change in form, character or function". By contrast, "exchange" is defined as "the act or an instance of giving one thing and receiving another in its place". Conversion rights are specifically identified in the Articles. Exchange rights are not mentioned and, more importantly, are not prohibited in the Articles.

246 In arguing whether the Mason Resolutions would have resulted in an amendment of the Articles, which would require a Special Resolution of the Non-Voting Shares, both Mason and TELUS refer to certain comments in the *BCCA Reasons*. The Court of Appeal answered that question in the negative:

> [58] On the face of it, the proposed resolutions do not affect any "right" or "attribute" of the non-voting shares, because there is no right or ability to convert or exchange shares. ...
>
> ...
>
> [61] The same cannot be said in respect of the ability to exchange TELUS non-voting shares for common shares. Except in narrowly defined circumstances, the articles do not suggest any ability to exchange non-voting shares for voting ones. Nor is this a matter left in the discretion of the board of directors.
>
> [62] There is, then, no existing right to exchange or convert non-voting shares to common shares, nor will the resolutions, if passed, create such a right. Article 27.9 would, therefore, appear not to be applicable.

247 I do not accept Mason's argument that the Court of Appeal has equated "conversion" rights with "exchange" rights in the context of the TELUS Articles.

248 The issue must be focused on whether there is any change or alteration in the "rights and attributes" of either type of share. This is consistent with the importance placed by the Court in *BCE* on the alteration of "legal rights" as opposed to "economic interests": paras. 130-135.

249 It cannot be said that any such change or alteration will occur upon implementation of the Arrangement. Both types of shares will continue to be part of TELUS' authorized capital structure. Both types of shares will be, as in the past, entitled to the same rights and attributes in relation to equity participation and dividends. Further, there is no change in the voting rights of either share class. In other words, the legal rights attributable to any Non-Voting Share or Common Share will remain the same. And the fact that there will be no issued and outstanding Non-Voting Shares after the implementation of the Arrangement is irrelevant.

250 In *Muir Reasons #1*, Master Muir held that a 2/3rds vote was not required because the Arrangement did not constitute a change to the Articles. She reasoned that the class of Non-Voting Shares will continue to exist, *albeit* with no such shares issued: para. 55. Further, she stated:

> [56] ... Thus, requiring the non-voting shareholders to exchange non-voting shares for voting shares can be accomplished by way of a proposal and an amendment to the articles of the corporation is not necessary.

251 I agree. I conclude that the result of the New Proposal, while altering the right of Non-Voting Shareholders to hold Non-Voting Shares, does not result in any change or alteration to the legal rights or attributes of either the Common Shares or the Non-Voting Shares. Accordingly, I find that the New Proposal does not result in any amendment to Article 27, which would have required a Special Resolution from the Common Shareholders.

> *(b) Does the Arrangement affect the legal rights of the Common Shareholders because it would constitute a "reclassification" of the Non-Voting Shares, which is prohibited by Article 27.3?*

252 The TELUS Articles provide:

> **27.3 Subdivision or Consolidation**
>
> Neither the Common Shares nor the Non-Voting Shares shall be subdivided, consolidated, reclassified or otherwise changed unless contemporaneously therewith the other class is subdivided, consolidated, reclassified or otherwise changed in the same proportion and in the same manner.

253 In substance, Mason's argument is the same as that related to the amendment of the Articles. Mason contends that the "exchange" of shares in accordance with Article 2.2(b) of the New Proposal amounts to a "reclassification" of the Non-Voting Shares into Common Shares, which is prohibited by Article 27.3.

254 TELUS does not dispute that any "reclassification" would require an amendment to its Articles. Consistent with its argument above, it contends that no amendment or "reclassification" results from the New Proposal, which provides for an "exchange" of shares. Further, it contends that immediately following the implementation of the Arrangement, the Articles will continue to authorize the issuance of Non-Voting Shares with the same rights and attributes as before.

255 The *Act* is not helpful in terms of determining what constitutes a "reclassification". That word is not defined in the *Act*.

256 Certain publications from the TSX and the TSX Venture Exchange do, however, address "reclassification". Section 622(a) of the TSX Company Manual requires a Certificate of Amendment in connection with a "security reclassification". Section 9 of Policy 5.8 of the TSX Venture Exchange refers to a "security reclassification" occurring when the "terms and privileges of an Issuers' Listed Securities are amended". In this regard, the addition or amendment of a dividend feature to a class of securities is said to constitute a reclassification. As with the TSX, a Certificate of Amendment must be filed with the TSX Venture Exchange in connection with a "security reclassification".

257 Both of these publications suggest that a "reclassification" goes beyond a simple exchange of shares and instead involves a change or alteration of rights attached to shares, consistent with the need for an amendment to the Articles.

258 Mason relies on certain authorities in support of its reclassification argument. In *Canadian Pacific Ltd. (Re)* (1996), 30 O.R. (3d) 110 (Gen. Div.), Canadian Pacific was undergoing a major and complex reorganization. The court's description of the transactions referred to certain preference shares being "exchanged" for common shares. In addition, the shares in CPR were to be transferred to "new CPL" in "exchange" for shares in "new CPL". At p. 115, Mr. Justice Blair (as he then was) stated:

> In addition, the reclassification of the CPL Preference Shares, and the reduction of the voting classes of shares from two classes to one, will simplify the capital structure of the Company ...

259 It is not apparent that any distinction between "exchange" and "reclassification" was particularly argued before the court in *Canadian Pacific*. It does not appear to have been an issue particularly addressed by the Court, and I consider that the use of both words by the Court in describing the arrangement to be indicative of that fact. Also, that case involved a significant change to the capital structure of Canadian Pacific, including a collapse of different share classes, which is not a feature of this case.

260 Similarly, the court in *Re Holdex Group Ltd.* (1972), 3 O.R. 425 (H.C.J.) was addressing a complex restructuring of the company's capital structure which involved a "reclassification of the shares, and a variation of the preferences, rights and conditions attaching to the shares".

261 For the same reasons as those relating to the first issue in (a), I do not consider that any "reclassification" of the Non-Voting Shares to Common Shares has occurred. As TELUS argues, this is a one-time transaction by which the current issued and outstanding Non-Voting Shares are being cancelled and exchanged for Common Shares. The share structure remains intact with each share class having the same rights and attributes as before.

> *(c) Does the Arrangement seek to alter the capital structure of TELUS in a significant way and affect all shareholders such that it is an arrangement which is proposed with each class of shareholders?*

262 Unlike the more technical arguments advanced under (a) and (b) above, Mason argues that, in substance, the New Proposal is indistinguishable from the Initial Proposal and thus requires a Special Resolution of the Common Shareholders. Mason argues that, when viewed objectively and

having regard to the overall statutory scheme, the Arrangement alters or "arranges" the legal rights of the Common Shareholders.

263 As Mason argues, there is no doubt that the overarching intention of the Arrangement is to remove the currently issued and outstanding Non-Voting Shares. TELUS' information circular dated August 30 states:

> Under the terms of the Arrangement, each Non-Voting Share outstanding as of the Effective Time, would be exchanged for a Common Share on a one-for-one basis. Following the exchange, no Non-Voting Shares would remain issued and outstanding. As a result, immediately following the Effective Time, the Common Shares would be TELUS' only class of issued and outstanding equity securities.
>
> [Emphasis added.]

264 Mason argues that the effect of the New Proposal is such that there are no distinguishable differences between the Initial and New Proposals. Mason further argues that while there will still be an authorized Non-Voting Share class, it will be empty; accordingly, it says that the true effect of the Arrangement is to eliminate the Non-Voting Shares class and change the capital structure.

265 TELUS argues that, unlike the Initial Proposal, no change in the capital structure is currently proposed and so no special resolution of the Common Shareholders is required. As TELUS stated in its information circular, it is "not proceeding at this stage with an amendment to the Notice of Articles and the Articles in order to remove the Non-Voting Shares from the authorized share structure of the Company".

266 On the face of it, TELUS is right. The capital structure after the New Proposal will be same as before, in that the authorized shares will be no different and will include the Common Shares, Non-Voting Shares and the preference shares. There is no change in the shares which TELUS can choose to issue.

267 The only difference will be that immediately after the implementation of the Arrangement, there will be no issued and outstanding shares in the Non-Voting Share class. That situation could change in the future, of course, if TELUS encounters circumstances where issuing Non-Voting Shares is desirable or it again becomes necessary to comply with foreign ownership rules. In that event, the rights of those new Non-Voting Shareholders will not have been changed by an exchange of Non-Voting Shares to Common Shares at this time.

268 The court must focus on the terms and the impact of the Arrangement, and the Arrangement must be viewed "substantively and objectively": *BCE* at para. 136. In *Magna SCJ*, the court was considering an arrangement which contemplated a collapse of its dual share structure, which included Class A subordinate voting shares and Class B multiple voting shares. The arrangement provided that the Class B voting shares were to be cancelled, and in consideration the Class B shareholders were to receive cash and Class A shares. Further, all of these shares were to be renamed "common shares". As a result, it was well acknowledged that the Class A shareholders would be affected (as will the Common Shareholders in this case) by a dilution of their voting power. On the particular facts of that case, and clearly where there was a change to the capital structure of Magna, the court accepted that the "substantive" effect of the arrangement was a conversion of the Class A shares into common shares": para. 132.

269 Mason's argument is largely based on the proposition that there is a change in the capital structure due to the impact on the Common Shareholders' "legal rights". Mason relies on the comments in the *BCCA Reasons* concerning the dilution of its voting power:

> [80] It should also be noted that, despite its hedged position, Mason does hold an economic interest in TELUS. Further, its contention that the historic premium that has applied to the TELUS common shares should be preserved in any share exchange is a cogent position that could reasonably be advanced by any holder of common shares. In the exchange proposed by TELUS, the common shareholders will see a massive dilution of their voting power without any direct economic compensation or benefit.

270 I do not accept that the legal rights of the Common Shareholders are being affected by the Arrangement. The legal rights of the Common Shares will remain as before. The Common Shares will have the same rights and attributes as before, in accordance with TELUS' Articles. I accept TELUS' arguments that what is truly being affected here are the Common Shareholders' economic interests, by way of the removal of the traditional trading spread between the two share classes and a dilution of the Common Shareholders' voting power.

271 The Court in *BCE* makes clear, however, that the arrangement provisions apply only to those whose *legal rights*, as opposed to *economic rights*, are affected:

> [132] A difficult question is whether s. 192 applies only to security holders whose *legal rights* stand to be affected by the proposal, or whether it applies to security holders whose legal rights remain intact but whose *economic interests* may be prejudiced.
>
> [133] The purpose of s. 192, discussed above, suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. As we have seen, the s. 192 procedure was conceived and has traditionally been viewed as aimed at permitting a corporation to make changes that affect the *rights* of the parties. It is the fact that rights are being altered that places the matter beyond the power of the directors and creates the need for shareholder and court approval. The distinction between the focus on legal rights under arrangement approval and reasonable expectations under the oppression remedy is a crucial one. The oppression remedy is grounded in unfair treatment of stakeholders, rather than on legal rights in their strict sense.
>
> [134] This general rule, however, does not preclude the possibility that in some circumstances, for example threat of insolvency or claims by certain minority shareholders, interests that are not strictly legal should be considered: see Policy Statement 15.1, s. 3.08, referring to "extraordinary circumstances".
>
> [135] It is not necessary to decide on these appeals precisely what would amount to "extraordinary circumstances" permitting consideration of non-legal interests on a s. 192 application. In our view, the fact that a group whose legal rights are

> left intact faces a reduction in the trading value of its securities would generally not, without more, constitute such a circumstance.
>
> ...
>
> [161] We find no error in the trial judge's conclusions on this point. Since only their economic interests were affected by the proposed transaction, not their legal rights, and since they did not fall within an exceptional situation where non-legal interests should be considered under s. 192, the debentureholders did not constitute an affected class under s. 192. The trial judge was thus correct in concluding that they should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. Although not required, it remained open to the trial judge to consider the debentureholders' economic interests in his assessment of whether the arrangement was fair and reasonable under s. 192, as he did.
>
> [Emphasis added.]

272 Mason's argument fails for the simple reason that the Common Shareholders have no *legal right* to prevent a dilution of their voting power. Article 3.1 provides that TELUS may issue unissued shares at the times, to the persons, in the manner, on the terms and conditions, and for the issue prices that the directors may determine, subject to the *Act* and the rights of the holders of issued TELUS shares. Accordingly, the Articles do not restrict the issuance of Common Shares up to the 1,000,000,000 limit by requiring a vote of the Common Shareholders.

273 Further, TELUS says that whether any shareholder approval is needed for a transaction that results in the dilution of shares depends on the particular rules of the TSX or NYSE. It says there are numerous instances where the TSX does not impose a voting requirement notwithstanding that substantial dilution may occur. In addition, where shareholder approval is required under the TSX rules, it is by a simple majority as mandated by s. 604 of the TSX Company Manual. It says that the NYSE rules similarly only require a simple majority when shareholder approval is necessary.

274 I am not aware of, nor did Mason direct my attention to, any provision in the *Act* or the Articles by which the directors are prevented from approving the issuance of further Common Shares save with the approval of a Special Resolution of the Common Shareholders.

275 In any case, TELUS says that the New Proposal does not involve any equity dilution because the Common Shares and Non-Voting Shares have the same economic rights regarding equity participation and dividends.

276 TELUS takes the position that it is entitled to proceed in a manner that achieves its objectives and which does not give rise to any further requirements in relation to the Common Shareholders beyond those arising from the Arrangement. Master Muir agreed, stating "[a]s to the additional right to exchange non-voting for voting shares, although TELUS could have, and did, in the initial proposal seek to achieve its ends by an amendment of its articles, it is not necessary that it do so": *Muir Reasons #1* at para. 56.

277 I agree that there is no requirement that the Arrangement take on a certain form for the purpose of attaining those objectives. Moreover, it does not follow that if TELUS chooses an alternate

means of obtaining those objectives, it must satisfy requirements that arise under other options. TELUS is entitled to rely on the *Act* and its Articles in conducting its business affairs and in proposing the Arrangement.

278 As in this case, the issue in *McEwen v. Goldcorp Inc.*, [2006] O.J. No. 4265 (S.C.J.) ("*McEwen SCJ*"), aff'd [2006] O.J. No. 4437 (Div. Ct.), arose from a fundamental disagreement as to whether shareholder approval was required under the Ontario legislation. Goldcorp wished to acquire Glamis. The chosen structure for the transaction required the Glamis shareholders to exchange their shares for shares in Goldcorp so that they became shareholders in Goldcorp. As such, a special resolution of the Glamis shareholders was required. A Goldcorp shareholder objected, contending that, in essence, this was an arrangement with Goldcorp and therefore a vote of the Goldcorp shareholders was required. The court, at paras. 33-37, accepted Goldcorp's argument that there was no legal requirement for a Goldcorp shareholder vote and that Goldcorp and Glamis were entitled to structure the transactions in a manner which avoided that requirement:

> [35] Goldcorp has complied with the law as it applies to Goldcorp. It did not propose an arrangement of Goldcorp. Each of Goldcorp's corporate actions is specifically authorized by a provision of the OBCA. Firstly, stage one of the transaction involves an issuance of shares by Goldcorp. Section 23(1) of the OBCA authorizes the directors to issue shares at such times and to such persons and for such consideration as the directors may determine, subject only to restrictions that may be contained in the constating documents. There are no such restrictions on share issuances in Goldcorp's constating documents.
>
> ...
>
> [37] In my view, the transaction is not subject to section 182. To the extent that Goldcorp is amalgamating with another corporation, this occurs when Glamis is a wholly owned subsidiary of Goldcorp and, by virtue of section 177(1), such an amalgamation is exempt from shareholder approval. Goldcorp is not issuing shares in connection with the short-form amalgamation. The fact that some of the elements of a multi-stage transaction could have been structured by way of an arrangement is insufficient for the transaction to be subject to section 182. Section 182(1)(c) is inapplicable. The same is true with respect to section 182(1)(d) which addresses an amalgamation of Goldcorp with a non OBCA corporation. The only amalgamation contemplated in this transaction is between two OBCA corporations as part of the vertical short-form amalgamation. ...

279 In *BCE*, the Court agreed with the trial judge that the arrangement did not affect contractual rights and that the debentureholders had failed to negotiate and obtain protections that would have preserved rights which would have prevented the detriment to their economic interests:

> [162] The next question is whether the trial judge erred in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The trial judge emphasized that the arrangement preserved the contractual rights of the debentureholders as negotiated. He noted that it was open to the deben-

tureholders to negotiate protections against increased debt load or the risks of changes in corporate structure, had they wished to do so. He went on to state:

> ... the evidence discloses that [the debentureholders'] rights were in fact considered and evaluated. The Board concluded, justly so, that the terms of the 1976, 1996 and 1997 Trust Indentures do not contain change of control provisions, that there was not a change of control of Bell Canada contemplated and that, accordingly, the Contesting Debentureholders could not reasonably expect BCE to reject a transaction that maximized shareholder value, on the basis of any negative impact [on] them. [Citations omitted.]
>
> [163] We find no error in these conclusions. The arrangement does not fundamentally alter the debentureholders' rights. The investment and the return contracted for remain intact. Fluctuation in the trading value of debentures with alteration in debt load is a well-known commercial phenomenon. The debentureholders had not contracted against this contingency. The fact that the trading value of the debentures stood to diminish as a result of the arrangement involving new debt was a foreseeable risk, not an exceptional circumstance. ...

280 In *McEwen SCJ*, the court also specifically addressed and rejected the argument that the issuance of shares by Goldcorp constituted a reorganization or scheme affecting shareholders which affected the legal rights of shareholders:

> [37] ... As to section 182(1)(h), I am hard pressed to see how the issuance of shares of an existing authorized class constitutes a reorganization or scheme affecting the holders of securities. Goldcorp will continue to conduct its business as it was conducted prior to the completion of the transaction and its shareholders will continue to hold shares with the same rights, privileges and conditions as existed prior to the transaction. Furthermore a reorganization of Glamis does not amount to a reorganization of Goldcorp. It follows that section 182(1)(i) is therefore also inapplicable.

281 Similarly, Mason had no legal right to prevent the issuance of further Common Shares, and the issuance of Common Shares to Non-Voting Shareholders does not amount to an arrangement being proposed to the Common Shareholders. Mason's argument would, in substance, result in the Common Shareholders being granted a veto power in relation to the issuance of further Common Shares, which power is not found in the Articles or the *Act*.

282 I conclude that the Arrangement will not result in any change in TELUS' authorized capital structure such that the Arrangement is proposed to the Common Shareholders.

> *(d) Since TELUS obtained the Second Interim Order providing for a vote by the Common Shareholders to adopt the Arrangement, was the Arrangement with the Common Shareholders?*

283 Mason contends that since TELUS sought and obtained the Second Interim Order providing for a vote by the Common Shareholders pursuant to s. 291(2) of the *Act*, it was a proposal to the

Common Shareholders which then required a 2/3 majority vote pursuant to ss. 289(1)(a) to (c) of the *Act*.

284 TELUS took the position before both Master Scarth (in relation to the Second Interim Order) and Master Muir (on the comeback hearing) that the proposed arrangement was one limited to the Non-Voting Shares. Further, since the Order was sought and obtained pursuant to s. 291(2) of the *Act*, TELUS said that the court could order a meeting and a vote of the Common Shareholders and set whatever level of approval the court thought appropriate. In that regard, TELUS advised that it had proposed on an *ex gratia* basis that a vote by the Common Shareholders was appropriate, *albeit* on a simple majority basis.

285 In *Muir Reasons #1*, the Master rejected Mason's contention that a 2/3 vote of the Common Shareholders was necessary simply because the Second Interim Order required a vote by the Common Shareholders:

> [20] The main contention on behalf of Mason is that Mr. Anderson advised the Court that ss. 289 and 291 of the *Business Corporations Act* did not require a special resolution or two-thirds vote of the common shareholders as the articles of the corporation were not being changed. He said that TELUS had decided that it would be in the company's best interest to have a vote of the common shareholders, but as that was not required under s. 289 it was being proposed under s. 291. As that section did not specify or require a percentage of the vote the board determined that it should be based on a simple majority. TELUS stands by that position as being correct in law and fact.
>
> ...
>
> [44] Section 291 deals with the role of the Court in arrangements, and amongst other things, allows the Court on the application of the company to make an order in s. 291(2)(b)(ii): "hold a separate vote of the persons the court considers appropriate."
>
> [45] Counsel for Mason submitted that the moment the Court in the *ex parte* order of Master Scarth made an order for the common shareholders to vote, that vote must have been in order to adopt the arrangement. Otherwise the combination of these sections would make no sense.
>
> [46] He further submitted that as the vote was to adopt an arrangement it has to be a two-thirds vote as provided in s. 289.
>
> [47] Further, it was submitted for Mason that arrangements are only to be voted on by shareholders who are sought to be arranged, and that by seeking and obtaining an order that the common shareholders vote on the second arrangement, TELUS is precluded from asserting that the common shares are not being arranged.
>
> [48] I do not agree.

> [49] The *Business Corporations Act* in s. 291(2) is clear that the order being made is in respect of a proposed arrangement. It is quite different from the wording of s. 289 which deals with the adoption of an arrangement.
>
> [50] I do not consider that by making an order under s. 291(2) the Court is necessarily making an order requiring the method of adoption of an arrangement, or that a Court is precluded from ordering a vote from other than those who are being arranged.
>
> [Emphasis added.]

286 The fundamental premise of Mason's argument is the Common Shares are being arranged. I disagree that that is so. In addition, Mason's submissions are an exercise in circular reasoning in that if the Common Shareholders have a right to vote, then the arrangement must be proposed to them, which in turn gives rise to the right to vote.

287 I confess that I find Mason's argument on this point to be a tortuous interpretation of the *Act*. Subsections 289(1)(a) and (b) clearly state that a Special Resolution of the shareholders or class of shareholders is required when an arrangement has been proposed to them. TELUS relies on s. 289(1)(b) to say that the New Proposal only involves the Non-Voting Shareholders.

288 Section 291(2) provides the court with considerable discretion in making orders in relation to any proposed arrangement. Section 291(2)(b) specifically allows, but does not require, the court to order that meetings be held of the person the court considers "appropriate". Section 291(2)(e) provides an example where a proposal is made to creditors, in which case the court may order that the arrangement also be approved by the shareholders. However, if such "additional" approvals are required under s. 291, it does not necessarily follow that the proposal becomes one that is proposed to those "other" persons, even though they might be shareholders, so as to invoke the voting threshold requirements of s. 289(1): *Inex Pharmaceuticals Corp. (Re)*, 2006 BCCA 267 at para. 5.

289 I reject Mason's argument that ss. 289(1)(a) and (b) are a "complete code" in respect of any shareholder vote on an arrangement, even if such a vote by shareholders to whom the arrangement has not been proposed has been ordered under s. 291(2).

290 In this case, the Second Interim Order provided for a meeting and vote by the Common Shareholders which was to be "in addition" to the meeting and vote by the Non-Voting Shareholders. Pursuant to s. 289(3) of the *Act*, this "additional" meeting was required to be held as set out in the Arrangement and in accordance with the Second Interim Order. Under s. 289(3.1) of the *Act*, this "additional" vote was required to be in accordance with the approval level set out in both the Arrangement and the Second Interim Order. Although both sections require that these steps be met in order to "adopt" the arrangement, I do not consider that the "adoption" is subject to s. 289(1) of the *Act* such that a 2/3 vote is required.

291 It is well taken that the intention underlying the arrangement provisions is to provide a flexible and practical means by which these types of changes can be made to corporate structures, while ensuring that persons who may be affected are treated fairly. It makes eminent sense to me that even where changes are being proposed to one stakeholder group, the company may as a matter of overall fairness require a certain level of support from others, even though they are not affected. Never-

theless, by doing so, the company does not alter the essence of the arrangement itself such that approvals are to be sought as if the arrangement is being made to those other persons.

292 Mason has provided no authority that would support any interpretation of the *Act* in this fashion. I reject this argument.

> *(e) Does the Act require that any class vote of the Common Shareholders required the approval of at least 2/3 of the votes cast?*

293 In the alternative, Mason contends that even if the Arrangement is not one, either in substance or form, with the Common Shareholders, the court was obliged to direct that any order for a class vote of the Common Shareholders pursuant to s. 291(2)(b) of the *Act* required the approval of at least 2/3 of the votes cast.

294 As with the other arguments relating to the voting threshold of the Common Shareholders, this argument engages the issue of the correctness of the provision in the Second Interim Order directing the vote to be taken on a simple majority basis. On the comeback hearing, Master Muir rejected this contention: *Muir Reasons #1* at paras. 40-59. In large part, this argument parallels the same arguments made under the immediately preceding issue in (d).

295 Mason begins its argument by submitting the uncontroversial principle of statutory interpretation set out by Elmer Driedger in *Construction of Statutes*, 2d ed. (Toronto: Butterworths & Co. (Canada) Ltd., 1983) at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

These statements were adopted by Justice Iacobucci in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26. See also *Gateway Casinos LP v. BCGEU*, 2007 BCCA 140 at paras. 15-16.

296 I accept that the *Act* provides certain procedural safeguards for affected shareholders in terms of approval levels required for certain corporate actions. For example, the *Act* requires Special Resolutions in relation to the following major changes in the corporate structure: s. 259(2) - alteration to articles; s. 271(6) - amalgamation agreements; s. 301(1) - disposal of all or substantially all of a company's undertaking; and s. 308(1) - continuation outside British Columbia. Similar approval levels are of course set out in s. 289 in relation to arrangements.

297 Mason argues that the key lies in the difference in wording as between s. 291(2)(b) and s. 291(2)(e) of the *Act*. Again, those provisions state that the court may grant:

> (b) an order requiring the company to do one or both of the following <u>in the manner</u> and with the notice the court directs:
>
> (i) call, hold and conduct one or more meetings of the persons the court considers appropriate;
> (ii) <u>hold a separate vote of the persons the court considers appropriate</u>;

...

(e) an order directing that an arrangement proposed with the creditors or a class of creditors of the company be referred to the shareholders of the company in the manner and for the approval the court considers appropriate.

[Emphasis added.]

298 Mason argues that the additional wording found in s. 291(2)(e) ("and for the approval the court considers appropriate") must refer to the voting threshold. Since this phrase is not found after "in the manner" in s. 291(2)(b), that must mean that the court has less discretion concerning the voting requirements set out under s. 291(2)(b) and that the court must then look only to s. 289 in respect of the level of approval required. Yet Mason does not also identify that s. 291(2)(b)(ii) also refers to the court allowing a vote of persons the court "considers appropriate". To add to the confusing wording, s. 186(1)(a) of the *Act* provides that the court may order that a meeting be called, held and conducted "in the manner the court considers appropriate".

299 Although it is not clear on the face of s. 291(2)(b)(ii) whether it is referring only to the identification of those persons voting or to the approval required, I consider that given the flexibility afforded under the *Act* and under that section in particular, the wording would encompass both. Section 291(2) provides for a broad discretion in respect of proposed arrangements and while specific *included* matters are set out in subsections (a) to (e), in my view, they were not intended to restrict the matters that might be addressed by the court where appropriate and towards achieving the objectives of the *Act*. Those matters would include not only procedural matters concerning the conduct of the meetings, but also more substantive matters such as the level of approvals required in respect of persons other than those to whom the arrangement is proposed.

300 I do not consider that interpreting the *Act* in this fashion results in a conflict, either in form or in substance, with other provisions of the *Act* and in particular s. 289. The focus of that specific section is to prescribe the level of voting approvals "in respect of an arrangement proposed with the shareholders" or "in respect of an arrangement proposed with the shareholders holding shares of a class or series of shares". So long as the arrangement is not proposed with a class of shareholders, such as with the Common Shareholders here, s. 289 is not engaged and the court retains a discretion in respect of any meeting and vote by such class of shareholders under s. 291(2)(b).

301 In my view, any restriction as contended by Mason would only undermine the inherent flexibility that is intended to be a fundamental feature of the arrangement provisions of the *Act*.

302 In conclusion, I find that TELUS has satisfied all statutory requirements under the *Act*.

3. Is the Arrangement Fair and Reasonable?

303 As stated above, *BCE* states that this aspect of the test must be satisfied within the context of two prongs: firstly, whether there is a valid business purpose and secondly, whether objections were resolved in a fair and balanced way.

a) Is there a Valid Business Purpose?

304 The first prong of the "fair and reasonable" test articulated by the Court in *BCE* requires that the court consider whether the Arrangement has a valid business purpose. The focus is on the interests of the company:

> [145] The valid business purpose prong of the fair and reasonable analysis recognizes the fact that there must be a positive value to the corporation to offset the fact that rights are being altered. In other words, courts must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation. The proposed plan of arrangement must further the interests of the corporation as an ongoing concern. In this sense, it may be narrower than the "best interests of the corporation" test that defines the fiduciary duty of directors under s. 122 of the *CBCA* (see paras. 38-40).

305 This enquiry is invariably fact-specific, but an important factor is whether the arrangement is "necessary" in respect of the company's continued operations: *BCE* at para. 146. It is conceded by TELUS that the arrangement is not necessary in the sense of ensuring its continued business, but it is equally apparent that it is considered "necessary" towards enhancing TELUS' ability to compete in the marketplace. As explained by the Court in *BCE*, the degree of "necessity" will dictate the level of scrutiny in considering the arrangement's effect on stakeholders:

> [146] ... Necessity is driven by the market conditions that a corporation faces, including technological, regulatory and competitive conditions. Indicia of necessity include the existence of alternatives and market reaction to the plan. The degree of necessity of the arrangement has a direct impact on the court's level of scrutiny. Austin J. in *Canadian Pacific* concluded that:
>
> > while courts are prepared to assume jurisdiction notwithstanding a lack of necessity on the part of the company, the lower the degree of necessity, the higher the degree of scrutiny that should be applied. [Emphasis added; p. 223.]
>
> If the plan of arrangement is necessary for the corporation's continued existence, courts will more willingly approve it despite its prejudicial effect on some security holders. Conversely, if the arrangement is not mandated by the corporation's financial or commercial situation, courts are more cautious and will undertake a careful analysis to ensure that it was not in the sole interest of a particular stakeholder. Thus, the relative necessity of the arrangement may justify negative impact on the interests of affected security holders.

306 Mason concedes that the Arrangement has a valid business purpose. In fact, Mason agrees that this move will benefit TELUS. In its Response to Petition, Mason simply states, "Mason is not opposed to a collapse of the dual class share structure". Further, in the Second Mason Dissident Circular, it adopts comments of Professor Black which support the view that a single share class is preferable:

> Having two classes of common shares is often thought to reflect poor corporate governance. That view, which I share, has strong empirical support.

307 The rider from Mason's point of view, however, is any exchange must provide for a premium to the Common Shareholders. Mason asserts that if the share exchange is done without payment of any premium, the prejudice to the Common Shareholders must be weighed as against the fact that this exchange is not necessary in respect of TELUS' continued operations.

308 I will briefly review what I consider to be the overwhelming evidence as to this valid business purpose. Indeed, at the outset, it must be emphasized that there is considerable support for the Arrangement towards achieving the benefits that will arise. This is evident from the support of the Board, the Special Committee, Scotia, two independent proxy advisors, ISS and Glass Lewis, and the positive vote by the shareholders.

309 Fundamentally, the benefits of the Arrangement include an increase in the ability of TELUS to attract investors and access capital on a level playing field with other single class competitors, which will contribute to TELUS' ability to compete in the marketplace. An important aspect is that the Common Shares will be traded on the NYSE. As TELUS points out, the market responded positively upon the announcement of the Initial Proposal, causing an increase in price for both Non-Voting and Common Shares.

310 As reviewed above, in relation to the benefits to TELUS from both the Initial Proposal and the New Proposal, the Special Committee concluded the collapse will:

(i) enhance the liquidity and marketability of TELUS' shares through an increase in the number of Common Shareholders and a listing on the NYSE for the first time for the Common Shares;
(ii) address earlier concerns expressed by Shareholders about the impact of TELUS' dual class share structure on liquidity and trading volumes;
(iii) enhance TELUS' leadership in respect of good corporate governance practices by granting the right to vote to all shareholders who have an economic interest in TELUS;
(iv) align TELUS' capital structure with what is generally viewed as best practice; and
(v) enable TELUS to continue to comply with the foreign ownership restrictions under the *Telecommunications Act*, S.C. 1993, c. 38, the *Radiocommunication Act*, R.S.C. 1985, c. R-2 and the *Broadcasting* Act, S.C. 1991, c. 11.

311 In addition, both of the proxy firms, ISS and Glass Lewis, have confirmed that the Arrangement has a valid business purpose. Glass Lewis was of the opinion that the Arrangement will have a positive impact on both TELUS' competitive advantage and access to capital:

> We also note that the share conversion will provide for a simplified capital structure that is comparable to other large telecommunications companies operating in Canada including BCE and Manitoba Telecom Services. This single class share structure should, in the long term, enhance access to capital, attract new investors and provide a more liquid market for the Company's shares. As a large telecommunications company, we believe the potential increase in liquidity is particularly advantageous as the Company may require equity-based fund raising in order to preserve or raise cash for capital intensive projects. While Mason has argued that the Company's liquidity is already relatively high, one could hardly argue that moving to a single class share structure that is traded on the NYSE will not increase liquidity.

312 Simplification of a share structure can be a valid business purpose. In *Canadian Pacific*, the court was addressing a major reorganization to be implemented with a view to "simplifying its

structure, placing its CP Rail System on the same footing as its other subsidiaries, providing it with better access to capital markets, and generally with a view to positioning itself more competitively in today's business environment": p. 113. The Court concluded at p. 132:

> The Plan is advantageous to the Company in that it is able to simplify its share structure, place its traditional rail business on the same footing as other interests, rationalize its treatment of its consolidated debenture stock, and develop greater flexibility in its approach to capital markets and to its competitive environment generally ...

313 Similarly, in *Magna SCJ*, the Special Committee had identified substantial potential benefits from the elimination of the dual class share capital structure: para. 43. The court accepted that there were "real benefits" to Magna in adopting the arrangement. That conclusion was upheld on appeal (see *Magna Appeal* at paras. 46-50). The court stated:

> [120] However, even on a standard of careful scrutiny, it is clear that the elimination of the dual-class capital structure would benefit Magna, both from a corporate governance and from a financial perspective. The Special Committee's assessment of the benefits to Magna was set out in an excerpt from the Supplement set out above. Consistent with this position, as mentioned above, in concluding that the proposed Arrangement is fair and reasonable to Magna, the Special Committee has implicitly concluded that there is a valid business purpose for the proposed Arrangement. The Opposing Shareholders also do not challenge the proposition that the elimination of the dual-class capital structure would benefit Magna in the manner described by the Special Committee. As Magna points out, they do not object to the purpose of the proposed Arrangement, only the allocation of the risks and benefits.
>
> [Emphasis added.]

314 In conclusion, the underlying objectives of the Arrangement demonstrate that there is a valid business purpose. The clear benefits at this time of moving all issued and outstanding shareholders into a single class of Common Shares are acknowledged by all, including Mason, to be benefits that will assist TELUS in its business.

b) Does the Arrangement Resolve Objections in a Fair and Balanced Way?

315 Both TELUS and Mason agree that the Arrangement must pass the test of being both procedurally and substantively fair and reasonable.

i. Procedural Fairness

316 TELUS has complied with the Second Interim Order.

317 Beyond that, Mason's arguments on this issue are similar to those already addressed above on the issue as to whether Master Muir was justified in refusing Mason's application to adjourn the meetings. In summary, it reiterates:

(a) After delivery of the Requisition, Mason issued a press release on August 21, affirming its intention to pursue the Requisition. That same day, TELUS issued its own press release headed, "TELUS rejects Mason Capital's anti-democratic and invalid requisition".

(b) On August 31, TELUS issued a press release announcing that it would launch a legal proceeding seeking a court order directing that Mason's attempt to hold a shareholder meeting is invalid. An officer of TELUS was quoted as describing the Mason Meeting as "an absurd tactic", "undemocratic" and "invalid under Canadian law".

(c) On September 11, TELUS issued a press release announcing the judgment of Savage J: "TELUS announces that BC Supreme Court decides overwhelmingly in its favour". It stated that "the Court determined that the actions of Mason Capital were contrary to law and that Mason's meeting and resolutions will not proceed". TELUS quoted passages from Savage J.'s reasons describing Mason as an "empty voter".

(d) Mason issued press releases on September 12 and 18 announcing that Savage J.'s decision was under appeal and that the appeal had been expedited. TELUS did not acknowledge the appeal in a press release.

(e) On October 12, after the release of *BCCA Reasons*, Mason issued a press release disclosing the decision. TELUS did not. TELUS' next press release was issued on October 15. It announced a decision of Master Muir, but did not reference the Mason Meeting or the decision of the Court of Appeal. The press release stated:

> The Supreme Court of B.C. today rejected Mason Capital's attempt to challenge TELUS' share exchange proposal. The Court confirmed the validity of the order it had initially granted to TELUS enabling the company's shareholders to vote on its proposal to exchange non-voting shares for common shares on a one-for-one basis. TELUS' proposal requires approval of two-thirds of the company's non-voting share votes and a majority of common share votes.
>
> "We are pleased that the Supreme Court of B.C. has once again provided their support for our share exchange proposal to proceed, rejecting the latest legal maneuver from Mason Capital whose net economic ownership position in our company is a mere 0.02 per cent," said Darren Entwistle, TELUS President and CEO. ...

318 Mason says that between August 21 and September 11, a cloud hung over the Mason Resolutions because of TELUS' initial disparagement of them as invalid and the subsequent legal attack, and that from September 11 until October 12, the Mason Resolutions were entirely "off the table". After October 12, while Mason's resolutions were restored for shareholder consideration, TELUS was not prepared to admit or acknowledge this in a press release and instead issued a press release which further confused the situation. By this time, the proxy deadline had passed.

319 Mason again contends that as a result of these events, a shareholder paying attention to TELUS' public pronouncements would understand that Mason had engaged in an invalid manoeuvre in

attempting to requisition and call a shareholder meeting; that this was an absurd tactic successfully challenged by TELUS in court; that the court decided overwhelmingly in TELUS' favour, finding that Mason's actions were contrary to law and confirming that TELUS' repeated attacks on Mason's "empty voting" strategy were legitimate; and as late as October 15, that the Supreme Court was again rejecting Mason's further legal manoeuvring.

320 Mason says that TELUS took every advantage of its temporary victory before Savage J., providing the context in which shareholders were assessing the competing contentions and deciding how to vote. It says that this advantage was illegitimate and should not have been obtained by TELUS and that if it had time and opportunity to adequately publicize the Court of Appeal's decision, the damage from TELUS' illegitimate gains could have been remedied. But it says it had neither under the circumstances.

321 I have already accepted that the shareholders received from both camps considerable information that would have helped them fully understand the respective positions. As I have already noted, the communications from Mason in the time frame after release of the *Savage Reasons* included notice of the Mason Resolutions themselves and communications concerning those Resolutions. In addition, although TELUS was not quick to publicize its loss before the Court of Appeal, it is equally apparent that Mason quickly did so. Accordingly, I do not see that as any basis upon which to say that shareholders were not truly aware of the state of the battle between TELUS and Mason at any point in time.

322 I have concluded that even if further communications had been sent in respect of the Mason Resolutions, there would have been no material difference in the outcome of the meetings.

323 While TELUS did take action to prevent Mason from putting the Mason Resolutions before a shareholder meeting, I do not agree that the course of events lent credibility to TELUS' attack on Mason's motives and strategy or that they altered the views of some shareholders as to Mason's position. Mason equally attacked the motives and strategies of TELUS in its extensive and substantive communications to shareholders, in addition to announcing that the appeal was underway.

324 Mason's claim that it was negatively affected by TELUS' name calling is dubious. As far as I can see, the communications from both sides, particularly after the introduction of the New Proposal, included quite negative language about the other. Mason is hardly in a position to say that it could not or did not defend itself at every turn in the public communications battle. As I said earlier, many of the negative comments about its position were factually based and not open to debate.

325 I have accepted TELUS' contention that Mason had a fair opportunity to solicit proxies in favour of its position and that the use of the proxies for the New Proposal was a fair method of proceeding in the circumstances. Simply put, the Mason Resolutions would not have provided Common Shareholders with a "viable third alternative" in relation to the New Proposal and the exchange ratio proposed.

326 Mason is a sophisticated investor and market participant. It is obviously a well-funded entity which had considerable assistance in seeking support of its position, including legal advice, shareholder solicitation programs, Professor Black's comment on empty voting, Professor Gilson's sworn affidavit in which he provides a favourable opinion as to Mason's alleged status as an "empty voter" and the Blackstone Report. Its position was well publicized for consideration by the shareholders. At the end of the day, Mason failed to obtain the level of support it wanted or needed, but this was

not as a result of a lack of opportunity to adequately explain and advocate its position to TELUS shareholders.

327 I conclude that the Arrangement has been brought forward in a procedurally fair manner, particularly as it relates to Mason.

ii. Mason as an "Empty Voter"

328 It can hardly be overstated that the contention by TELUS that Mason is an "empty voter" in this and prior proceedings has infused much of the tenor in the contest between them. Mason rails against this pejorative moniker. Whether one accepts that name or not, it seems that, at best, one could describe Mason as an "opportunistic investor".

329 The question that arises in the first instance is whether, in the context of the fairness analysis, Mason's unique circumstances and motivations are relevant factors to consider. TELUS takes the position that in determining whether the New Proposal is fair and reasonable, this Court should consider Mason's status as an "empty voter".

330 A review of the factual circumstances relating to Mason is instructive. When TELUS announced its intention to proceed with the Initial Proposal on February 21, Mason did not hold TELUS shares. At the time of the announcement, the market responded and the historical spread between the two types of shares decreased. At this time, Mason saw an opportunity to profit from a strategy described as arbitrage, which is not typically expected from such an investment. At its core, the success of this plan was founded upon the defeat of TELUS' Initial Proposal and what Mason expected would be a return to the historical spread between the trading prices of Common Shares and Non-Voting Shares.

331 As outlined above, Mason acquired a substantial share position by the end of March. When voting was set for the Initial Proposal, Mason had 100 times the voting power in relation to its net economic investment in the shares. It was in the face of such voting power that TELUS withdrew the Initial Proposal at the May 9 meeting. By the time the New Proposal was formulated and the Second Interim Order was obtained in late August, Mason had taken steps to alter its share position and reduce its exposure by selling its Non-Voting Shares while still holding 32,765,829 Common Shares. It had also increased its short sold Common Share position and decreased its Non-Voting short sold position. As a result, as of August 31, Mason's net position was 0.021% of TELUS' issued and outstanding shares, representing voting power that was approximately 1,000 times greater than its net economic interest in TELUS.

332 TELUS submits that this strategy has provided Mason with substantial voting power, while simultaneously disenfranchising the other holders of Common Shares. TELUS further accuses Mason of exercising its voting power for reasons entirely at odds with promoting the interests of TELUS or the value of the Common Shares.

333 This raises the issue of what has been referred to as "empty voting", which term the academic literature has used to describe the scenario where a shareholder has "decoupled" economic ownership from voting power such that their "voting rights substantially exceed their net economic ownership": Henry T.C. Hu & Bernard Black, "The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership" (2006) 79:4 S. Cal. L. Rev. 811 at 825.

334 In the *BCCA Reasons*, the court cited certain authorities which have considered the phenomenon:

> [73] TELUS cites a number of cases and scholarly articles which raise concerns about the phenomenon of "empty voting" - the accumulation of votes by a party that has a very limited financial stake in a company. The discussion of the Delaware Supreme Court in *Crown Emak Partners, LLC v. Kurz*, 992 A.2d 377 (Del. 2010) at 387-388 is representative:
>
> > Shareholder voting differs from voting in public elections, in that the shares on which the shareholders' vote depends can be bought and sold. Vote buying in the context of corporate elections and other shareholder actions has been and continues to be an important issue. Several commentators have addressed the corporate voting process and techniques by which shareholder voting rights can be manipulated.
> >
> > ...
> >
> > The Court of Chancery noted a 1983 scholarly analysis of shareholder voting which concluded "[i]t is not possible to separate the voting right from the equity interest" and that "[s]omeone who wants to buy a vote must buy the stock too." The Court of Chancery also recognized, however, that over the last twenty-five years "[i]nnovations in technology and finance have made it easier to separate voting from the financial claims of shares." Today, "the market permits providers to slice and dice the shareholder's interest in a variety of ways, and investors are willing to buy these separate interests."
> >
> > According to a recent scholarly study of corporate voting by Professors Robert Thompson and Paul Edelman, a disconnect between voting rights and the economic interests of shares "compromises the ability of voting to perform its assigned role." They concluded that "[a] decision-making system that relies on votes to determine the decision of the group necessarily requires that the voters' interest be aligned with the collective interest. [Therefore, i]t remains important to require an alignment between share voting and the financial interest of the shares." [Footnotes omitted.]
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> [Emphasis added.]

335 In these proceedings, both TELUS and Mason submitted evidence and materials from the same two scholars identified in the paragraph above (Professors Hu and Black) who co-authored the series of articles which coined the term "empty voter" and introduced related concepts such as "economic ownership" and extreme categories of "empty voters" who have "negative economic ownership or interests" (the "Hu & Black Articles"). TELUS submitted the affidavit of Professor Hu containing an analysis as to Mason's current arbitrage position. Mason submitted an article prepared by Professor Black, entitled "Equity Decoupling and Empty Voting: The TELUS Zero-Premium Share Swap" (the "Black Analysis"), which was included in the Second Mason Dissident Circular. Professor Black received compensation from Mason for this article. Curiously, although Professors Hu

and Black co-authored the Hu & Black Articles, they take opposing views here as to whether Mason is engaging in "empty voting".

336 The formulation of these concepts began in 2006/2007 and substantial scholarship has resulted since that time. Also, these concepts have been considered and concerns about these types of market participants have been expressed by the United States Securities and Exchange Commission (the "SEC") and the Delaware Supreme Court (see: *Crown EMAK Partners LLC v. Kurz*, 992 A.2d 377 (Del. Sup. Ct., 2010) and *TR Investors v. Genger*, 2010 Del. Ch. LEXIS 153 (Del. Ch. July 23, 2010)).

337 The discussion must start from what is normally considered the traditional hallmarks of the relationship between a company and its shareholders. It is not a one-dimensional relationship. It is one that has many different aspects, including rights and obligations flowing from both parties. As Professor Hu puts it:

> Ownership of shares customarily conveys economic, voting, and other rights and obligations, including certain disclosure obligations. Law and business practice typically assume that the elements of this package of rights and obligations cannot be readily "decoupled" -- that, for instance, voting rights cannot be separated from an economic interest in the corporation. The nearly-universal (in the U.S.) "one share-one vote" corporate ownership and governance model is an example of this assumption. ...
>
> ... If one of the basic goals of all corporations is to increase shareholder wealth (i.e., the share price), we want those who have a stake in shareholder wealth to be in a position to select management and to pressure them to maximize shareholder wealth. There is a close, integral relationship among the core pecuniary objective of corporate management (i.e., shareholder wealth maximination), the concept of "economic ownership" in Hu & Black (i.e., one determined by shareholders' entitlement to returns on shares), and the rationale for shareholders having voting rights.

338 Professor Black is of the view that because Mason has an economic interest in the value of voting rights, it in turn has an economic interest in the outcome of the proposed Arrangement; and as Mason has an economic interest in the outcome, Professor Black concludes that Mason is not engaging in "empty voting".

339 In his response to the Black Analysis, Professor Hu had no difficulty in describing Mason as an "empty voter", in that its voting rights substantially exceed its net economic interest in TELUS. He stated that this conclusion was consistent with: (i) the Hu & Black Articles, which coined the terms "empty voter" and "economic ownership" and introduced an analytical framework for "decoupling"; (ii) how the SEC and the Delaware Supreme Court have used the terminology and analytical framework, citing the Hu & Black articles; and (iii) how these terms and the analytical framework is understood amongst legal and financial academics, corporate management, hedge funds and other institutional investors, judges, lawyers and regulators.

340 Moreover, Professor Hu described Mason as an extreme type of "empty voter", as it has a "negative economic interest or ownership" in TELUS in that its motivation in exercising its voting power is to *destroy* shareholder wealth. This situation is illustrated by comparing the "economic

ownership" of Mason in relation to other shareholders who hold Common Shares only, Non-Voting Shares only, or both types of shares. All of the latter shareholders have the same "economic interest or ownership" in TELUS; the value of their investment will increase or decrease depending on market conditions that cause the share prices to rise or fall. In contrast, Mason's position arising from the arbitrage plan is not necessarily affected if the share prices rise or fall. As Professor Hu puts it, Mason's wealth is not tied to a return on either class of shares. Rather, as noted in the *Savage Reasons* at paras. 108 and 110, Mason's "economic interest" in TELUS lies in the price *spread* as between the two classes of shares, and it stands to profit if that spread widens.

341 In looking at this scenario, there is considerable evidence and opinion to suggest that the success of the New Proposal will result in an increase of the trading price of both classes of shares (see, e.g., the Second ISS Report). If that is so, then all three of the shareholder categories described above will benefit. Mason, on the other hand, is the only shareholder who would not benefit. The corresponding inference is that in the event that the New Proposal is defeated, trading prices will fall and the price spread as between share classes will return.

342 Professor Hu persuasively concludes that assuming the Arrangement will have a positive impact on the prices of both classes of TELUS shares, and further assuming that Mason will profit from an increase in the share price spread if the New Proposal fails, then Mason is the extreme type of "empty voter" identified by Hu & Black as an "empty voter" with "negative economic ownership".

343 Accordingly, as is made abundantly apparent from its opposition on this application, Mason's interests lie in defeating the New Proposal. Mason does not suggest otherwise. Given that, and assuming that the success of the New Proposal would increase share prices, Professor Hu concludes Mason is using its voting power to destroy shareholder value or wealth.

344 Justice Savage did not find it necessary to address TELUS' alternate argument that Mason's status or market position provided the court with jurisdiction to disentitle Mason from requisitioning a meeting under s. 167 of the *Act*: *Savage Reasons* at paras. 100-113. With respect to "empty voting", however, he stated:

> [104] The practice of empty voting presents a challenge to shareholder democracy. Shareholder democracy rests on the premise that shareholders have a common interest: a desire to enhance the value of their investment. Even when shareholders have different investment objectives, the shareholder vote is intended to reflect the best interests of the company in the pursuit of wealth maximization.
>
> [105] When a party has a vote in a company but no economic interest in that company, that party's interests may not lie in the wellbeing of the company itself. The interests of such an empty voter and the other shareholders are no longer aligned and the premise underlying the shareholder vote is subverted.

345 This alternate argument was addressed by the Court of Appeal. At the outset, the ambivalent status of Mason in these proceedings was noted by Justice Groberman. Although he recognized that Mason had a "cogent position" regarding the conversion ratio issue, he also stated that Mason's position and strategy was a "cause for concern": paras. 72 and 81. The court concluded that there was no basis upon which the court should disenfranchise Mason in respect of the exercise of its rights arising under its shares:

> [79] TELUS argues that the court has powers, under this section, to enjoin the holding of a requisitioned meeting. I see nothing in the provision that grants such a power. Further, while the section gives the court fairly broad authority to control the calling of a meeting and the manner in which it is conducted, nothing in the section allows a court to disenfranchise a shareholder on the basis of a suspicion that it is engaging in "empty voting".
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> [80] It should also be noted that, despite its hedged position, Mason does hold an economic interest in TELUS. Further, its contention that the historic premium that has applied to the TELUS common shares should be preserved in any share exchange is a cogent position that could reasonably be advanced by any holder of common shares. In the exchange proposed by TELUS, the common shareholders will see a massive dilution of their voting power without any direct economic compensation or benefit.
>
> [81] The fact that Mason has hedged its position to the extent that it has is cause for concern. There is, at the very least, a strong concern that its interests are not aligned with the economic well-being of the company. That said, there is no indication that it is violating any laws, nor is there any statutory provision that would allow the court to intervene on broad equitable grounds. To the extent that cases of "empty voting" are subverting the goals of shareholder democracy, the remedy must lie in legislative and regulatory change.
>
> [Emphasis added.]

346 To similar effect, Mason relies on various authorities which it says support its contention that its rights as a shareholder should be given effect notwithstanding that it may be an "empty voter".

347 In *Palmer v. Carling O'Keefe Breweries of Canada Ltd.* (1989), 67 O.R. (2d) 161 (C.A.), an investment firm, described as a speculator and arbitrager, had purchased preference shares after a certain corporate step, in the belief that it could exert leverage to cause a redemption of those shares. This firm later alleged it had been oppressed. The court rejected the argument that the firm should be denied any relief since it had "bought into the oppression".

348 In *Richardson Greenshields of Canada Ltd. v. Kalmacoff et al.* (1995), 22 O.R. (3d) 577 (C.A.), an investment firm sought leave to bring a derivative action against the directors. It had purchased its shares for the purpose of bringing the proceedings, although it had some previous involvement with that share class. The Court of Appeal overturned the decision of the chambers judge who had denied leave to commence the action. The Court stated that it should not go behind the circumstances of the firm in terms of its monetary stake in the outcome in determining whether it was, or was not, acting in good faith, as required by the legislation: pp. 586-587. At pp. 586-587, the court stated:

> In my opinion, the extent of Richardson Greenshield's stake, monetary or otherwise, in the outcome of these proceeding is of little weight in deciding whether it has met the good faith test applicable to the present circumstances. This case is not at all akin to a strike or bounty action. Although the appellant purchased

> shares for the purpose of bringing these proceedings, it is by definition a complainant, and stands, *vis a vis* the company, in the same position as any other person who fits within the definition of "complainant". The issues involved are of a continuing nature, and it seems to me apparent that the appellant is in a better position than most shareholders to pursue the complaint. Indeed, I see no advantage in requiring that the action be brought by another shareholder, as suggested by the judge hearing the application. I think it significant that the appellant has had a long-standing commercial connection with this class of shares and is familiar with the matters in dispute. It acknowledges that it has clients who purchased shares on its recommendation, and, it can be inferred from the shareholders' vote, that it voices the views of a substantial number of the preferred shareholders. Whether it is motivated by altruism, as the motions court judge suggested, or by self-interest, as the respondents suggest, is beside the point. Assuming, as I suppose, it is the latter, self-interest is hardly a stranger to the security or investment business. Whatever the reason, there are legitimate legal questions raised here that call for judicial resolution. The fact that this shareholder is prepared to assume the costs and undergo the risks of carriage of an action intended to prevent the board from following a course of action that may be *ultra vires* and in breach of shareholders' rights does not provide a proper basis for impugning its *bona fides*. In my opinion, there is no valid reason for concluding that the good faith condition specified in s. 339(2)(b) has not been satisfied.

349 *Richardson Greenshields* is of limited applicability here since the *bona fides* of TELUS, not Mason, is one of the issues to be addressed on this application. Nevertheless, I accept the premise from both these cases as being consistent with the reasoning of our Court of Appeal that Mason is entitled to assert its legal rights as a shareholder on this application notwithstanding its position as an "empty voter".

350 Mason contends that clear statutory authority would be required to support any inquiry into Mason's status as an "empty voter"; and absent such authority, the court cannot look behind the shareholding to see whether it represents a material interest in the company.

351 In *Blackburn Developments Ltd. (Re)*, 2011 BCSC 1671, this Court recently considered an argument to disallow voting by a "vulture fund" in respect of the sanctioning of a plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). The allegation was that the creditor was not acting in good faith and was voting for an improper purpose. Assuming that the court had the necessary jurisdiction to disallow the voting, Sewell J. found that the preferable approach was to allow the creditor to vote as it wished unless such voting was unlawful or would result in a substantial injustice: paras. 44-45. Given that the allowed votes resulted in the plan being defeated, the court was not required to consider whether factors relating to the creditor were relevant to the determination of the fairness and reasonableness of the plan under s. 6 of the *CCAA*.

352 In the first instance, TELUS says that a simple majority threshold for the Common Shares is appropriate in this case to avoid the result that an "empty voter" such as Mason can single-handedly veto any arrangement. Common Shareholders holding 67.6% of those shares were decidedly in favour of the New Proposal to the extent of 84.4%, excluding the votes of Mason. Looking at the

overall shareholdings, total votes cast accounted for 76.3% of the total outstanding shareholdings, with 93% of votes cast in favour of the New Proposal, again excluding Mason.

353 Taken in context, I do not consider that TELUS is arguing that Mason should be disenfranchised as a voting shareholder. To do so would fly in the face of the Court of Appeal's reasoning and conclusions in the earlier proceedings. I accept that there is no basis upon which a lower voting threshold could be set contrary to the *Act* on the basis that Mason is an "empty voter". However, as I have found, the voting threshold for the Common Shares was appropriately set in accordance with the *Act*, and in particular s. 291(2). Mason voted its shares at the October 17 meeting, at which time that voting threshold was met. It is well acknowledged that Mason exercised its voting rights as a shareholder. It is therefore incorrect to say that Mason's votes have been counted differently than those of other shareholders.

354 TELUS further argues, however, that on the fairness hearing, the court may consider Mason's position or status and the voting patterns of the other shareholders as relevant factors in determining whether the New Proposal is fair and reasonable. In particular, TELUS says that those factors would include firstly, how all of the shareholders voted on the Arrangement and secondly, how the shareholders other than Mason had voted. Impliedly, of course, this raises a consideration of Mason's admittedly idiosyncratic status.

355 Mason contends that the entire notion of "empty voting" is vague and uncertain and that no distinction should be drawn between Mason and the other shareholders. It is well acknowledged that Mason has a "cogent position" in respect of its exchange ratio argument. It also clearly has an economic interest in TELUS. But, as Professor Hu notes, its interest is a unique one and its economic interest at this time is more apparent than real. While Mason argues that it is championing the rights of other Common Shareholders, Professor Hu's analysis makes clear that it likely stands alone and in clear distinction to all of the other shareholders in terms of how and why it exercises its voting rights, even in relation to those other Common Shareholders who also voted against the New Proposal.

356 I accept that there may be many other shareholders who have particular shareholdings which dictated the manner in which they have voted. As the court noted in *Richardson Greenshields*, "self-interest is hardly a stranger to the security or investment business": p. 587. Mason contends that if TELUS' argument is accepted, then the peculiar circumstances -- and self interest -- of these other shareholders should equally be subject to review and consideration. Clearly, that is impractical in the circumstances. Nevertheless, Mason is the only shareholder who has come before the court to oppose the Arrangement, and its own peculiar circumstances have clearly dictated that strategy from the outset.

357 The question therefore is: in the exercise of its discretion under the *Act* in considering the Arrangement, must the court be blind to Mason's unique circumstances?

358 The *Act* does not restrict the factors relating to an arrangement that may be considered by the court at a fairness hearing. I accept, however, that the discretion to be exercised under s. 291(4) of the *Act* is a statutory discretion which must be exercised in accordance with the requirements and objects of the *Act*: *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344 at paras. 37-47; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 at para. 33; *Protiva Biotherapeutics Inc. v. Inex Pharmaceuticals Corp.*, 2006 BCSC 1729 at paras. 30-33.

359 The Supreme Court of Canada in *BCE* makes clear that the *Act* is intended to allow a "practical and flexible" process to effect complicated transactions: para. 123. With that purpose in mind, the *Act* allows changes in the corporate structure, while ensuring that individuals and groups whose rights are affected are treated fairly: para. 128. In considering fairness, the court does not operate in a vacuum. The Court in *BCE* states that the court may consider a variety of factors depending on the circumstances of each case and that in balancing interests, fairness to all is in order, not just to the special needs of one particular group:

> [147] The second prong of the fair and reasonable analysis focuses on whether the objections of those whose rights are being arranged are being resolved in a fair and balanced way.
>
> [148] An objection to a plan of arrangement may arise where there is tension between the interests of the corporation and those of a security holder, or there are conflicting interests between different groups of affected rights holders. The judge must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case. Often this will involve complex balancing, whereby courts determine whether appropriate accommodations and protections have been afforded to the concerned parties. However, as noted by Forsyth J. in *Trizec*, at para. 36:
>
> > [T]he court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.
>
> [149] The question is whether the plan, viewed in this light, is fair and reasonable. In answering this question, courts have considered a variety of factors, depending on the nature of the case at hand. None of these alone is conclusive, and the relevance of particular factors varies from case to case. Nevertheless, they offer guidance.
>
> [150] An important factor is whether a majority of security holders has voted to approve the arrangement. Where the majority is absent or slim, doubts may arise as to whether the arrangement is fair and reasonable; however, a large majority suggests the converse. Although the outcome of a vote by security holders is not determinative of whether the plan should receive the approval of the court, courts have placed considerable weight on this factor. Voting results offer a key indication of whether those affected by the plan consider it to be fair and reasonable: *St. Lawrence & Hudson Railway Co. (Re)*, [1998] O.J. No. 3934 (QL) (Ont. Ct. (Gen. Div.)).
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> ...

> [152] Other indicia of fairness are the proportionality of the compromise between various security holders, the security holders' position before and after the arrangement and the impact on various security holders' rights: see *Canadian Pacific*; *Trizec*. The court may also consider the repute of the directors and advisors who endorse the arrangement and the arrangement's terms. Thus, courts have considered whether the plan has been approved by a special committee of independent directors; the presence of a fairness opinion from a reputable expert; and the access of shareholders to dissent and appraisal remedies: see *Stelco Inc., (Re)* (2006), 18 C.B.R. (5th) 173 (Ont. S.C.J.); *Cinar*, [2004] J.Q. no 3823; *St. Lawrence & Hudson Railway*; *Trizec*; *Pacifica Papers*; *Canadian Pacific.*
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> [153] This review of factors represents considerations that have figured in s. 192 cases to date. It is not meant to be exhaustive, but simply to provide an overview of some factors considered by courts in determining if a plan has reasonably addressed the objections and conflicts between different constituencies. Many of these factors will also indicate whether the plan serves a valid business purpose. The overall determination of whether an arrangement is fair and reasonable is fact-specific and may require the assessment of different factors in different situations.
>
> [154] We arrive then at this conclusion: in determining whether a plan of arrangement is fair and reasonable, the judge must be satisfied that the plan serves a valid business purpose and that it adequately responds to the objections and conflicts between different affected parties. Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation's continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups.
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> [Emphasis added.]

360 Mason's position rests on the proposition that the court in this case should only have regard to Mason's status as a Common Shareholder and its vote *simpliciter*; that is, the court should not enter into a detailed inquiry as to *why* Mason voted the way it did and *why* it seeks to defeat the Arrangement. Mason contends that the allegation that it is an "empty voter" should not, directly or indirectly, influence the court's assessment of the fairness and reasonableness of the Arrangement, particularly as it relates to Mason's contention that it does not give due consideration to the appropriate exchange ratio.

361 Yet, as Professor Hu points out, a shareholder's relationship to the company extends well beyond the exercise of voting rights. For that matter, TELUS' treatment of the exchange ratio in the Arrangement is only one of the factors to consider in determining whether the arrangement is fair and reasonable as it relates to all of the stakeholders, including Mason, and TELUS itself. Mason has no real interest in these other aspects or benefits of the Arrangement and, in my view, to ignore the reason why Mason concentrates only on its voting rights and the exchange ratio is to artificially disregard the complex circumstances in which the Arrangement has been proposed and that it affects different stakeholders in different ways.

362 In *Magna SCJ*, the court indicated that in considering fairness and reasonableness of an arrangement and in considering the significance of any favourable vote by the stakeholders, the circumstances surrounding the vote and the "nature" of the vote are relevant:

> [164] Third, the outcome of a shareholder vote is not, by itself, determinative of the fairness and reasonableness of an arrangement. A judge must review the circumstances surrounding the vote to assess the significance to be attached to the shareholder vote. In particular, a judge must review the nature of the shareholder vote to determine whether the vote can reasonably be regarded as a proxy for the fairness and reasonableness of the plan of arrangement and, if so, whether there is any reason arising out of the circumstances surrounding the vote that prevents the court from relying on that vote as an indicia of the fairness and reasonableness of the plan of arrangement.
>
> ....
>
> [178] Third, there is no evidence that the holders of the Class A Shares do not have a common economic interest. Put another way, this is not a circumstance in which conflicting interests exist among the Class A shareholders such that the Court should analyze the vote in terms of separate and distinct classes. Such a consideration would be relevant to the "fair and balanced" analysis particularly insofar as it resulted from the possibility that some of the holders of the Class A Shares were, for reasons specific to their particular situation, likely to receive materially more or less from the proposed Arrangement than the other Class A shareholders. There is no evidence, however, that such circumstances exist in the present proceeding in respect of any shareholder.
>
> [Emphasis added.]

363 Similarly, in *Plutonic Power Corporation (Re)*, 2011 BCSC 804 at para. 61, the court considered the "nature" of the voting process in terms of whether it could be regarded as a proxy for the fairness and reasonableness of the arrangement.

364 Fairness is an amorphous concept that is discussed in more detail below. What factors are relevant will vary from case to case. The Court in *BCE* has gone some way towards crafting a framework for the analysis and has identified many factors that are to be considered within the articulated fairness test. The listed factors, however, are not exhaustive. Having in mind the unique circumstances in this case, particularly as they relate to Mason, in my view, it would be unhelpful and indeed detrimental to disregard the dynamics that clearly exist between Mason, TELUS and the other shareholders.

365 Further, as Mason has now waded into the fairness arena on this application, it lies ill in Mason's mouth to contend that its true position should be ignored as a relevant factor. Put more succinctly, if Mason wishes the court to consider the matter of fairness as it relates to the exchange ratio and the lack of payment of a premium to Mason, it is hardly in a position to ask this Court to consider only that factor and disregard other relevant facts as it relates to Mason's position. Mason is not in a position to hide behind the skirts of the other Common Shareholders based on the tissue of an argument that they all have the same interest in obtaining a higher exchange ratio. Clearly,

Mason has other interests at play in this scenario, and in all likelihood it is acting in a manner detrimental to the interests of those other Common Shareholders.

366 The weight to be given to Mason's status as an "empty voter" remains an issue. I do not consider that Mason's status overwhelms other relevant factors, particularly in relation to its exchange ratio argument, which the Court of Appeal described as "cogent". The exchange ratio that Mason refers to must be considered in the context of a proposal that removes the historical value that the market has ascribed to the Common Share voting rights. Nevertheless, Mason's status is also a factor to be considered within the context of all relevant factors in what is admittedly a complex set of circumstances.

iii. Substantive Fairness

367 The second prong of the fair and reasonable analysis focuses on whether objections of those whose rights are being arranged are being resolved in a fair and balanced way: *BCE* at para. 147. It is a fact-specific inquiry. Ultimately, the court must be satisfied that the arrangement "strikes a fair balance" in all the circumstances, in that it "adequately responds to the objections and conflicts between different affected parties": *BCE* at paras. 148 and 154.

368 In making this determination, the court is not required to subject the arrangement to "microscopic examination" or demand from the company the "best" or "most fair" arrangement possible: *BCE* at para. 155; *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435 at para. 32 (Q.B.). There is no such thing as a perfect arrangement; in any given circumstance, there are "any number of possible transactions that fall within a range of fairness and reasonableness": *Magna SCJ* at para. 208.

369 At the same time, however, the court should not simply defer to the views of the company's officers and directors as to what are the best interests of the company: *BCE* at paras. 139-142 and 155. Nor should the court otherwise relinquish its duty to carefully review the arrangement. As noted by Forsyth J. in *Trizec* at para. 36, the court must "be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist".

370 In determining whether an arrangement is fair and reasonable, therefore, the court must engage in an objective and substantive review of the terms and the impact of the arrangement and satisfy itself that the arrangement is within the range of fair and reasonable alternatives, such that conflicting interests between different stakeholder groups are fairly balanced in all the circumstances.

371 In this assessment, courts consider a variety of factors, none of which is conclusive and the relevance of which varies from case to case. In *BCE*, the Court set out a non-exhaustive list of "indicia of fairness" which courts have considered in past cases. The Court concluded, at para. 153, that "[t]he overall determination of whether an arrangement is fair and reasonable is fact-specific and may require the assessment of different factors in different situations".

372 The Court first recognized that although the directors will exercise their best judgment as to what is best for the company and the shareholders, it is ultimately the voting shareholders who determine whether such an arrangement is in their best interests: para. 150. Therefore, though not a determinative factor, the Court noted with approval that courts generally place "considerable weight" on the outcome of a vote, as results offer a "key indication" as to whether the affected parties consider the arrangement fair and reasonable. Courts in past cases have described voting results

as a "litmus test" for fairness: see *PetroKazakhstan Inc. v. Lukoil Overseas Kumkol B.V.*, 2005 ABQB 789 at para. 32; *Canadian Pacific* at p. 132.

373 In similar circumstances, *Magna* involved a proposal to collapse the dual share structure. It involved substantial cost to the existing Class A shareholders whose interests would be diluted. However, as described above, there were also substantial benefits to be achieved. In the court below and on appeal, the courts placed considerable emphasis on the favourable vote outcome as indicating that the shareholders believed the benefits outweighed the costs: *Magna SCJ* at paras. 166-182 and 210; *Magna Appeal* at paras. 55-66. In that case, unlike here, the shareholders did not have the benefit of recommendations from a special committee or a fairness opinion.

374 Accordingly, while the approval of the arrangement by a large majority suggests that the arrangement is fair and reasonable, no majority approval, or approval by only a slim majority, suggests that it is not.

375 Courts also give considerable weight to the conclusions of a special committee. As the Court stated in *BCE*, it is a factor in the analysis if the special committee members are independent and reputable:

> [152] Other indicia of fairness are the proportionality of the compromise between various security holders, the security holders' position before and after the arrangement and the impact on various security holders' rights: see *Canadian Pacific*; *Trizec*. The court may also consider the repute of the directors and advisors who endorse the arrangement and the arrangement's terms. Thus, courts have considered whether the plan has been approved by a special committee of independent directors; the presence of a fairness opinion from a reputable expert; and the access of shareholders to dissent and appraisal remedies [Citations omitted].

See also *Plutonic Power* at para. 57; *Gazit* at paras. 10-11.

376 In this case, the repute and independence of the Special Committee members has not been challenged.

377 Finally, the court will also consider any fairness opinion or other independent opinions relating to the arrangement: *Plutonic Power* at paras. 57 and 59.

378 As I stated earlier in these reasons, fairness is an amorphous concept and may be hard to discern in the context of two significant parties advocating widely divergent positions on a topic. However, the court has broad discretionary powers in determining if an arrangement is "fair and reasonable", as that expression is defined in *BCE*.

379 I have already addressed the allegations concerning the fact that the officers and directors holding Non-Voting Shares stand to benefit. I see no substantive unfairness arising from this circumstance that would dictate not approving the Arrangement, either alone or in conjunction with other factors.

380 In relation to the substantive fairness of the New Proposal, Mason's primary complaint about it is the exchange ratio is too low and does not properly compensate Common Shareholders for the value of their voting rights. Mason divides its submissions on this point into five separate but closely related arguments:

(i) Diluting the voting power of the Common Shares, without any direct economic compensation or corresponding benefit, disproportionately impacts the class of Common Shares and is unfair and unreasonable.
(ii) The Special Committee's review process was flawed.
(iii) The Second Fairness Opinion was flawed and failed to demonstrate that a one-to-one exchange ratio was most appropriate.
(iv) The Second ISS Report was flawed because it did not consider whether the proposal represents a fair and reasonable balancing of interests and wrongfully treated the rollback of foreign ownership restrictions as inevitable.
(v) In the Second Glass Lewis Report, Glass Lewis did not deny or dismiss the validity of Mason's concerns about the unfairness of the conversion ratio, and therefore erred when it concluded the collapse is good for all shareholders without having addressed the unfairness to the Common Shareholders.

381 TELUS' competing view is that the New Proposal was crafted from a thorough and careful process and is fair and reasonable in its terms and effects, which effects include increased liquidity and marketability of TELUS shares and consistency with corporate governance best practice. In its view, there is no evidence that the New Proposal confers a windfall on the holders of Non-Voting Shares:

(i) Shareholders were aware that Non-Voting Shares could be converted on a one-for-one basis upon certain triggering events.
(ii) Since TELUS' two classes of shares have identical economic rights, an exchange on any of Mason's proposed ratios would dilute the economic rights of the holders of Non-Voting Shares.
(iii) The Common Shares are widely held, and thus the New Proposal will not cause a change of control which would warrant payment of a premium.
(iv) Mason had no reasonable expectation of an ongoing premium, as it bought its shares after the Initial Proposal was announced.

382 Ultimately, the Special Committee and the Board both determined that the New Proposal was in the best interests of TELUS and was reasonable and fair in the circumstances; the voting results clearly demonstrate that a good majority of TELUS shareholders, including the Common Shareholders other than Mason, believe the same. In support of its position, TELUS relies on the conclusions of the Special Committee, Scotia's Second Fairness Opinion, the Second ISS Report and the Second Glass Lewis Report. Mason takes issue with all of these separate opinions and relies on the analysis in the Blackstone Report. The analysis and findings of each are set out below.

The Special Committee's Process and Conclusions

383 The information circular for the Initial Proposal states that the Special Committee considered, among other things, the following factors in assessing the fairness of that proposal: (i) a collapse of the structure would align voting rights with the economic interests of each class; (ii) the First Fairness Opinion from Scotia, which confirmed that a "one-for-one conversion ratio is fair, from a financial point of view, to the holders of Non-Voting Shares and to the holders of Common Shares" (emphasis added); (iii) the New Proposal would enhance liquidity for the Common Shares; and (iv) the EPS, dividend yields and trading liquidity would be unaffected.

384 The Special Committee concluded that "based on its overall consideration of procedural and substantive factors relating to the Proposal, that the Arrangement is in the best interests of TELUS and is reasonable and fair in the circumstances". The information circular accurately described what considerations were given to the appropriate exchange ratio issue:

> The Company therefore determined that a collapse of the dual class share structure warranted careful consideration. ... The Board in turn determined on January 25, 2012 that a Special Committee should be established to carefully consider the implications of the Proposal, whether to proceed with the Proposal and, if so, the most appropriate way to implement the Proposal.
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> ...
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> On February 1, 2012, the Special Committee held its initial meeting. TELUS' management presented an overview of options to be considered in deciding how best to collapse the dual class share structure.
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> ...
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> The Special Committee was also afforded an opportunity to discuss and review with management information relating to the creation, attributes and historical trading price and volumes of the Common Shares and Non-Voting Shares. Issues related to the share conversion ratio and the impact of that ratio on share price, dividend yield, the number of outstanding Shares, forecasted EPS and dividend payout, as well as related implications for Common Shareholders and Non-Voting Shareholders were also reviewed and discussed.
>
> ...
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> On February 8, 2012, the Special Committee received a presentation from Scotia Capital setting out their preliminary observations on matters to be considered in determining an appropriate conversion ratio.
>
> ...
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> On February 15, 2012, the Special Committee received an updated presentation from Scotia Capital on matters to be considered in determining an appropriate conversion ratio, along with a presentation from management on certain legal, accounting and taxation issues.
>
> During the updated presentation, Scotia Capital reviewed a range of different possible conversion ratios and provided their perspective on the implications of these options for such matters as share price, EPS, dividend yield and share dilution. Scotia Capital observed that it was their view that a one-for-one conversion ratio was the appropriate conversion ratio.

> The members of the Special Committee held extensive discussions with Scotia Capital concerning the implications of different possible conversion ratios. Members of the Special Committee then determined that they saw considerable merit to a one-for-one conversion ratio.
>
> [Emphasis added.]

385 Mason asserts that the Special Committee fell into error when it failed to consider other exchange ratios. Further, Mason submits it is clear that the Special Committee incorrectly inquired whether the Initial Proposal was good for TELUS and fair and reasonable rather than properly asking whether the conversion ratio represented a reasonable compromise and a fair balancing of the competing interests of the two classes. Put another way, Mason says that TELUS was obliged to consider and fairly balance the competing interests of these stakeholders, not just ask what is in the best interests of the company.

386 I see little merit in Mason's criticisms of the Special Committee. While the word "balance" may not have been used in describing the considerations of the Committee, it is manifestly clear that a major issue was what the conversion or exchange ratio should be. Having reviewed the TELUS materials, in particular those relating to the Special Committee, I agree with TELUS that it has been unquestionably demonstrated that the Special Committee gave careful consideration to other exchange ratios. Furthermore, I accept that that the Special Committee considered the conversion ratio in the context of fairness to holders of Common Shares as a separate class, in addition to whether the one-for-one conversion ratio was fair to the Non-Voting Shareholders or TELUS.

Scotia's Second Fairness Opinion

387 In preparing both of its fairness opinions, Scotia held discussions with TELUS' management, the Special Committee and its legal counsel; it reviewed the Articles and various materials; and it reviewed and considered publicly available information regarding the stock trading history of TELUS' shares and the historical trading price of both classes, recent dual class share collapse transactions, and various empirical studies and research publications which compared those public companies which have dual class share structures to those which had a single class structure.

388 In assessing the fairness of the proposed exchange ratio from a financial point of view, in its Second Fairness Opinion, Scotia stated that it considered, among other things, "the context under which the Non-Voting Shares were created, the legal attributes of each class of Shares, and the net benefits that accrue to each class of Shares as a result of the [New Proposal]" (emphasis added).

389 Scotia also reviewed 22 dual share collapse transactions in Canada. It found that: (i) unlike here, in all 22 instances, the reorganization resulted in the company transferring the balance of control from an individual or tightly held group to the market; (ii) in 16 of the 22 instances, a one-for-one exchange ratio was used and since 2000, 15 of the 17 transactions used a one-for-one exchange ratio; and (iii) in 14 of the 17 cases where the company had coattail provisions, a one-for-one exchange ratio was used and since 2000, in all 13 cases where the company had coattail provisions, a one-for-one exchange ratio was used.

390 As already stated, Scotia concluded that a one-to-one exchange ratio was fair, from a financial point of view, "to the holders of the Non-Voting Shares and to the holders of the Common Shares, respectively".

391 Mason advances considerable criticism at Scotia's reports, asserting that the benefits would equally arise on a collapse at another exchange ratio. It also argues that Scotia's opinion is fatally flawed because it based its opinion primarily on irrelevant transactions, came to the wrong conclusion with respect to the remaining relevant transactions, wrongly distinguished TELUS from its precedent list by claiming that TELUS does not have a control group owning the superior voting shares, and ignored or failed to include several additional relevant transactions.

392 Mason further says that Scotia failed to comprehend or was willfully blind to the importance of the historical trading premium. Lastly, it argues that the Second Fairness Opinion was restricted to considering the fairness of the one-to-one exchange ratio, and did not address the relative merits of the other available exchange ratios. In Mason's view, any reference to the historical trading premium or alternative exchange ratios was merely 'lip service'.

393 Nevertheless, TELUS disagrees. Citing considerable evidence that Scotia reviewed publicly available information regarding the stock trading history of TELUS' shares and "historical trading values" of both classes, TELUS argues that the record clearly establishes that Scotia considered the historical trading premium. TELUS also points out that the Special Committee specifically considered and discussed the historical trading price with Scotia as a factor in setting the ratio.

394 I am unable to see any merit in Mason's criticism of Scotia's Fairness Opinions. Again, the reports themselves and the description of the process by which Scotia came to its conclusions clearly demonstrate that all relevant matters were considered, including the appropriateness of the one-for-one exchange ratio in relation to other exchange ratios. Fairness of the Arrangement to the Common Shareholders was a specific consideration. While it may be a matter of argument whether the other dual share collapse transactions were identified and analysed properly by Scotia, in my view, this does not detract from the overall considerations of Scotia and its conclusions on both the exchange ratio issue and the overall fairness of the Arrangement.

395 It is of significance that Mason has not put any contrary opinion evidence before the court that disputes the opinion of Scotia.

The Blackstone Report

396 The Blackstone Report is not an opinion and contains a disclaimer at the beginning of it, which makes it readily apparent that reliance on it must be viewed with skepticism. It states in part:

> Neither this analysis nor any of the results of Blackstone's services shall constitute an opinion, valuation, or recommendation with respect to any proposed or potential conversion transaction or conversion ratio, and neither may be relied upon as an opinion, valuation, or recommendation by Mason or any third party.
>
> ...
>
> ... [This report] is intended for preliminary discussion purposes only and it is not intended that it be relied upon to make any investment decision or as to how to vote on any matter. It does not constitute investment advice or a recommendation as to how to vote on any matter.

397 Blackstone then discloses that it acted as financial advisor to Mason with respect to its investment in TELUS and received payment for its services (in June it was reported that Blackstone

was hired by Mason to dispose of its interest in TELUS). Blackstone further discloses that it "may receive an additional fee from Mason contingent upon the outcome of the TELUS share conversion". As such, any views of Blackstone can hardly be described as independent, such as those of ISS and Glass Lewis.

398 As for the substance of its analysis, the Blackstone Report is restricted to assessing only what constitutes a fair and reasonable exchange ratio in this case. In conducting its analysis, Blackstone reviewed 25 conversion transactions.

399 In the Second Mason Dissident Circular, Mason set out what it considered the key findings of the Blackstone Report, which may be summarized as follows:

(i) The average premium paid to the high vote shareholder as a percentage of total market capitalization equaled 0.82% in the precedents, which would imply a conversion ratio of 1.0774 for Common Shares.

(ii) The precedent analysis revealed the following: (a) although 18 of the 25 precedents had a one-to-one exchange ratio, in 12 of those 18 precedents, the one-to-one conversion ratio implied a premium to the owners of the high vote shares because the trading price of the high vote shares was less than that of the low vote shares prior to the announcement; (b) one-to-one conversion ratios are most common where high vote shares trade at a discount; and (c) conversion ratios greater than one-to-one generally occur where high vote shares trade at a premium to low vote shares.

(iii) In the seven precedents where the high vote share class received an exchange ratio greater than one-to-one, the premium was measured by the additional shares paid to the high vote shares class relative to the low vote share class as a percentage of market capitalization. The high vote share class was paid an average premium of 3.26%, which would imply a second conversion ratio of 1.0607 for Common Shares.

400 Blackstone also analysed the implied economic impact of a one-for-one conversion on the Common Shares. Assuming the pre-announcement and post-conversion market capitalisation are the same, Blackstone found that the New Proposal implied a loss of $1.05 or 1.87% in the value of each voting share. This represents a discount worse than any Canadian precedent reviewed by Blackstone.

401 Mason says that the Blackstone Report clearly establishes that, in order to be fair and reasonable, the New Proposal must provide an exchange ratio higher than one-to-one.

402 I agree with TELUS that the Blackstone Report is neither a comprehensive valuation study nor an objective opinion which can be relied on in these proceedings. Rather, it is an analysis intended for preliminary discussion purposes only, and was drafted by a non-neutral third party who stands to receive a 'success fee' if Mason defeats the New Proposal.

403 I place little weight on the conclusions of the Blackstone Report for the foregoing reasons. In addition, while it may have included a more fulsome analysis of these other comparative transactions than did Scotia in terms of the exchange ratio issue, it did not extend its analysis to the balancing and weighing of overall benefits to both shareholder classes, as did Scotia, ISS and Glass Lewis.

The Second ISS Report

404 As stated above, ISS provided two reports providing substantially similar analyses on the Initial Proposal and the New Proposal. ISS recommended both proposals. The discussion here, however, is restricted to the Second ISS Report.

405 ISS openly acknowledged that Mason's position has merit. In its view, the one-to-one exchange ratio is "meaningfully different" from the historical trading premium, and thus an exchange at that rate "effectively transfers a premium from the voting to the non-voting shares". ISS also disagreed with TELUS that it was relevant that Scotia could not explain why the Non-Voting Shares traded at a discount, stating that "[a]n exchange ratio which forces the voting shares to suffer voting dilution, then cede a market premium to the other share class as well, flies in the face of the principle that voting rights themselves have value". It believed that the impact on the Common Shares was therefore "cause for concern", and cautioned TELUS shareholders to scrutinize the New Proposal.

406 Despite the potential unfairness to the Common Shareholders, however, ISS recommended all shareholders vote in favour of the New Proposal because, in its view, the Board's process in implementing it appeared to be fair and the one-to-one ratio was "logically justified" in all the circumstances. In concluding that shareholders should vote for the New Proposal, it appears that ISS was most influenced by the fact that the Articles provide for a one-for-one conversion ratio on certain triggering events.

407 ISS agreed with TELUS that it is reasonable for shareholders to believe that the federal government will further liberalize foreign ownership restrictions, triggering a conversion. Having made this determination, ISS appears to have concluded that the one-for-one ratio was appropriate as being inevitable. It reasoned that if either of the triggering events seemed even marginally possible, which ISS found to be the case, Non-Voting Shareholders would have little incentive to approve a dual class share collapse at any ratio other than one-for-one or lower. At the same time, however, Common Shareholders would never agree to a ratio below one-for-one because they can similarly wait for a triggering event and an exchange ratio of one-for-one. This led ISS to conclude in its analysis that, in effect, the result invariably would be a deadlock, and therefore the one-to-one ratio is an "inevitable" outcome at any point in the future. As a result, in ISS's view, shareholders should not ask whether the exchange ratio is fair; instead, they should ask whether there are any other potential benefits that justify voting for the New Proposal *at this time*, as opposed to voting for another proposal with the same exchange ratio at a later date.

408 ISS then turned to the other potential benefits of the Arrangement. It focused on the enduring positive impact of the New Proposal on the price of both classes of shares. It agreed with TELUS that the price increase of both classes resulted from TELUS announcing the Initial Proposal, pointing out that the dividend increase was part of a long-standing, well-communicated policy of regular semi-annual dividend increases which would surprise no longer-term investor. It also noted that Mason had provided no evidence to demonstrate that share prices rose for some other reason.

409 On this application, Mason presented no evidence upon which one could conclude that other factors had contributed to the price increases since the February 21 announcement. I accept the evidence of TELUS and ISS that the announcement of the New Proposal has resulted in an increase in the overall share prices.

410 Given the price increases which resulted from expectations that a proposal would be approved, ISS concluded that voting down the New Proposal would eliminate such expectations and

cause the price of both share classes to fall, resulting in the loss of "some or all of that incremental market value". Such a price decrease would generate significant losses for all shareholders.

411 Furthermore, ISS noted that the New Proposal would align voting rights with the economic interests of each class; increase trading liquidity of a single, larger class of Common shares; offer TELUS shareholders additional market opportunity from a dual listing on the NYSE; and eliminate any lingering investor uncertainty associated with a more complicated capital structure. It considered these all positive developments.

412 Finally, ISS disagreed with Mason's argument that a collapse of the share structure would cause the level of foreign ownership to exceed that which is legislatively permitted, compelling TELUS to force non-Canadians to sell shares. ISS saw little reason to believe that this would occur. In fact, it concluded that "there is still ample room to nearly double the historical foreign ownership levels".

413 I conclude that it has been clearly demonstrated that ISS did, in a fulsome analysis, consider that the one-for-one exchange was appropriate and that it did so while fully considering the rights of the Common Shareholders specifically in relation to the appropriate exchange ratio. It concluded generally that the benefits to all shareholders outweighed any negative aspects arising from the lack of a premium on the exchange.

414 No competing third party analysis or opinion was advanced by Mason.

The Second Glass Lewis Report

415 As with ISS, Glass Lewis issued two reports: one for the Initial Proposal and one for the New Proposal. In both, it also recommended that all shareholders vote for the arrangement. Again, however, the discussion here is restricted to the Second Glass Lewis Report.

416 Although Glass Lewis expressed disapproval with Scotia's Fairness Opinions and was far more impressed with the "considerably more robust" analysis contained in the Blackstone Report, and though it stated, in part, that it was inclined to view certain of Mason's concerns as "reasonably valid", it concluded that the Blackstone Report did not provide compelling enough evidence to support the conclusion that the New Proposal should be rejected. In this respect, it concluded:

> Taken together, we believe the foregoing issues fall short of providing robust footing for Mason's allegations of watershed value destruction and an unmitigated failure to protect the perceived value of the Company's voting shares. To the contrary, we consider Blackstone's analysis highlights the exceptionally contextual nature of fixing the terms of a unification transaction, and, perhaps more importantly, fails to make a compelling case that the Conversion deviates excessively from common and recent market transactions.

417 Furthermore, Glass Lewis believed that a well-informed investor would know that the Articles provide for a conversion on a one-for-one basis in certain situations and would consider such information when investing in either class of shares.

418 In addition, although Glass Lewis agreed with Mason that the voting rights have carried a value, it believed that "the long-term benefits of a simplified share structure, combined with the overwhelming support for the Initial Proposal from shareholders other than Mason, outweigh any short-term gains that may result from a conversion ratio of greater than one-for-one".

419 Finally, Glass Lewis recognized that the New Proposal dilutes votes, but observed that this was not "particularly contentious" because TELUS shares are publicly traded and widely held, and any such concern, again, would be outweighed by the overall long-term benefits of the New Proposal. Moreover, it noted that although the New Proposal may cause the forced sale of shares so that TELUS can remain compliant with foreign ownership restrictions, the amount of shares that would need to be sold would be minimal in the grand scheme and the negative short-term consequences would be heavily outweighed by the long-term benefits of the New Proposal.

420 Based on all of these considerations, Glass Lewis concluded:

> We believe that the interests of long-term shareholders with significant economic investments in the Company should ultimately dictate the direction of the Company, rather than the influence of a singular short-term investor.
>
> ...
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> We believe the overwhelming support from shareholders, excluding Mason, accurately depicts the value that is expected to be unlocked for long-term shareholders following the adoption of a single class share structure. ...
>
> The long-term enhanced access to capital, increased attractiveness for new investors and potential increase in liquidity resulting from the simplified share structure and possible NYSE listing outweigh the upside of a theoretical higher exchange ratio in light of the highly unique nature of the Company's articles, share structure and shareholder base.

421 Upon reviewing particular excerpts from the Second Glass Lewis Report, Mason says that rather than supporting a conclusion of fair and reasonable treatment to each of the classes, the report highlights TELUS' failure to effect any compromise or seek any fair balance between them.

422 I reject Mason's arguments. The Second Glass Lewis Report is, like that of ISS, a manifestly complete analysis of all issues relating to the Arrangement, including the specific issues with respect to Mason. Glass Lewis' clear conclusion was that, considering the Arrangement as a whole, any detrimental effects on the Common Shareholders were outweighed by the general benefits to all shareholders.

Conclusions Regarding Substantive Fairness

423 The premise of Mason's argument is the Common Shares will be diluted. In addition, Mason says that a one-for-one exchange ratio will result in a "windfall" to the Non-Voting Shareholders and a corresponding "confiscation" of the historical premium from the Common Shareholders.

424 Regarding dilution, I accept that this will be a consequence of the Arrangement. However, that matter was addressed in the deliberations of the Board, the Special Committee, Scotia, ISS and Glass Lewis. Given that the Common Shares are widely held, while this is a concern, it is not particularly significant.

425 In any event, as discussed above, the Common Shareholders could have no reasonable expectation that further Common Shares would not be issued, resulting in a dilution of their position. This was the same situation addressed by the Court in *BCE* in relation to the debentureholders who

argued that the transaction should be structured to preserve the high market value of their debentures: paras. 105-106. What is truly argued in this respect is that the Common Shareholders' *economic interests* are being negatively affected in that the premium they have paid for their shares will be disregarded. The Court in *BCE* expressly rejects that such economic interests are a consideration on this application: see paras. 132-135. Only *legal interests* are to be considered.

426 Mason's "windfall/confiscation" argument is equally suspect. As I have already stated, the Non-Voting Shareholders already enjoy the same economic benefits as do the Common Shareholders. That they will now enjoy voting rights is an added benefit to them, but again not a significant one, particularly in light of the overall benefits that all shareholders will receive. Consistent with the analysis of ISS, Professor Hu addresses this argument nicely:

> ... Gilson and Black base their position on the foundational assumption that Telus's shareholder wealth consists of a "fixed" pie, with the impact of the plan constituting a "zero-sum" game between Voting Shareholders and Non-Voting Shareholders - the movement of any voting rights from the Voting Shareholders to the Non-Voting shareholders is detrimental to the former and correspondingly beneficial to the latter.
>
> ...
>
> The plan is not a simple, "zero-sum" game that "donates" or "gifts" voting rights from one class of shareholder to another without compensation. Instead, under this concept, the "pie" of overall shareholder wealth grows.

427 The arrangement provisions in the *Act* clearly contemplate that changes may have an "adverse impact on the rights of particular individuals or groups": *BCE* at para. 129. The "proportionality of the compromise" must be considered: *BCE* at para. 152.

428 In *Canadian Pacific*, the court was considering arguments against a plan on the basis that the conversion rate was not high enough. Justice Blair dismissed these arguments, holding that the plan of arrangement must be considered in light of the company and the shareholders as a whole, even if different classes of shareholders were to be treated differently: see p. 125-126. At p. 126, he concluded:

> In the end, the court must be satisfied that the proposed plan of arrangement is fair and reasonable, having regard to *the interests of the Company and the shareholders taken as a whole*. To the extent that differences may exist in the manner in which different classes of shareholders are treated, those differences must be examined against that primary benchmark, in the context of the proposed plan looked at in its entirety. [Original emphasis.]

429 I have already discussed at length the positive gains that are expected to be achieved by way of the Arrangement for the benefit of not only TELUS but also the Common Shareholders and Non-Voting Shareholders. Again, Mason does not dispute that these benefits are desirable. Nevertheless, it is as against these undeniable benefits to TELUS and all shareholders that the negative effects of the Arrangement must be weighed: *BCE* at para. 148.

430 I am satisfied that there has been a thorough consideration of the balancing of the interests of the Common Shareholders in relation to the dilution of their voting power and lack of payment of a premium, to the extent that those are relevant factors. These factors have been weighed as against the interests of the Non-Voting Shareholders and the benefits to be achieved by all shareholders. This involved a very extensive consideration of the appropriate exchange ratio. This is evident from the process conducted by TELUS through management, the Board, the Special Committee, Scotia's Fairness Opinions and the independent analyses of ISS and Glass Lewis.

431 In particular, ISS has provided a comprehensive and compelling analysis of the Arrangement. It fairly identified the negative effects the Arrangement will have on the Common Shareholders, but balanced those as against the benefits to be achieved by all TELUS shareholders. Put simply, ISS says that there is no circumstance under which the Non-Voting Shareholders would agree to pay a premium (or alternatively, take a discount) to exchange their shares for Common Shares when the voting rights that they would obtain mean little given that the shares are widely held.

432 The market clearly has identified a benefit with respect to the voting rights of the Common Shares given the historical premium that had been paid. Why that is so is not particularly evident; both shares have the same economic benefits and the Common Shares are also widely held. In any event, ISS concludes that if an exchange at a ratio favourable to Common Shareholders would inevitably be refused by the Non-Voting Shareholders given a loss of their economic interest for little reward, then the only other option is to see whether other benefits arise to either the Non-Voting Shareholders or the Common Shareholders. Effectively, there will be either an exchange of shares on this basis or none at all. As such, any dilution of the voting rights of (or lack of any premium to be paid to) the Common Shareholders must be balanced against a "win-win" result arising from the exchange of shares on a one-for-one basis. That "win-win" result has already been demonstrated to some degree by the increase in both share prices.

433 Further, the positive vote by all shareholders must be considered. It is a strong indication that the shareholders, including the Common Shareholders, consider that the benefits outweigh any negative aspects. I have already indicated that 84.4% of the Common Shareholders (excluding Mason) support the arrangement. Mason's vote is, of course, to be considered. Nevertheless, as discussed above, it is a relevant consideration that its vote has been cast for the purposes of implementing a market play that has nothing to do with the interests of TELUS or all its shareholders collectively. In other words, these other benefits that have been clearly identified by all parties, including Mason, are completely ignored by Mason.

434 What does fairness dictate in these circumstances? Mason's arguments would have the court focus solely on the conversion issue, which of course plays to Mason's arbitrage strategy. In a perfect world, and in a perfect arrangement, there would be some consideration for the loss of the historic premium paid by Common Shareholders. In my view, however, Mason's arguments display a lack of regard for the overall circumstances relating to TELUS and its shareholders, which are to be considered by this Court in the context of this fairness hearing. As I have earlier stated, Mason can hardly be considered a spokesman for the Common Shareholders when its strategy will result in a loss of value to the other Common Shareholders.

435 The Arrangement has arisen through a robust process that has been independently and favourably reviewed. The benefits to be achieved by the Arrangement are real and substantial. From a shareholder point of view, the benefits have already been realized through the increase in the share prices for both classes. As identified by both ISS and Glass Lewis, and as argued by TELUS, the

benefits to TELUS are not just benefits that would be "nice to have", but are benefits that will materially affect TELUS' ability to compete with other entities in the marketplace. To that extent, they are "necessary" to allow TELUS to maintain and, hopefully, enhance its market position which will redound to the benefit of all shareholders.

436 All evidence on this application points to the conclusion that the Arrangement which has been proposed to the Non-Voting Shareholders is fair and reasonable. TELUS has additionally proposed, quite reasonably, that the interests of the Common Shareholders should also be considered. I agree that the level of support required by the Common Shareholder vote (i.e. a simple majority) was reasonably set. While the legal rights of the Common Shareholders are not affected, arguably their economic interests are. Nevertheless and importantly, the shareholders, including the Common Shareholders who have a real economic interest in TELUS, overwhelmingly support the Arrangement.

437 Finally, Mason's opposition must be viewed through the lens of its unique strategy, which has nothing to do with the well-being of TELUS and its shareholders. I do not make this comment in the sense of disregarding Mason's vote, but in the sense of *understanding* its vote. Mason stands alone and its submissions are clearly directed at the benefits it alone will achieve by defeating the Arrangement.

438 I conclude that the terms of the Arrangement are fair and reasonable.

V. CONCLUSIONS AND ORDERS

439 The appeals from Master Muir's orders are dismissed. The New Proposal or Arrangement is approved in accordance with the Petition.

440 At the conclusion of the hearing, submissions were made by counsel concerning any appeal proceedings that might be taken upon release of these reasons. As consented to by the parties, I am ordering a stay of the order approving the Arrangement and any efforts of TELUS to implement the Arrangement, as approved, for a period of five business days. That will allow Mason time to commence any appeal proceedings, if it wishes, and to seek any further stay as it sees fit.

S.C. FITZPATRICK J.

cp/e/ln/qlrxg/qlced

Court of Appeal File No.: M42068
Court File No.: CV-12-9667-00CL

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

AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at Toronto

SUPPLEMENTARY BOOK OF AUTHORITIES OF THE APPELLANTS, INVESCO CANADA LTD., NORTHWEST & ETHICAL INVESTMENTS L.P., AND COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC.

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